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THE NEW FEDERAL RULES AND INDIANA PROCEDURE

By BERNARD C. GAVIT*

I.

The Act creating the Indiana Judicial Council imposes upon the Council a duty "to devise ways of simplifying judicial procedure, expediting the transaction of judicial business, and correcting faults in the administration of justice; and to submit from time to time to the courts, the judges, or any other officer or department, either upon the request of any such court, judge, officer or department, or upon the council's own motion, such suggestions or recommendations as it may deem advisable for changes in rules, procedure, or methods of administration, or upon any other matter pertaining to the judicial system."1

Following the passage of the Indiana Bar Association Act conferring the Rule Making Power on the Indiana Supreme Court2, the Council undertook a study of the proposed Fed-

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1 Sec. 5, Ch. 131, Acts, 1935.
2 Ch. 91, Acts, 1937.
eral Rules with a view to ascertaining the substantial changes which their adoption as State Rules would effect.\(^3\)

The Federal Advisory Committee on Rules for Civil Procedure reported finally to the United States Supreme Court in November, 1937, and it is anticipated that the Federal Rules will become effective not later than September 1, 1938.\(^4\)

In order that the Bar of the State be apprised of the work accomplished so far, and that the Council and the Supreme Court may have the benefit of suggestions and criticisms from members of the Bar it is proposed to publish in the Indiana Law Journal the results of the Council's study.\(^5\) The first twenty-five Federal Rules cover the subjects of Process and Pleading and this paper is limited to a discussion of those Rules. They include about one-third of the Rules, the second third being devoted to evidence and trial practice and the last third to judgments and appellate procedure.

II.

Rule 1\(^6\) when read in the light of Rule 81 limits the applicability of the Rules to the usual civil proceedings. Rule 81 excepts designated statutory proceedings from the operation of the Rules. The Supreme Court and the Council have

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\(^3\) The lawyers of the State who answered the questionnaire sent out by the Council in 1936 favored their adoption by a vote of 5 to 1 if they did not constitute a "serious departure" from the existing Indiana procedure. First Annual Report of the Indiana Judicial Council, p. 12.

\(^4\) Fed. Rule 86. The Rules were promulgated by the United States Supreme Court and transmitted to the attorney-general December 20, 1937, and referred to Congress by the latter at the beginning of the current session. The Court made some changes in the Rules as recommended by the advisory committee. The Rules as set out in the notes in this article are in the form in which they were promulgated by the Supreme Court.

\(^5\) Reprints of this and subsequent articles will be available through local Bar Associations to lawyers who do not receive The Indiana Law Journal. Members of the Bar are invited to submit suggestions and criticisms to the Secretary of The Judicial Council.

\(^6\) Rule 1. Scope of Rules. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.
been furnished with a list of Indiana procedural statutes which would be affected by an adoption of rules similar to the Federal Rules so that the necessary and desirable exceptions may be made to any general rules promulgated.

Rule 27 when read in the light of the later Rules expressly permitting the joinder of legal and equitable issues is the equivalent of Sec. 2-101, Burns' 1933. 8

Rule 39 when read in the light of Rule 4(a)10 is similar to the present Indiana practice under Sec. 2-802, except that the Federal Rules put the burden of the issuance of process on the clerk and the Indiana statute puts it on the plaintiff. Their adoption ought to have the effect, however, of repudiating the cases holding that the issuance of summons is jurisdictional and may not be waived.11 It would seem to follow, too, that the filing of a complaint would satisfy the statute of limitations even although a summons was not issued and delivered by the clerk until later, so that the present law on that point would be changed.12

Rule 4(b)13 is similar to Sec. 2-802 and 2-801. The Rule requires that the plaintiff's address or that of his attorney be stated in the summons and the statute does not. This is required because subsequent rules provide for the service of pleadings and notices on the plaintiff or his attorney. The

7 Rule 2. One Form of Action. There shall be one form of action to be known as "civil action".

8 Subsequent references to Indiana Statutes are to Burns' 1933, but this latter will not be indicated.

9 Rule 3. Commencement of Action. A civil action is commenced by filing a complaint with the court.

10 Rule 4. (a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.


13 Rule 4. (b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.
statute requires that the summons describe the type of action commenced and the Rule does not because later Rules require the service of a copy of the complaint.

Rule 4(c)14. The Indiana statutes are narrower and allow service of process only by an officer.15

Rule 4(d)16. Indiana practice does not require the service of a copy of the complaint on each defendant. Sec. 2-1052

14 Rule 4. (c) By Whom Served. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

15 Sec. 49-2802; Kyle v. Kyle, (1876) 55 Ind. 387.

16 Rule 4. (d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party is attacked, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to
simply gives the trial court power to require the filing of one additional copy.

(1) The requirement as to personal service is the same as that provided by Sec. 2-803, but the Rule is more stringent in the case of substituted service at the home, requiring that a copy be left with "a person of suitable age and discretion then residing therein." This latter seems desirable and perhaps necessary as there is constitutional doubt concerning the service of process by the leaving of a copy at a home when no one is there.  

The Rule seems more liberal than the statute as to the place where a summons may be left. It has never been decided whether the Indiana statute permits service at a residence as distinguished from a domicile, but the Rule is worded so as clearly to allow service at either place.

The Rule is narrower than several Indiana statutes as to service on an agent for a natural person, because the Rule limits the service to an agent "authorized by appointment or by law to receive service of process." This would take care of statutes like the automobile statutes which make operation of an automobile within the state the appointment of a designated officer as agent for the owner to receive service of process. It would not take care of Secs. 2-703; 2-805

such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.


