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PROPOSED PROCEDURAL REFORM

HUGH E. WILLIS*

PROCEDURAL ACT

An act to abolish the present and to provide a new system of legal procedure both civil and criminal, by authorizing the Supreme Court to prescribe forms and rules, and generally to regulate pleading, evidence, and practice.

Be it enacted by the Legislative assembly of the State of__________

Section 1. Supreme Court to Make Rules. The Supreme Court of this state shall have the power to prescribe 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 and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence, drawing up, entering and enrolling orders; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire procedure, including pleading, evidence, and practice, to be used in all actions, motions and proceedings of whatever nature in both civil and criminal trials by the various courts of this state. Separate rules shall be made for civil and for criminal 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 on the merits.

(b) Pleading. All rules of pleading in civil actions 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).

(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 may advise the jury upon the creditability or weight of the evidence. The

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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, and the expense thereof shall be included as a part of the trial costs.

(d) Practice: Supreme Court. No case shall be reversed for a violation of rules of court, or any other technicality, or ever remanded for a new trial if the first trial satisfies constitutional requirements, but the Supreme Court shall in such case 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 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 times, whether statutory or common law rules, in-so-far as they are not inconsistent herewith, 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. Repeal. All acts or parts of acts 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.

The above is a copy for a Bill for the reform of the legal procedure generally found at present in the states of the union by substituting therefor what may be called modern procedural methods. The Bill was drafted by the author of this article with the assistance of his law faculty and other friends. It has already been introduced into the legislature of North Dakota; it will be introduced into the next legislature of the state of Minnesota; and perhaps the publicity given herein may lead to its introduction in other states.

Before the act was drafted the plan of reform contained therein
was submitted to Dean Roscoe Pound,1 of the Harvard University Law School, to Dean Henry M. Bates,2 of the University of Michigan Law School, and to Dean John H. Wigmore,3 of Northwestern University Law School, and the author of Wigmore on Evidence, and all of these men approved of the plan in its entirety.

After the act was drafted it was submitted to Professor C. B. Whittier, of Leland Stanford Jr. University, an authority on Legal Procedure, for suggestions and criticisms. Mr. Whittier made some suggestions as to phraseology (which have been incorporated in the Act) and then specifically approved of every section in the Act. The Act was then submitted to the Hon. Elihu Root, the leader of the American Bar to-day. He studied the entire Act and after rephrasing one section specifically approved of every section in the Act except Section 2(b) and he said he was not opposed to this.4

1 Dean Pound said: “I have looked over your plan carefully. The several propositions advocated therein have for many years been advocated by thoughtful lawyers in this country. The first proposition has repeatedly been endorsed by the American Bar Association, and has been advocated by one of its committees. An increasing number of state bar associations have also been endorsing it. Also the New York Commission on Statutory Consolidation has approved of it. I have no doubt that within a few years it will be generally adopted in this country, and as you know it was adopted in England in 1873.

“As to notice pleading, the attention of the profession has not been so much drawn to this matter as to the first proposition, but here also a steady movement has been going on for some time. I imagine that it would follow necessarily from the adoption of the first proposition and that when pleadings are governed by rules of court they will inevitably change to the notice type.”

2 Dean Bates said: “The changes which you propose in general I heartily approve. In principle at least they have, of course, been tried elsewhere already, as you have indicated. Notice pleading seems to be successful in this state. Declaratory judgments, which I think you do not specifically mention, are on trial here, and while it is too early to speak with assurance, I have little doubt of the success of this change. Certainly you are altogether right in urging that courts themselves should make the great body of rules and regulations governing procedure with only the general outline and general limitations fixed by the legislature. Legislative interference in this matter has been one of the crying ills in our procedural scheme, as you well point out.

“General simplicity of course must be sought if the courts are not to lose ground steadily. Great advances have been made in this state, and while at each change there is a howl from some members of the bar, the successive reforms have in the main been received in good spirit and every one of them is now heartily approved.”

