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Rules for Civil Procedure in the United States District Courts: Pre-trial Procedure

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THE RULES FOR CIVIL PROCEDURE IN THE UNITED STATES DISTRICT COURTS: A. PRE-TRIAL PROCEDURE

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In the space of our own lives we have witnessed a change in the business of the Indiana lawyer. A generation ago very few lawyers, especially those practicing in the country county seats, ever practiced inside a federal court room. With the extension of the functions of the federal government and the enlargement of the field of federal law, almost all of us are called upon to practice in federal, as well as in state courts, and the federal rules are to all of us a matter of deep concern. Perhaps for eighty-five years, pursuant to the conformity act of Congress of 1872 and earlier conformity acts, providing that the practice, pleadings and forms and modes of proceeding in civil causes in the federal courts should conform, as near as may be, to those existing in the courts of the various states in which the federal courts are held, the practice in the federal courts in Indiana has been substantially the same as that prescribed by our code of 1852.

Following the Act of Congress of June 19, 1934, authorizing the Supreme Court of the United States to prescribe rules for practice and procedure in civil actions in the District Courts, there was appointed by the Supreme Court a very distinguished committee headed by Mr. Wm. B. Mitchell, a Democratic Attorney-General in a Republican administration, and including able lawyers from all parts of the country, to which the preparation of the rules was entrusted.

The advice of the profession was sought and after some three years of intensive study, a new system of uniform procedure in the District Courts was adopted by the Supreme Court, reported to Congress, and now goes into effect.

As Judge Hughes has just said, a somewhat similar law

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was passed by our 1937 Legislature, authorizing our Supreme Court to prescribe practice in the various courts of this state, and the question now is: Should the Supreme Court of Indiana adopt these new federal rules of procedure and practice as the procedure and practice in the courts of Indiana?

I will confine what I say to the first twenty-five of the federal rules, dealing with pre-trial procedure. Those rules having to do with trial and appellate procedure will be discussed by other members of the Association.

I don't claim to be any authority at all on this subject. You have, perhaps, all of you, seen the very splendid work which has been published, both in the Journal and in pamphlet form, prepared by Dean Gavit, in which he has annotated each of the federal rules to the provisions of our code, which bear upon the same subject. Those of you who have read those annotations know as much or more about the subject than I do.

I welcome the opportunity, however, to make a few observations on the question, as to whether, and to what extent, those rules should be adopted, as the rules of our state practice.

I think we can recognize the fact that there is perhaps a difference of opinion upon this subject among the members of the bar in this state. We have heard a great deal during this session about liberals and conservatives and progressives and reactionaries in governmental affairs. Our thought upon this question is divided upon somewhat similar lines. Some of us feel that the administration of justice has not been all that it should have been, and if something new has been proposed, it should be forthwith adopted in order that justice may be administered with less expense and without delay.

There are others of us who feel that we have done pretty well under the present system; that the defects in our system are not serious, and that the thing to do is to hold fast to what we have.

It seems to me that on the whole, and in a general way, it may be said that there is at least one rather obvious advantage in either course which might be pursued. It is, of

course, desirable that we have uniformity in our practice. There isn't any very sound reason why we should have one system of procedure and practice in the federal courts in Indiana, and an entirely different system in the state courts, when litigation in both forums is carried on by the same lawyers.

On the other hand, it may be said that over a period of eighty-five years, the old code of 1852 has been construed by the courts and its meaning made clear; why should we embark upon some new system, requiring that anew we examine and construe its provisions?

I think the fundamental question to be considered is whether or not the adoption of these rules will improve the administration of justice in Indiana, whether it will lessen expense, whether it will lessen and eliminate delay and whether it will promote a surer and quicker determination of the real facts at issue.