18 See, Sturgis v. Fay, (1861) 16 Ind. 429. Similar statutes in other states have received varying interpretations. See, 21 R. C. L., p. 1280-1.

19 Sec. 47-1015.
and 3-1307. The first provides for service on the agent of an individual as to a cause of action arising out of business done in the State; the second provides for service of process on the agent of a non-resident receiver; the third provides for service of process on the agent of a non-resident in an action of ejectment. There is doubt as to the constitutionality of all three statutes.\(^\text{20}\) Clearly Sec. 2-703 must be limited to non-residents and all three statutes should be re-framed in terms of an implied appointment by the doing of business in the state.

(2) (3). These adopt the state practice as the Federal practice. The present Indiana law makes no special provision as to the service of process on an infant. Service of process on an incompetent is covered by Sec. 2-803. Service of process on domestic or foreign corporations is covered by Sec. 2-804. This section is defective in that it makes no provision for the service of process on a foreign corporation illegally doing business in the state, except by publication, and Sec. 2-1062 prohibits a personal judgment on such service. Indiana could and should provide that in such a case there is an appointment for personal service of process as to causes of action arising out of business actually done in the state.

Indiana makes no provision for the service of process against a partnership as such except in Sec. 2-703, and in effect under Sec. 2-809 (1). There is doubt as to the validity of these statutes, and there should be a rule recognizing the partnership as an entity for the purposes of procedure.

Indiana now does make provision for service of process on reciprocal and Lloyd’s insurance associations by service on the attorney in fact.\(^\text{21}\) Again there should be a rule recognizing the unincorporated association as an entity for the purpose of procedure.\(^\text{22}\)

(4) A similar rule as to actions against the State would be desirable. Sec. 4-1501 and Sec. 2-229 now provide for


\(^{21}\) Sec. 39-2710; 39-2804.

\(^{22}\) Sec. 39-2815 (being Sec. 1, Ch. 35, Acts, 1937) makes such a provision as to reciprocal insurance and inter-insurance associations.
service of process on the attorney-general in the now permitted actions against the State.

(5) There is no general statute in Indiana prescribing the manner of service of process on a state officer or agency. The matter is left, therefore, to the general statutes on the subject of service of process, and the Indiana rule is at present broader than this which is limited to actual personal service.

(6) This rule is now covered by Sec. 2-804(a) and is substantially the same, although more explicit.

(7) This incorporates the state practice as an additional federal practice.

Rule 4(e). A similar State Rule would save all special statutes on the subject and would provide for special court orders in any case. The latter is now covered by Sec. 4-305-7. This Rule is the only one on service by publication. The Indiana practice on this point needs revision as the present statues do not cover all actions in rem or actions in personam where the State has extra-territorial jurisdiction and clearly a rule should be framed to do so. Sec. 2-1062 prohibiting a personal judgment on constructive notice should be superseded and provision should be made for the cases where the State does have jurisdiction to render such a judgment.

Rule 4(f). The substantial effect of this Rule is reached in Indiana by the statutes authorizing the issuance of process to any county in the state. Sec. 2-808 provides for serv-

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23 Rule 4. (e) Same: Other Service. Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

24 Sec. 2-807.

25 E.g. as against a citizen or domiciliary who has left the state and maintains no residence here.

26 Rule 4. (f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

27 Sec. 2-702-3; 2-707.
ice out of the State where service by publication would be permissible.

Rule 4(g).\textsuperscript{28} Apparently no Indiana statute expressly provides for the sheriff's return. Certainly there is a duty to make prompt return.\textsuperscript{29} Sec. 2-1637 substantially covers this Rule, and allows an acknowledgement of service in addition. Sec. 2-808 covers proof of notice by publication.

Rule 4(h).\textsuperscript{30} Sec. 2-806 renders most defects immaterial and it has been construed to allow amendments.\textsuperscript{31}

Rule 5(a)(b)(c).\textsuperscript{32} The provision for service of a copy of all pleadings would constitute a significant change in In-

\textsuperscript{28} Rule 4. (g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service.

\textsuperscript{29} Sec. 2-1105 contemplates such a return.

\textsuperscript{30} Rule 4. (h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

\textsuperscript{31} See, Haines v. Bottorff, (1861) 17 Ind. 348.

\textsuperscript{32} Rule 5. (a) Service: When Required. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard \textit{ex parte}, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new and additional claims for relief against them, shall be served upon them in the manner provided for service of summons in Rule 4.

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.
diana practice. The provisions for service of notices and orders would not materially alter the Indiana practice where by local court rule or custom this practice prevails. The Rule makes detailed and desirable provision for the method of service of notices, orders, and pleadings, the persons who may be served, and for the proof of service. Only the latter is now covered by statute.33

Rule 5(d).34 This is a necessary addition to the preceding sub-sections.

Rule 5(e).35 This would alter the Indiana practice requiring all pleadings (after the complaint) and motions to be filed in open court rather than directly with the clerk.

Rule 6(a).36 This is covered in Indiana by Sec. 2-4704. The Rule goes further in excluding holidays and in not excluding half-holidays and excluding intervening of Sundays and holidays if less than 7 days is involved.

(e) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

33 Sec. 2-1637.

34 Rule 5. (d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

35 Rule 5. (e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

36 Rule 6. (a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statutes, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.
Rule 6(b).\textsuperscript{37} This is covered as to pleading in Indiana by Sec. 2-1102. The Rule is broader, dealing with other matters as well as pleading. Undoubtedly Indiana courts have inherent power which covers this situation.

Rule 6(c).\textsuperscript{38} Sec. 4-321 reaches the same result.

Rule 6(d).\textsuperscript{39} Such matters have been left to local rule in Indiana.

Rule 6(e).\textsuperscript{40} This takes care of a situation not present in the Indiana practice.