3 Dean Wigmore said: “In general, I can say, without hesitation, that the plan seems to me to be an admirable one.”

4 Mr. Root phrased section 2(c) of the Act, adding the clause in regard to including the expense of experts as a part of the trial costs, and then said, “I agree with the provisions of Section 1, and with Section 2, including provis-
The purpose of the Act is to make legal procedure a means for the administration of justice instead of an end in itself. To-day, as always heretofore, legal procedure has been an end. We are litigating procedure. Over one-half of the cases appealed involve no questions except procedure. Attorneys may be interested in these questions, but clients certainly are not. Society (and that means clients) is complaining of the delays, uncertainties, technicalities and expense. All of these are due to the fact that so much time is spent in litigating procedure. It is as though physicians should pay no attention to the question of whether or not the medicines they prescribe are good for their patients. Society would not tolerate such physicians. Attorneys do not ask whether or not their legal procedure is good for their clients. Society is beginning to ask why there is this difference between physicians and attorneys. The above Procedural Act is planned to stop this practice.

How will it accomplish this result? (1) By the requirement of notice pleading instead of essential fact or issue pleading; (2) by the requirement that the judges shall exercise greater control over the conduct of trials; (3) by the requirement that reversals for technicalities shall be abolished; and (4) by the requirement that all rules of legal procedure shall be directory rules formulated by the court instead of mandatory, statutory, or common law rules. This program of reform is supported by enlightened judgment and common sense. It is necessary to satisfy the demands of justice and the spirit of fair play. It is in harmony with all modern practice. English legal pro-

ions (a), (d), (e), and (f), and with Sections 3, 4, and 5." As to proviso (b) under Section 2 he said, after referring to the reform of common law pleading by code pleading, "Perhaps a change in the direction of notice pleading would be another improvement. Of course, the main purpose of pleading is to give notice to the other side." His only doubt was whether or not, with the rule making power in the courts, they would not in making rules as to notice pleading gradually lead the practice back to the discarded system of common law pleading. We think the danger to which Mr. Root refers is safeguarded by Sections 3 and 4 of the Act.

Of course the problem of how to reform the administration of justice is a fourfold problem and this is only one of the four parts of it. The other parts are (1) how properly to organize the courts and thereby judicial business; (2) how to obtain and retain the best judges; and (3) how to get into the legal profession the best possible attorneys. 13 School and Society 9.


Sec. 2 (b).
Sec. 2 (c).
Sec. 2 (d).
Sec. 1, Sec. 2 (a), (e), (f), Sec. 3, Sec. 4.
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procedure and legal procedure in the United States have been successful only in-so-far as they have adopted some or all of these principles.

(1) Probably code, or essential fact, pleading, while not as technical as common law or issue pleading, has had much to do with raising mere procedural instead of substantive law points, and the substitution of notice pleading therefor would do as much as anything else to correct this defect in our present system. The proof of this is the statistics in regard to the work of the Chicago municipal court and the courts of Michigan, the English courts and the courts of other countries where notice pleading obtains or has been adopted.11

(2) Another cause of the litigation of procedure instead of the real disputes of clients is the power which attorneys have at the present time over the conduct of cases in trial courts. The judge is elected to control the trial of cases, but as a matter of fact, in most state courts, the attorneys try the cases. The judge acts only as an umpire to decide points of procedure, i.e., questions of violations of rules of the game. He does not participate in the trial of the substantive questions. The result is that the litigant who has the better attorney stands a better show of winning than the other litigant. Attorneys are always partial and are under the imperative duty of so being. In the business of trying a case the only real chance for impartiality comes from the intervention of the judge. It is better once in a while to have a partial judge (whose work is subject to review by a higher court) than never to have any impartiality in the court room. In some cases, like marriage and divorce and probate cases, the court should have the power to call and examine witnesses. The calling of experts by the parties also has produced serious abuse, and has worked to the confusion of juries, the disadvantage of litigants of slender means and the discredit of experts. All of these defects can be cured by investing the judge with much of the power now exercised by the