In view of the fact that the new federal rules came into being as a result of a campaign by the American Bar Association, it may be that I am somewhat guilty of heresy, and I probably minimize the importance of the subject which I have been asked to discuss, when I say to you very frankly that the shortcomings in the administration of justice which have so often been discussed, and which perhaps have aroused the public against the profession, will not be in great measure cured by the adoption of the federal rules. It sounds very well to say that our system of pleading has been too technical, and that we need a simpler system, which is of necessity provided by the new federal rules because they contain a provision that the complaint shall contain only a short and plain statement of the claim, showing that the pleader is entitled to relief, together with a further provision that each averment of a pleading shall be simple, concise and direct and no technical forms of pleadings or motions are required. But we turn back to our present code and we find that it provides that the complaint shall contain a statement of the facts constituting the cause of action, in plain and concise language,

without repetition, and in such manner as to enable a person of common understanding to know what is intended.

It may be said that there have been too many technicalities in our practice under the existing code, and that a new system of rules, which contains a provision that the court at every stage of the proceeding must disregard every error or defect in the proceeding which does not affect the substantial rights of the parties, makes for the elimination of the determination of controversies upon technicalities. But our present code provides that 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 shall be reversed or effected by reason of such error or defect, nor shall any judgment be stayed 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.

It has been my observation that the last provision has been quite persuasive in the work of the courts of error in this state. We all know that, sometimes to our regret, the court apparently overlooks what we think are obvious errors, evidently because it believes that a right result has been reached, and that in other instances, the court apparently searches the record for grounds for reversal, where it seems to the court that substantial justice has not been done.

And so I think it can't be assumed that merely because a new code is proposed, or, because it provides that practice shall be simple and that technicalities shall be eliminated, that these things about which we have been complaining will thereby be remedied, nor does it follow from the mere fact that delays occur and that technicalities exist that the fault lies in the code under which the administration of law has been conducted throughout all these years.

There isn't time for me to go through even the first twenty-five rules, dealing with pre-trial procedure, and attempt to explain them one by one. Suffice it to say, however, that in a very great many instances, as pointed out in Dean Gavit's admirable work, there is no substantial change in the pro-

cedure from that which is provided by the existing code; in fact, the old Field Code, prepared in the first instance by William Dudley Field, in 1848 and adopted in Indiana in 1852, is the foundation of the new rules of federal procedure, and while I think it is true that in many respects no improvement can follow from its adoption, it is equally true that fears that our practice would be revolutionized if these rules were adopted, are largely groundless.

I will take time to refer briefly to just a few of these rules in the light of the present code provisions which they would supplant.

So far as the form of action is concerned,—one form, known as a civil action, there is no change. There is a change in the manner in which an action shall be commenced, a change, however, rather of detail than of substance. The rules provide that it shall be begun not merely by filing a complaint in the court and the issuance of summons, but by serving a copy of the complaint with a copy of the summons on the opposing party.

It seems to me that that provision promotes the convenience of litigants and lawyers and enables the defendant at the outset to be furnished with a copy of the pleading which he is called upon to answer in court. There are provisions for the service of all subsequent pleadings, motions and notices by mail, which is a matter of considerable convenience. Conditions have changed since the adoption of the code in 1852. A half dozen copies of a paper may now be made as easily as one and by the simple expedient dropping of a copy in a mail box, it is promptly furnished to the opposing counsel. Whatever will facilitate the work of the profession ought, of course, to be adopted. Yet the difference between going to the Clerk's Office and getting a copy of a paper, and receiving it through the mail is a difference in form and detail rather than a difference in substance.

There is a provision in Rule 6-c, which on first reading would seem to indicate that the terms of the court are virtually abolished. It provides that the expiration of a term of court in no way affects the power of the court to do any

act in any pending action and yet, it is my understanding that that would not have the effect of authorizing everything which is done in term time to be done in vacation and under our rule-making bill the Supreme Court would not have the authority to confer jurisdiction upon judges in vacation.

So far as the pleadings are concerned, they are substantially those that we have now. They are generally speaking a complaint and an answer. No reply is contemplated in most cases. There are provisions for counter claims and for cross-claims, which are substantially the same as the cross-complaint, which, though not authorized by the code, has been authorized by judicial decision; there is liberal provision for what are called third party claims.