III.

Rule 7(a).\textsuperscript{41} Except by special leave this Rule terminates the pleadings with an answer, whereas the Indiana statute

\textsuperscript{37} Rule 6. (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified period, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act earlier was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

\textsuperscript{38} Rule 6. (c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

\textsuperscript{39} Rule 6. (d) For Motions—Affidavits. A written motion, other than one which may be heard \textit{ex parte}, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on \textit{ex parte} application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

\textsuperscript{40} Rule 6. (e) Additional Period After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed time after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

\textsuperscript{41} Rule 7. (a) Pleadings. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated
terminates them with a reply. The Rule designates the answer to a counter claim a "reply"; and an answer to a cross-claim an "answer."

Rule 7(b)(1). While the statutes and practice in Indiana provide for a number of motions which may be made before the court, there is no general rule requiring them to be in writing. Some of the statutes setting out the manner in which a particular motion may be made provide that it must be made in writing. However, most of the statutes make no statement at all as to the necessity of a written motion. The general practice in the courts of Indiana has been similar to the procedure anticipated under the proposed Federal Rule, and the matter covered in this rule usually is dealt with in the local rules.

Rule 7(b)(2). There is no statute covering this point, but the Indiana practice is in accord.

Rule 7(c). If this rule were to be adopted in Indiana it would abolish the demurrer and enlarge the category of motions. Abolishing the demurrer by Rule would supersede Secs. 2-1007-10; 2-1011 (in part); 2-1012-14; 2-1026 (in part).

The adoption of this rule, when construed in the light of Rule 12, would change simply the name of the technic to be used in raising most questions now raised by demurrer.

as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

42 Sec. 2-1001; 2-1003; 2-1026.

43 Rule 7. (b) Motions and Other Papers. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

44 Rule 7. (b) (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

45 Rule 7. (c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.
Rule 8(a). When read in conjunction with Rule 10 this rule, except as to the last sentence, would not materially change the general Indiana rules on the same subject.

(1) Would change the Indiana rule if jurisdiction of the person be involved. Because most of the trial courts in Indiana are courts of general jurisdiction the complaint shows jurisdiction of the subject-matter as a matter of course. This part of the Rule deals with a matter peculiar to the Federal Courts and probably should be omitted from an Indiana Rule.

(2) This substitutes "claim" for "the cause of action." It is not expected that this would change the existing law on the subject.

The last sentence would allow a prayer for alternative equitable or legal relief for example, whereas the present Indiana practice would require the claims to be stated separately. Otherwise subsequent Federal Rules contemplate separate statements where two actions are joined.

Many statutes make express provision as to the form of complaint in special actions (quiet title, e.g.). Rule 81 deals with this situation.

It would be questionable as to whether or not Sec. 2-1046 (as to judicial notice) would be affected by the adoption of Rule 8(a) and (e).

Rule 8(b). No Indiana statute prescribes the form of allegation in an answer, but the provisions of the complaint

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46 Rule 8. General Rules of Pleading. (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

47 Secs. 2-1004; 2-1026.

48 See also, Rule 8(e).

49 Rule 8. (b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet
statute on this score have been followed. If (a) does not change existing law as to the form of allegation (b) does not.

The balance of this sub-section would prohibit a general denial except where actually justified. It requires a specific denial or admission as to each fact alleged, or an excuse. The original New York code contained this provision. Sec. 2-1015 probably was intended to adopt this rule, but was construed to permit a general denial.

Rule 8(c).50 No Indiana statute attempts to elaborate on the dividing line between facts in issue under the general denial and those which are so-called affirmative defenses. Sec. 2-1015 simply provides for the pleading of "new matter constituting a defense." The Indiana courts have here followed substantially the common law precedents. The adoption of 8(c) would change in Indiana law only in a few instances.51

the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

60 Rule 8. (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

51 For the sake of brevity specific reference is not made to the Indiana cases in accord with this Rule. The contra cases are as follows: the Statute of Frauds is in issue under a general denial, Indiana Trust Co. v. Finitzer, (1903) 160 Ind. 647, 67 N. E. 520; Illegality may be in issue under a general denial, Bonner v. American Brewing Co., (1921) 75 Ind. App. 540, 129 N. E. 332; Statute of Limitations is in issue under general denial in mechanic's lien cases, Odell v. Green, (1919) 72 Ind. App. 65, 122 N. E. 791, and by statute in actions to quiet title, etc.; Contributory negligence is in issue under general denial but by reason of Sec. 2-1025 in an action involving
A number of statutes make the general denial the only necessary answer in some proceedings, e.g. quiet title, etc. Unless excepted from Rule 8(c) those statutes would be superseded.

The last sentence in (c) states the Indiana law. The character of a pleading is usually determined by its allegations and not by what the pleader calls it.\textsuperscript{52}

Rule 8(d).\textsuperscript{53} This is substantially the same as Sec. 2-1055, except that the Rule makes allegations as to value but not damages material.

Rule 8(e)(1).\textsuperscript{54} This is substantially the same as Sec. 2-1004 (as to a complaint),\textsuperscript{55} except that the statute also requires a pleading which enables "a person of common understanding to know what is intended." Sec. 2-1050 abolishes fictions in pleadings and the Rule does this by implication.

Rule 8(e)(2).\textsuperscript{56} The first two sentences would change the Indiana law.\textsuperscript{57} It is a formal matter, however, because if personal injuries the burden of proof is on the defendant. Actions for personal injury and property damage arising out of the same accident may now be joined under Sec. 1, Ch. 68, Acts, 1937, and there should be clearly one rule as to contributory negligence.