11 For such statistics as well as for full explanation of notice pleading and a presentation of the arguments thereon, see Whittier's Article thereon in (1918) 31 Harv. L. Rev. 501. Mr. Whittier suggests the following as an appropriate but the only necessary rule for the Supreme Court to formulate upon the subject of notice pleading. "Enough facts must be stated so that the opponent, with such knowledge as he already has, may understand what cause of action or defense the pleader is relying upon; if that is done no more can be required. The trial court, or some officer thereof, shall determine when a pleading gives the required notice; and the trial court, in its discretion, may require a pleading sufficient to apprise the court of the cause of action or defense relied upon, even though the opponent does not or cannot successfully object to the pleading."

Notice pleading is adapted, as issue and essential fact pleading are not, to the growing litigation between groups of litigants, as in the Kansas Industrial Court.
attorneys. The success of the modern English system and of the practice in the juvenile, municipal, some state district courts and many federal courts and the procedure before the executive boards and administrative tribunals of this country are abundant proof of this. The attorney's objection is a selfish objection and it must yield to the argument of the general good.

(3) Another fruitful cause of the litigation of mere procedure is the abomination of new trials and reversals for technicalities and the bandying of litigants back and forth from one court to another. All of this can be remedied by the requirement that the Supreme Court shall render final judgment where the parties have had one constitutional trial. In England the abuses above referred to are practically unknown, and they have been abolished, not at the expense of justice, but in the furtherance of it.

(4) But the greatest cause of the litigation of legal procedure—the rules for the trial of cases—instead of the real cases of litigants is the fact that our rules of legal procedure are mandatory statutory rules.

There have been three periods in the historical development of legal procedure in the Anglo-American system.

The first period was that in which the common law judges built

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12 In England, according to a recent report, out of fifty trials attended (five of them murder cases), "it did not take longer to choose the jury than the few minutes required to call their names and administer the oath. There was not a single challenge or objection. The same twelve jurors tried five separate felony cases in one day. The presiding judge directed the proceedings at every stage and was the active controlling power throughout the trial. Of his own initiative he called and examined witnesses. He permitted or refused cross-examination in his own discretion. The evidence was introduced according to the view of the judge rather than according to the view of counsel. He, in summing up, expressed his opinion in regard to the weight of the evidence, commented on the demeanor of witnesses, and even went further and expressed his opinion in regard to guilt or innocence."


14 Metropolitan etc. v. Wright (1886) 11 App. Cases 152; Commissioner etc. v. Brown (1887) 13 App. Cases 133.
up a body of rules of legal procedure through a system of precedents, just as they built up a body of substantive law by a system of precedents. In this period they developed the system of common law pleading; the system of evidence, and the system of common law practice. The rules of legal procedure thus developed were just as important as the rules of substantive law. (The observance of them was just as mandatory as the observance of the rules of substantive law.) If any rule of pleading, evidence, or practice was violated that was as fatal to a party's cause of action as would be any failure to show a substantive cause of action. The consequence of this procedure was that the courts more and more got into the habit of litigating mere procedural points, as we are doing to-day. The situation finally got so bad that a reform became imperative. The English people tried to reform their common law procedure by the Hilary rules. The people of the United States tried to reform their common law procedure by the so-called code reform inaugurated by David Dudley Field.

The so-called code reform marks the second period in the development of our legal procedure. It undertook to correct the evils of the common law system by making the rules of legal procedure statutory rules instead of common law rules. The only effect of this reform was to make the rules a legislative matter instead of a judicial matter. They remained as mandatory as they were under the common law system. In fact, if possible, they became even more mandatory. Making the rules statutory meant that they must be lived up to in every respect, or it was reversible error. The result was that under the code system procedural points were litigated as much as under the common law system. People have long seen that the code reform was a mistake so far as the subject of legal procedure is concerned. There was no advantage in making the rules of legal procedure legislative rules instead of judicial rules. In this respect the code reformers were working on the wrong theory. The time has come when it is necessary to abandon the code system of legal procedure. The problem is: How to give up the code system of legal procedure without going back to the old common law system?