I think perhaps the outstanding change, which is proposed by the new federal rules, is a broadening of the right to litigate in one action every matter which has anything at all to do with the controversy, and yet I very seriously doubt whether there has been much delay in the determination of controversies or many instances of a miscarriage of justice due to the somewhat narrower provisions of our present practice, because as construed by the courts, it has been made quite liberal in that particular.

There is a difference in the kind of answer which is required to be filed, and I think that in that particular the federal rule might well be adopted by our court. The rules provide that the different allegations of any pleading requiring an answer must be specifically admitted or denied or the pleader must state he is without knowledge or information, which shall be equivalent to a denial. In the absence of a denial or of such a statement averments are deemed admitted.

I can conceive of no good reason why the general denial should continue. In every complaint and in every answer, there are many allegations which are known to be the truth, by all of the parties concerned, and why should a party have imposed upon him the burden of proving these matters about which there is no controversy?

The rules contain a new provision for the signature of pleadings. They may not be signed merely by the firm name

of the firm of attorneys representing the party, but they must be signed by one of the individual members of that firm, and the signature is equivalent to a certificate of the attorney he has read the pleading, that there is good ground to support it and that it is not interposed for delay.

I very much feel that by abolishing the old general denial and requiring a specific admission or denial of all of the allegations of the pleading, over the signature of the lawyer, certifying upon his professional word that he believes there is good ground to substantiate the allegations which he has made, the issues can be very much narrowed and the trial of cases very much expedited.

Provision is made as to what defenses must be affirmatively pleaded, and in large measure they are the same as those which must now be specially pleaded, with perhaps an addition or two, like the statute of frauds which it is now held is available under the general denial.

Almost all claims and all defenses, legal or equitable, in contract or tort, may be disposed of in the same action, and that, of course, promotes the prompt determination of a controversy.

The federal rules specifically require another matter of mere detail, which is now authorized by our statute but not generally observed, which we frequently note in the pleadings which are filed in the courts of other states. I refer to the numbering of the grammatical paragraphs of a pleading.

The average lawyer, if he prepares a will, an important contract, or a lease, attempts to separate the subject matter into separate grammatical paragraphs, and numbers them so that they may be readily referred to. I think that such a course is desirable, with respect to pleadings. It is, however, a matter of form and not of substance.

Perhaps the most significant change which is proposed in the procedure is the abolishing of the demurrer and the substituting of a motion. I doubt whether that change would bring about any more efficient or economical administration of justice because it too is very largely a change of form, and not of substance. It is provided that by motion, which may

be a preliminary motion, there may be raised the question of lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process. This is but the plea in abatement by another name.

There may be also questioned by motion the failure of a pleading to state a claim, or of an answer to state a defense. In other words, the demurrer for insufficiency of facts. The procedure is liberalized by providing that all of these matters may likewise be raised by answer, as well as by a motion, and there is a provision to the effect that all motions must be consolidated into a single motion. The rule in this respect is very similar to the statute which was enacted by the last legislature, and which was referred to by Judge Hughes as having been abrogated. There is, however, one very significant change. It is provided that after such a motion has been made, a party may nevertheless thereafter raise the question, which might have been raised by motion, that the claim is not one upon which relief can be granted. There was, it seemed to me, a very sound objection to the statute which provided that one must include in one motion, a motion to make more specific, a motion to strike out, and a further motion that the complaint be dismissed because it failed to state a cause of action, because it would be impossible for any one to know at the time the all-inclusive motion must be filed what the complaint would allege after it had been made more specific, or after certain matter had been stricken out, and, therefore, impossible to determine at that time whether or not it would state a cause of action. The motion to strike out and the motion to make more specific, are preserved by the federal rules in substantially their present form under the Indiana practice.