\textsuperscript{52} Wright v. Anderson, (1889) 117 Ind. 349, 20 N. E. 247.

\textsuperscript{53} Rule 8. (d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

\textsuperscript{54} Rule 8. (e) Pleading to be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

\textsuperscript{55} No statute expressly provides for the form of allegation in other pleadings, but the same rule has been applied.

\textsuperscript{56} Rule 8. (e) (2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

\textsuperscript{57} See, Wheeler v. Thayer, (1839) 121 Ind. 64, 22 N. E. 972.
the allegations are made in separate paragraphs the third sentence of the Rule states the Indiana law. As to the last sentence, see Rule 11.

Rule 8 (f). This is similar to the first half of Sec. 2-1048.

Rule 9 (a). In general the first sentence would not change the Indiana rule, so far as the complaint is concerned. This arises out of the fact that before a demurrer is available on this point the lack of capacity must affirmatively appear on the face of the complaint. Thus lack of capacity is normally an affirmative defense which under Sec. 2-1034 usually must be raised by a plea in abatement. The statutes on actions by administrators, executors, and receivers reach the same result. The statute applies in the corporation cases, and in the case of a partnership.

The second sentence of this Rule, in the light of Rule 12 (b) which allows joinder of defenses without waiver would change the Indiana law requiring a plea in abatement to be filed and disposed of first.

59 Rule 8. (f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.
60 Rule 9. Pleading Special Matters. (a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

61 The only exception I know of is in the trustee cases where the cases require allegations as to the trustees' powers. See, Marion Bond Co., Trustee, v. Mexican Coffee & Rubber Co. et. al, (1902) 160 Ind. 558, 65 N. E. 748; Waldrip v. McConnell, (1908) 42 Ind. App. 54, 84 N. E. 517.
62 Sec. 2-1007.
Rule 9(b).66 The first sentence states the Indiana law.67 No cases have been found directly in point on the second sentence. Certainly the practice is in accord. The situation usually would come within the general rule excluding the pleading of facts peculiarly within the knowledge of the adverse party.68

Rule 9(c).69 The first sentence is the equivalent of Sec. 2-1039. The second sentence would change the law and is a specific application of Rule 8(b).

Rule 9(d).70 Indiana has no general rule comparable to this.71

Rule 9(e).72 Indiana has no statute covering this point if a judgment of a court of general jurisdiction is involved, but the cases announce such a rule.73 Sec. 2-1038 states a similar rule as to courts of special jurisdiction. Rule 9(e) covers also decisions of board and officers, and in this particular would change the Indiana law.74

66 Rule 9. (b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.


68 See, Brashear v. City of Madison, (1895) 142 Ind. 685, 42 N. E. 349.

69 Rule 9. (c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

70 Rule 9. (d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

71 The following statutes affect the situation: Secs. 2-1040; 2-1046; Ch. 124, Acts of 1937. See also, the State ex rel. Schumacher v. Gramelspacher, (1890) 126 Ind. 398, 26 N. E. 81:

72 Rule 9. (e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

73 See, Hardin v. Hardin, (1907) 168 Ind. 352, 81 N. E. 60.

74 See, State ex rel v. Wheaton, (1923) 193 Ind. 30, 138 N. E. 820.
Rule 9(f). This repudiates the Common Law rule which has been accepted in Indiana.

Rule 9(g). This would not change the Indiana law.

Rule 10(a). When read in connection with Rule 8(a), this is the equivalent of the Indiana statute. There is no requirement in Indiana as to the designation of the pleadings, nor any provision equivalent to the second sentence here, but the practice is in accord.

Rule 10(b). This rule deals in the first sentence with grammatical paragraphs in one count of a pleading, and in the second sentence with paragraphs in the sense of separate counts. When read in connection with Rules 13 and 18 the latter provision is the equivalent of the Indiana statutes on the separate statement. Although the Federal Rule is not in terms absolute, the first sentence (as a requirement) would constitute an innovation in Indiana. It is designed to facilitate the special denial or admission required by Rule 8(b).

75 Rule 9. (f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.


77 Rule 9. (g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

78 See, Oolitic Stone Co. of Ind. v. Ridge, (1910) 174 Ind. 558, 91 N. E. 944.

79 Rule 10. Form of Pleadings. (a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

80 Sec. 2-1004.

81 Rule 10. (b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

82 Secs. 2-301; 2-1004; 2-1015; 2-1026.

83 Sec. 2-1006 provides for the numbering of grammatical paragraphs at the option of the pleader.
Rule 10(c). The first sentence is the equivalent of Sec. 2-1006. The second sentence being permissive would change the rule of Sec. 2-1031 requiring written instruments to be copied.

Rule 11. First and second sentences. This is the equivalent of Sec. 2-1027, except that it requires the address to be stated.

Third sentence. This is in general in accord with the Indiana practice. Sec. 3-1208 gives the plaintiff in a divorce action the privilege of requiring a verified answer.

Fourth sentence. Sec. 2-1029 deals with the problem of proof if verified pleadings are filed and states a rule in accord with this Rule.

Sixth sentence. This is in accord with the Indiana statute, except that by the terms of the statute the falsity must appear on the face of the pleading.

Fifth, seventh, and eighth sentences. No statute in Indiana states this rule. Certainly, however, an attorney who violated his duty to the court by filing false pleadings or who sought unjustly to delay litigation would be guilty of contempt of court. "The Federal Rules here simply provide explicitly"

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84 Rule 10. (c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

85 Rule 11. Signing of 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. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. 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 wilful 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.

86 Sec. 2-1054.

87 Sec. 4-3608 (2) (4).
for a well established rule governing the relationship of attorney and court. It should have a wholesome effect in calling attention to the accepted law on the subject and courts which enforced it would accomplish much good.