The third period in which the problem is being solved may be called the period of modern legal procedure. England was the first to inaugurate the work of reform in this period. This was done in 1873 and 1875. Since that time England's legal procedure has been completely revolutionized. To-day England's legal procedure is a real instrument for the administration of justice. There is little criticism of it. The English people have discovered how to avoid the mistakes made in the two first periods in the historical development

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15 Chitty's English Statutes, pp. 640, 641, 650, 674.
of legal procedure. The English system has now been tried for a long enough period so that it is no longer an experiment. It has demonstrated its success. It proves that all that we have to do to correct the defects in our system, due to the fact that our rules are mandatory statutory rules, is to adopt the English system. To do this the formulation of the rules of legal procedure must be taken away from the legislature and given to the Supreme Court, and such rules when formulated must be directory in nature as to the courts and decisions thereon, must not be governed by the principle of stare decisis.

In the United States very little comparatively has been done in the way of inaugurating a modern reform of legal procedure further than criticisms of the code and common law systems, the adoption of resolutions favoring a new system and the writing of law articles upon programs of modern legal procedure. The American Bar Association has gone on record a number of times in favor of a system practically like the modern English system. A number of state bar associations have done the same thing. The United States Supreme Court has inaugurated a reform of this sort for the trial of cases on the equity side of the court, and there is now a bill before Congress to authorize the United States Supreme Court to formulate the same sort of rules for the common law side of the court. New Jersey, Colorado, Alabama, Michigan, Vermont, Virginia, and New York have adopted practice acts which are long steps in this direction. The Association of American Law Schools has authorized the publication by a committee of the Association of a Source Book containing all of the materials on modern legal procedure. The American Judicature Society has drafted a number of model procedural acts on various branches of the subject of legal procedure. Yet, while very little has yet been done in the United States in the way of reform, it


19 Col. Laws 1913, Chap. 121.


22 Vt. Laws 1915, No. 90, Sec. 10.


seems as though we are on the threshold of another reform and whenever it is inaugurated, that it will be the modern English system.

The Procedural Act which has been printed at the beginning of this Article is an attempt to adapt the modern English system of legal procedure to conditions in this country. All of the principles of reform alluded to above are embodied in it. However, the transition from the code procedure to the new procedure, under formulated rules of court, is made easy by a provision that the first rules shall be those in operation at the present time, except as they may be inconsistent with other provosions of the Act. In other words, the old rules are handed to the Supreme Court and it is made to adopt them. This means that there will be no sudden break or change in the legal procedure, but that the practitioners will continue to work under the same rules with which they are familiar, only they must stop litigating the rules and when they desire any amendments in them they must go to the Supreme Court instead of to the legislature.

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25 Section 2 (f).
26 The student will find it interesting to compare the reform outlined and advocated above with the Roman Civil Law formulary procedure, where instead of notice pleading there was no pleading at all, instead of the judges (praetor and judex) exercising greater control they exercised entire control, and the praetors framed the issues; instead of the abolition of reversals there was not even an appeal. The Roman law would be regarded in this country as much more radical than the modern English procedure, although Anglo-American reform seems in many ways to be taking the direction of the Roman Civil Law: yet no Anglo-American would have the temerity to say that the Roman Law—either substantive or adjective—was inferior to the Anglo-American law. Pound’s Readings in Roman Law, 93–111; Speedy Justice in Ancient Rome (1921) 5 Jour. Am. Jud. Soc. 101.

A similar interesting comparison can be made with the Hebrew Law (1907) 41 Am. L. Rev. 715.

We have borrowed largely from the substantive law both of the Roman Empire and of Palestine. Why should we not also borrow from the adjective law of these countries when they have so much to offer and our own is in need of so much?

For a complete Bibliography of Procedural Reform, see Pound’s Bibliography (1917) 11 Ill. L. Rev. 451–463.