As I said a while ago, the rules go into quite minute details as to counter claims, cross claims, and third party claims, which are in the nature of cross complaints bringing in a new party, and they give a very wide latitude to the pleader, as to the causes of action which he may set up within the confines of the original action.

Of course, we are familiar with the rule that a defendant can not, by cross complaint, bring in new parties, if the effect is to delay the prosecution of the original claim of the plaintiff. Notwithstanding the extreme liberality of the new rules in permitting cross claims against new parties, there is no reason to fear that this provision can be abused to delay the determination of the original action. That is taken care of by liberal provisions by which actions can be severed and separately tried. Here again, it seems to me the change is largely one of form. Under the procedure as it exists today, a wide latitude is allowed in consolidating actions which may not be originally joined in order that they may be tried together and speedily determined. The new rules adopt the converse of the proposition. They authorize them all to be joined in the first instance, but provide that they may be severed and separately tried if the parties so desire or the court so decides.

The counter claims and cross claims, I think, are perhaps considerably liberalized. Counter claims are divided into compulsory counter claims, and permissive counter claims. The rules provide that the person filing such a claim may claim relief in excess or different in kind from that sought by the opposing party. Claims which arise, mature or are acquired after the filing of the initial pleading may be filed with permission of the court. Such a claim may not now be pleaded as a set-off. A party may state as a cross claim, any claim against a co-party, arising out of the original action or a counter claim. The cross-claim may include a claim that the cross defendant is or may be liable to the cross complainant for all or part of the claim in the original action. This constitutes a substantial enlargement of the right to litigate in one action matters relating to the same subject matter as it exists under the present code.

I will not go further into these various rules and their subdivisions with a view to showing how they correspond or differ from our present practice. Suffice it to say that they are very similar to those which are now found in the code, at least so far as their substance is concerned. Provision is made that the action shall be maintained by the real party in

interest, in almost the identical words of the old Field Code; substantially the same provision is retained with reference to actions by and against infants and incompetents, suing or defending by next friends and guardians and guardians *ad litem;* substantially our present procedure is preserved with reference to class actions and actions by shareholders of corporations; the right of intervention by a petition for leave to intervene, accompanied or followed by an intervening petition, is preserved in substantially its present form.

There is, however, one marked change that is expressly provided for in these rules. It is something that perhaps could be done now if court and counsel saw fit to do it. There is provision made for what is called pre-trial procedure. The court may call the attorneys into his chambers for a conference to discuss the case for the purpose of determining whether or not the issues can be simplified and whether or not admissions of fact or admissions of documents can be obtained for the purpose of considering the limiting the number of expert witnesses, the advisability of the reference of issues to a master, and the discussion of all other matters which can be settled in advance of the trial, leaving for the final determination before court or jury only the single disputed issues about which there is serious controversy.

It seems to me that by such a system the trial of cases could be very much shortened and a very material amount of expense would in all probability be saved.

I will not take more time now. I will be glad to answer any question that I can, although Dean Gavit can answer them far more intelligently than can I. In conclusion, let me say, however, that it seems to me that any hope that the new rules are going to be a panacea for the defects in the administration of justice is a hope that will not be fulfilled; that it is desirable sooner or later that they be adopted because I believe, in the first place, that prepared as they were, by the Supreme Court, with the aid of this Committee of outstanding lawyers, after this extensive study, they probably comprise the best code that can be devised, and in the second place, because uniformity is highly desirable.

I think the members of this bar should be thoroughly informed, and thoroughly educated, and as Dean Gavit said, the changes ought to meet with their approval.

I believe that pursuant to its rule-making power, our Supreme Court should immediately examine these rules and adopt such of them as will, without question, speed up, economize and simplify the procedure as we know it in Indiana. Following this the federal rules should be given further and constant study; the experience of the federal courts in functioning under their provisions should be observed and noted, and in due time there should be adopted, all or such of them as in the light of such study and experience may seem advisable. By such a course we will attain all that can be attained as a result of an improved system of procedure in the way of better administration of justice in Indiana.