Rule 12(a). Under this Rule an appearance must be made within 20 days after service of process rather than at a designated time as in the present Indiana practice. The time within which pleadings are to be filed is governed by Sec. 2-801 and 2-1101 and local rules. There is no statute requiring the service of pleadings on the adverse party. Sec. 2-229 and 4-1501 provide that in actions against the state process is returnable in thirty (30) rather than ten (10) days, thus in effect extending the pleading time in those cases under the Indiana practice.

Rule 12(b). When read in connection with the Rule abolishing demurrers this Rule provides that

1. Jurisdiction of the subject-matter
2. Of the person

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings. (a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States Attorney of the pleading in which the claim is asserted. The service of any motion provided for in this rule alters the time fixed by these rules for serving any required responsive pleading as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading may be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement or for a bill of particulars, the responsive pleading may be served within the time usually allowed by these rules or within 10 days after service of the more definite statement or bill of particulars.

88 Rule 12. (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the
(3) venue
(4) insufficient process
(5) insufficient service of process
(6) insufficient facts

may be raised by motion or answer.

Thus (7) another action pending
(8) defect of parties

must be raised by answer. (Misjoinder of actions cannot arise for subsequent rules impose no restrictions on the joinder of actions.)

The proper motion here as to (1), (2), (3), and (6) would seem to be a motion to dismiss; as to (4) and (5) a motion to quash. If these matters are raised by motion the motion must be made before pleading. If they are raised by answer or motion they may be joined with answers on the merits. (This seems inconsistent with the requirement that the motion shall be filed first.) They need not be verified.

The last sentence is an extension of Sec. 2-1055 where a reply with new matter is deemed denied, and would allow proof of affirmative matter although not pleaded.

Rule 12(c). The previous rules contemplate that the pleadings explicitly deny or admit all the facts, and this Rule provides that on such a record either party may move for judgment on the pleadings. Even so a party might defeat the motion by an amendment (with the consent of the court). The purpose of the Federal Rules on this score is to abolish the tentative admission under the demurrer and

pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

91 Rule 12. (c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

92 See Rule 15(a).
to provide for an express admission in the pleadings and a judgment based on it, or on a failure to state a claim or defense. A motion under this Rule would defeat the Indiana rule resulting from our waiver statutes under which a party is entitled to prove what he has alleged if a pleading has not been properly attacked by demurrer or motion.

Rule 12(d). This is in general accord with Indiana practice on a plea in abatement or motion to quash, although it will be noted that the matter need not be tried first. The motion for judgment procedure would, of course, be new in Indiana.

Rule 12(e). This is in general accord with the Indiana practice, and fixes a time for action. It probably is broader because the bill of particulars statute has been narrowly construed. Sec. 2-1032, however, deals also with abstracts of title.

The language of this Rule is not identical with Sec. 2-1048 as to when a motion to make more specific is available but its purport seems to be the same. Sec. 2-1005 making allegations of "conclusions" subject to a motion to make more specific seems also to be covered by this Rule. Whether it is the sole remedy is not clear. Thus whether a "legal conclusion" in a pleading on a motion to dismiss for insufficient facts,

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93 Rule 12. (d) Preliminary Hearings. The defenses specifically enumerated (1)—(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

94 Rule 12. (e) Motion for More Definite Statement or for Bill of Particulars. Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. A bill of particulars becomes a part of the pleading which it supplements.
would be disregarded (as it was at Common Law and in Indiana prior to the amendment of Sec. 2-1005 on this point) is questionable. It would seem that the Federal Rules were drafted on the theory that a "legal conclusion" is valid as against a motion to dismiss and the sole remedy would be by a motion to make more specific.

Rule 12(f). This is in accord with Indiana practice.

Rule 12(g). Indiana practice contemplates that motions shall be filed before demurrers and not with pleas in abatement. This Rule again allows the joinder of motions raising questions of jurisdiction with motions on the pleadings or merits.

Whether the Rule requires all motions to make more specific, to strike, and to dismiss for insufficient facts to be filed at the same time is not entirely clear. It does clearly allow them to be filed together. It, however, provides that no amendment shall be made, and talks about "a motion" as filed being final in form.

I have been informed by a member of the Advisory Committee that the word "may" in this Rule (and in all Rules) was used in its strict sense, and that a compulsory joinder was not intended. The problem presented by the practice of filing motions for delay can be taken care of under Rule 11, and Rule 16.

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86 Rule 12. (f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading.

98 See, Secs. 2-1054 and 2-1069.

97 Rule 12. (g) Consolidation of Motions. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.

98 The author of a recent article, Pike, Objections to Pleadings Under the New Federal Rules, (1937) 47 Yale L. J. 50, assumes that this rule requires the joinder of motions.
Rule 12 (h). This Rule states the Indiana law embodied in the following statutes: Sec. 2-1005; 2-1007; 2-1009; 2-1011; 2-1063-5; 2-1066-8; 2-1071, except that the Rule provides for waiver of jurisdiction of the subject-matter as against the parties, but not as against the court. The Indiana statute as to waiver of "failure to state a cause of action" has reached the same result as the provision on this point in this Rule. The waiver is simply as to the pleading stage of the trial. A party may not properly prove a material fact not alleged, nor may he recover simply because he proves what he has alleged.

It is to be hoped that if the Supreme Court promulgates a rule requiring a decision on the merits that the courts of the state will finally repudiate "the theory of the case." Both the Supreme and Appellate Courts have repudiated it on occasion, but a very recent decision reverts to it.

Rule 13 (a). This would modify the Indiana statute giving the defendant the privilege of suing later at his own cost.

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80 Rule 12. (h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

99a The present author has previously elaborated on the desirability of such a rule. See, Jurisdiction of Court (1936) 11 Ind. L. J. at 541-552.

100 See, Prudential Ins. Co. v. Ritchey, (1918) 188 Ind. 157, 119 N. E. 369, 484.

101 See, 9 Ind. L. J. 458; 11 Ind. L. J. 482.


103 Rule 13. Counterclaim and Cross-Claim. (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

104 Sec. 2-1019.
It is broader than the Indiana statute in that it allows a counterclaim against any opposing party, or a new party properly brought in by the compulsory counterclaim under Rule 14, because the Indiana statute provides that a counterclaim must be against "the plaintiff," and in favor of "the defendant."\textsuperscript{105}

Sec. 2-1017 allowing a surety to use a defense not asserted by a principal is substantive and not procedural.

The language of Sec. 2-1018 departs from the usual code provision on counterclaims (i.e. "same transaction") and the Federal Rule follows the usual language. The Indiana cases now reach substantially the same results as cases in other states have reached under the "transaction" provision.

Rule 13(b).\textsuperscript{106} This permits any counterclaim and reaches the same result as does the Indiana statute on "set-off" in contract cases. See, Sec. 2-1016. That is, there need be no factual connection between the plaintiff’s claim and the defendant’s claim. It is, therefore, broader than the Indiana practice.

This Rule substitutes "an opposing party" for "any opposing party" [used in (a)] and presumably therefore requires the parties to the counterclaim here to be the same as the parties to the complaint. But, see, Rule 13 (g) and (h), and Rule 14.

Rule 13(c).\textsuperscript{107} This repudiates the common provision found in Sec. 2-1018 to the contrary. I have never found an Indiana case turning on this provision.

Sec. 2-2508 allows an excess judgment on a set-off.

\textsuperscript{105}See, Steinke v. Bentley, (1892) 6 Ind. App. 663, 34 N. E. 97. Cf.: Heaton v. Lynch, (1894) 11 Ind. App. 408, 38 N. E. 224, preserving the equitable cross-bill. Rule 13 extends the doctrine of this case to all cases.

\textsuperscript{106}Rule 13. (b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

\textsuperscript{107}Rule 13. (c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.
Rule 13 (d). A similar provision in Indiana rules would seem necessary as the court probably ought not to enlarge the State’s consent to be sued.

Rule 13 (e). This enlarges Sec. 2-1016 as to set-offs. As to counterclaims there seems to have been no such restriction in Indiana.

Rule 13 (f). This modifies (a) and would not alter the Indiana rule. Indeed it might be narrower, for in practice additional paragraphs of answer are filed without leave.

Rule 13 (g). This result (first sentence) is reached in Indiana by holding that the Code had not completely superseded the equity practice of cross-bills.

The second sentence is covered (as to principal and surety) by Sec. 3-2503, but in terms this Rule is broader than that.

Rule 13 (h). This modifies (b) and makes clear (a) above. It alters the Indiana law very materially.

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108 Rule 13. (d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

109 Rule 13. (e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

110 Rule 13. (f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

111 Rule 13. (g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.


113 Rule 13. (h) Additional Parties May Be Brought In. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.
Rule 13 (i).\textsuperscript{114} This is not covered in Indiana by a general statute. Sec. 2-1021 does provide that the dismissal of a complaint does not dismiss a set-off or counter-claim.

Rule 14 (a).\textsuperscript{115} As suggested under Rule 13 (a), (b) and (h) this would extend the present Indiana rule, where the counter-claim statute has been interpreted as not being broadened by the statutes on bringing in additional parties, except in equitable proceedings where a cross-complaint is held proper. The purpose of Rule 14 is to provide for unlimited joinder of parties and actions if the same factual background exists. In terms Sec. 2-222 and Sec. 2-224 state this rule, but they have been interpreted as prohibiting (in the light of the counter-claim statutes) the bringing of a party who is not a necessary party to the plaintiff's original claim.

The objection that the plaintiff should not be burdened by such a procedure is met in Rule 42 which gives the court wide discretion in the severance and consolidation of issues for trial.

\textsuperscript{114} Rule 13. (i) Severance; Separate Trial; Separate Judgments. If the court orders separate trials as provided in Rule 42 (b), judgment on a counter-claim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

\textsuperscript{115} Rule 14. Third-Party Practice. (a) When Defendant May Bring in Third Party. Before the service of his answer a defendant may move \textit{ex parte} or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.
Rule 14(b).\textsuperscript{116} This extends the present Indiana practice even further, and what is said under Rule 14(a) is applicable here.

Rule 15(a).\textsuperscript{117} This is similar to Sec. 2-1066 and also goes on and again fixes the time for pleading which in Indiana is governed by local rules.

The adoption of Rule 7(d) abolishing the demurrer would render inapplicable Sec. 2-1010 and Sec. 2-1013 providing for pleading over after a ruling on demurrer as a matter of course and without limit. Under Rule 15(a) a party, after an adverse ruling on a motion for insufficient facts is entitled to file an amended pleading as of course but could not file a second amended pleading without leave. The Rule would therefore restrict the present privilege of amendment in Indiana.

Rule 15(b).\textsuperscript{118} This seems to state the Indiana law found in Secs. 2-1011, 2-1013, 2-1057, 2-1063-5, 2-1066-8, 2-1071 and 2-1304.

\textsuperscript{116}Rule 14. (b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

\textsuperscript{117}Rule 15. Amended and Supplemental Pleadings. (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

\textsuperscript{118}Rule 15. (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be sub-
Rule 15(c). There is no Indiana statute stating this Rule, but the Indiana courts have so held, except as against the Statute of Limitations. In some jurisdictions, too, there has been difficulty about an amendment as to a jurisdictional allegation.

In terms, the Rule does not except the Statute of Limitations. It was designed I am sure to change the law on that subject. It is to be noted, however, that the amendment must arise "out of the conduct, transaction, or occurrence" originally alleged, so that only in that situation would the amendment relate back so as to defeat the Statute of Limitations. There has been confusion in the Federal cases on the point. There is some conflict, too, in the Indiana cases, although the cases have consistently said that a new cause stated by the amendment (i.e. a substantially defective statement cured) is subject to the Statute of Limitations as of the date of the amendment. Rule 15(c) would change that rule.

Rule 15(d). This is the equivalent of Sec. 2-1072.
NEW FEDERAL RULES AND INDIANA PROCEDURE

Rule 16. No Indiana statute makes express provision for this procedure. Undoubtedly, under Sec. 4-307 and Sec. 4-313 trial courts in Indiana could proceed in this manner, and a few do occasionally.

IV.

Rule 17(a). This is almost identical with Sec. 2-201-2, except that the first section provides further that “this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.”

It is believed that Rule 17(a) would not change the Indiana law in any particular.

124 Rule 16. Pre-Trial Procedure; Formulating Issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider (1) The simplification 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.

126 Rule 17. Parties Plaintiff and Defendant; Capacity. (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

126 This latter is substantive and not procedural. At the time the Code was adopted part of the purpose here was to abolish the Common Law rule requiring an assignee to sue in the name of his assignor. It is now settled that the law of assignment is substantive and not procedural and that if an assignee may sue as “the real party in interest” it is because he is the legal transferee of the right involved.

127 But see 17(c) infra.
The last clause (if "Indiana" be substituted) would continue Sec. 2-203 which provides for actions on official bonds.

Rule 17 (b). The first sentence here as originally drafted did not contain the phrase "other than one acting in a representative capacity." This latter was inserted in the final draft of November, 1937. Apparently the purpose originally was to abolish the Common Law rule against actions by foreign officers, but this is now abandoned and under the third sentence that matter is left to the state law of the district. The Common Law rule on this score has been largely repudiated in this State by the statutes and cases authorizing suits by foreign executors, administrators, receivers and guardians.

The first sentence states a rule contrary to the accepted one.

The second sentence would have the effect of superseding the foreign corporation statutes on this point and although desirable as a Federal Rule probably should not be adopted as a State Rule.

The second part of the last sentence (if generalized) seems desirable, and if adopted would change the existing law in Indiana, except as noted previously in connection with reciprocal insurance and inter-insurance associations.

Rule 17 (c). The adoption of this Rule would take care of the difficulty which now exists in Indiana in connection with

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128 Rule 17. (b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or law of the United States.

129 See, 44 Yale L. J. 1291, at 1313, note 96.

130 Sec. 588, Restatement, Conflict of Laws.


132 Sec. 1, Ch. 35, Acts, 1937.

133 Rule 17. (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or
actions by guardians, and would make the guardian a proper party in all cases, whether or not he be the real party in interest or the legally interested defendant.

The Rule is similar to the Indiana statutes on "next friends" and guardians ad litem, although it is broader in that it permits a guardian ad litem to sue as plaintiff, and a "next friend" to sue for an incompetent.

Rule 18 (a). This Rule is much broader than the present Indiana practice making no restrictions on joinder, and in particular removes the restrictions as to identical parties. The problem of trial convenience is taken care of in Rules 20 (b), 21 and 42.

As a practical matter Rule 13 does not change the Indiana practice greatly. Misjoinder is not reversible error, and actions which may not properly be joined may be filed separately and consolidated for trial if there is any reason for so doing. Under the Federal Rule they may be joined and then separated for trial if there is any reason for so doing.

Rule 18 (b). This is the equivalent of Sec. 2-302-3.

defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Secs. 2-207; 2-209; 8-144.

Rule 18. Joinder of Claims and Remedies. (a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

Governed by Secs. 2-221; 2-301; 2-304 (1937); 2-502; 2-1015. The Indiana cases are collected in 7 Ind. L. J. (1932) 470, 536.

Sec. 2-1009.


Rule 18. (b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action;
Rule 19(a). This is the equivalent of Sec. 2-213, 219, 220. The Federal Rule uses the phrase "having a joint interest" rather than "united in interest." If this is narrower than the Indiana statute, the matter is taken care of by Rules 19(b), 20 and 21.

Rule 19(b). This seems to be substantially the same as Sec. 2-222.

Rule 19(c). Under the Indiana statute on demurrer a defendant may demur for defect of parties. This in effect puts the burden on the plaintiff to join all necessary (but not "proper") parties or explain the omission.

Rule 20(a). This is an extension of the general Indiana rules referred to under 19(a). In equitable proceedings,
however, the Indiana courts have allowed a very broad joinder of parties, where they have formulated concepts of joint interests and joint action quite at variance with those used in strictly legal actions. Statutes covering special proceedings also state a very broad rule.

In general, however, under the present Indiana practice parties must have a common or joint interest before they are properly joined. The significant change made by this rule is in the provision as to several or alternative interests. It is designed to permit, for example, the joinder of actions by two plaintiffs injured by the same act of the defendant's, or the joinder of actions against defendants severally liable for a plaintiff's injuries.

Sec. 2-221 permitting the joinder of actions as against persons liable on the same instrument, and Sec. 2-204 permitting the joinder of actions on successive bonds, and Sec. 3-2426 as to parties in partition having successive interests do give some precedent for the practice in Indiana.

The last sentence of Rule 20(a) is the equivalent of Sec. 2-2505-7. Rule 20(b). This is the equivalent of Sec. 2-303.

jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Cf.: e.g., Strong v. Taylor School Twp., (1881) 79 Ind. 208; and Orbison v. Klager, (1933) 205 Ind. 340, 184 N. E. 771.

Sec., e.g., Sec. 3-2426 (partition); Sec. 3-1405 (quiet title).


See also, Secs. 2-809-12; 2-2504.

Rule 20. (b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.
Rule 21. The second sentence is the equivalent of the first part of Sec. 2-222.

The third sentence is a reiteration of Rule 20(b).

The first sentence on its face seems to be at variance with Indiana practice, but it is believed that it really is not. "Misjoinder" is used here in the sense of too few, and in the sense of too many parties. The proper procedure is to move for the inclusion or exclusion of parties, or for judgment on the pleadings. It seems clear that if a party refused to obey an order as to inclusion or exclusion of parties, or failed to amend to cure a defect raised by a motion for judgment on the pleadings that the penalty would necessarily be a dismissal or adverse judgment. The dismissal or judgment, however, would be for the failure to obey the order or to amend, and would not be for "misjoinder" as such.

Under Indiana practice the questions are raised by a plea in abatement, a demurrer, or on the merits; and the error may be corrected by amendment. If not corrected, the party must lose.

Rule 22 (1). This is much broader than the Indiana statute, which really allows the equitable bill of interpleader as an equitable defense.

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150 Rule 21. Misjoinder and Non-Joinder of Parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

151 Rule 22. Interpleader. (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

152 Sec. 2-223.

The Indiana statute restricts the remedy to cases where the action is upon contract or involves real or chattel property; and the action is pending; and there is a conflict of claims with a common origin, where the defendant admits liability in full. This Rule would remove all of those restrictions.

Rule 22 (2). The purpose of this is to preserve the recent Federal Act on Interpleader.

This Act is substantially the same as Rule 22, but makes provision for a deposit of the property in controversy or the giving of a bond, and provides for injunctive relief against separate actions on the claim, and provides for the appropriate judgment to be rendered.

Rule 23 (a) and (b). The Indiana Rule is found in Sec. 2-220.

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154 Otherwise the remedy is by equitable bill. Ketcham v. Brazil Block Coal Co., (1883) 88 Ind. 515.

155 Rule 22. (2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Section 24 (26) of the Judicial Code, as amended, U. S. C., Title 28, § 41 (26). Actions under that section shall be conducted in accordance with these rules.

156 Rule 23. Class Actions. (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

157 Rule 23. (b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.
The Federal Rule is perhaps no broader than the Indiana law and is designed to remove the confusion arising out of the usual Code provision on this subject. The reasons and intended results given in the extensive note at the end of Rule 23 bear out this conclusion. It is further supported by an article on Rule 23 by James W. Moore, who was Research Assistant to the Advisory Committee.

Rule 23 (c). A recent Supreme Court case involves a decision reaching the general result of this Rule.

Rule 24 (a) and (b). These Rules carry out the general purpose of the preceding Rules to allow unlimited joinder of parties and actions. The recent Indiana case referred to under Rule 23 (c) deals with the situation covered by (a, 2).

The Indiana Law on intervention seems to be as broad as these Rules, except that again (b, 2) allows a joinder be-
yond that allowed in Indiana where the parties to actions joined must be the same. But it has been held that the courts' power in this matter is not limited by the statutes.\textsuperscript{164}

The Indiana statutes are Sec. 2-222 and Sec. 3-534. They are more restricted in their language than the Federal Rule, but as suggested above the cases hold them not to be exclusive.

Rule 24(c).\textsuperscript{165} Sec. 2-222 provides for the filing of an application of intervention, but makes no express provision for notice. The latter is taken care of by local rule, or accepted practice.

The last sentence is an addition made in November and takes care of the situation arising out of the recent Federal Act on this subject. There is no similar provision in the Indiana law, but there might well be one.

Rule 25(a).\textsuperscript{166} (1) This is substantially the same as Sec. 2-227-8.\textsuperscript{167}


\textsuperscript{165}Rule 24. (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the attorney general of the United States as provided in the Act of August 24, 1937, c. 754, § 1.

\textsuperscript{166}Rule 25. Substitution of Parties. (a) Death. (1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

\textsuperscript{167}See also, Sec. 2-1020.
This is not expressly covered by statute in Indiana, but certainly it would be the result.

Rule 25(b). This is substantially the same as Sec. 2-227.

Rule 25(c). This is substantially the same as Sec. 2-227-8, and Sec. 3-1324, (as to ejectment).

Rule 25(d). This apparently is covered in general by Sec. 2-227-8, but there is no general statute of this character in Indiana.

CONCLUSION

It certainly is a fair conclusion that the first twenty-five Federal Rules are a modernization of Code Pleading. An adoption of the Rules in Indiana would not in any sense inaugurate a new system of procedure in the state. Certainly many of the rules with which lawyers are familiar would remain intact. Others would be modified but the changes are far from revolutionary. Indeed most of them have been

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168 Rule 25. (b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

169 Rule 25. (c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

170 Rule 25. (d) Public Officers; Death or Separation from Office. When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, §11 (43 Stat. 941), U. S. C., Title 28, §780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.
accepted in New York and other states for some time and have received commendation in that state. 171

The principal restrictions they would impose on present procedure are in the abolition of the general denial and of procedure for delay and the limitations on amendments as of course. They assume a professional standard of fair dealing and competence which the Bar of Indiana cannot well afford to repudiate.

The balance of the changes are all in the direction of liberality and flexibility. The existing restrictions on joinder of parties and actions and on counter-claims are quite artificial and there are persuasive reasons why they should be removed.