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PROCEDURAL REFORM IN INDIANA

By BERNARD C. GAVIT*

Mr. L. L. Bomberger's article\(^1\) ought to bring to the fore again the entire subject of procedural reform in Indiana. The Indiana State Bar Association at its Mid-Winter meeting in Indianapolis in December, 1930, recommended the passage by the Legislature of an act giving the Supreme Court exclusive power to regulate the entire subject of procedure. The proposed Act was introduced in the Senate as Senate Bill No. 120; it received a favorable committee report but was finally lost in the shuffle. The Bill as reported by the Senate Judiciary Committee A is attached to the end of this article as Appendix A. The only change made by the Committee in the Bill as proposed by the Bar Association was that Sec. 3, providing for the employment of assistants by the Court, was stricken out; largely, it is assumed because of the expense involved.

At the same meeting, it was suggested that the subject of Appellate procedure ought not to wait until a general revision of all procedure could be made, and the Bar Association directed its Committee on Legislation to prepare a bill on that subject. The Bill was prepared and introduced in the Senate as Senate Bill No. 227. It passed the Senate but was lost in the shuffle in the House. The contents of the Bill have never been given general publicity, and it is published in full at the end of this article as Appendix B.

It is submitted that the Bar Association ought again at the 1932 summer meeting consider the subject and again recommend the passage of these, or similar Bills. With a view to putting the matter before the Bar generally it is the purpose of the present author to discuss them at this time and to present the arguments in their favor. We shall take up the general Bill first.

II

The necessary starting point here is a compelling dissatisfaction with the present system in its practical workings. As to the appellate and criminal features of it the dissatisfaction seems both acute and more or less unanimous, so that it seems unnecessary to enlarge upon their failures. On the other hand

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\(^1\) 7 Ind. L. J. 341.
there is considerable support for the proposition that our present Civil Code on Pleading and Trial Practice works very well, and it seems desirable to point out in some detail some of the objections to it. Part of the support for the present system, however, it is feared, is simply the normal lawyer-like reaction to any proposed change. Lawyers generally seem committed to the dogma that a "lawyer must be conservative else he is no lawyer." That proposition is more untrue than most general statements. When a lawyer is dealing with the law of procedure it is primarily, if not solely, in his capacity as an officer of the court. Procedure is a mechanical step to the presentation of the merits of a legal controversy. It is a part of the machinery of the administration of justice. Theoretically and practically it is a means of presenting a matter of substance for judicial decision. Its use for any other purpose is a mis-use.

Thus it is clearly true that a lawyer has no business being an advocate during the pleading stage of judicial proceedings. At that time he is simply an officer of the court, and his sole interest as a representative of his client is to see that the pleadings fairly present his client's claims. A lawyer's interest in the law of procedure is purely, therefore, an official one; he, nor his client, have any vested interest in it. Of all portions of the law here is the portion which owes its life solely to its utility; here the only test is a pragmatic one.

If a lawyer must be a conservative in other fields he can justly be nothing but a scientist in this field. He must appreciate that here at least there are no vested interests, and that some changes ought to be tried, if for no other reason than to prove or disprove the present hypotheses. That we have found the perfect system of procedure is a postulate so startling and unusual that even the most conservative lawyer should retreat from it.

On the other hand it is well to call attention to the fact that no system which can be devised will be perfect in its operation. There are two stumbling blocks to any system. The first is the one just mentioned; the system has to be worked by lawyers and judges, who are far from perfect—and who may be far from enthusiastic in their attempts to make it work. But it is certainly true that once we take the matter of pleading out of the act of advocacy and put it into the official disinterested part of a lawyer's business we will have done much to make any system work. The second stumbling block is also a human one. Ignor-
ance—"just plain ignorance"—is here again an immense hindrance. And it is not solely an ignorance of the procedural law which is involved, but more often an ignorance of the substantive law. It is probably true that most trial lawyers know more procedural law than they know substantive law, and that a great many failures which appear to be failures of the procedural law are after all due to the ignorance of the attorneys involved in the field of the substantive law. The law of procedure is often written in terms of the substantive law; and some simple or multiple point of substantive law forms the background of almost every pleading. It is, to illustrate, highly improbable that a lawyer who knows the rules as to the pleading the facts constituting his cause of action or defense, but who does not know, for example, the law of deceit or estoppel, will be able to write a good complaint or answer on those subjects.

Back of both procedure and substance necessarily stands the learning and character of the lawyers and judges of the state. So it is well to emphasize that our first concern is always with the human element here. We continually need more learned and higher characterized lawyers; and we must not overlook that fact in any quest for an improvement of the administration of justice.

But once we seek those better lawyers it is perfectly obvious that they deserve respectable tools with which to work. It is proposed to show that the Code of Procedure which exists in Indiana today is not always a respectable tool.

III

1. The first objection is a re-iteration of what has been said above. The Code allows, and perhaps even requires, a lawyer to be an advocate during the pleading stage of the proceedings. In spite of the fact that the judge and the lawyers are engaged in a mechanical process having nothing to do with the real interests of the parties the judge is ruled out as an active factor in the process. We still accept at more than its face value the Common Law dogma that the burden of pleading is exclusively on the parties, and that their errors or mis-steps can and do affect the ultimate rights of the parties. No other known system of procedure has ever accepted that dogma; it has been rejected in England for over fifty years, and has been recently rejected in a number of states in this country. There is every
reason why the Judge should take the initiative in determining what the issues are between the parties; and he should be in a position to insist upon the attorneys assisting him in that quest, rather than, as at present, offering all of the opposition possible.

Certainly some rules of procedure could be devised to reach that desirable result. At least it's worth trying. It alone would do more to put procedure in its proper place and make it a workable thing than any other one suggested change which can be made.

2. The second objection is a corollary of the first. The code as now amended puts the burden of pleading on the adverse party. Unless the adverse party points out the defects in the pleadings, either by a motion to make more specific, or a demurrer or answer the defect is waived.\(^2\) Many lawyers take full advantage of those statutes, say as little as possible, in as vague terms as possible, and thereby put the burden of pleading on their opponent. The Code permits that, and thereby actually encourages a lack of cooperation, a selfish point of view, on the part of attorneys during the pleading stage of the proceedings. Certainly no one will be so bold as to defend that particular result.

3. The third objection is that Code Pleading too often fails to give adequate notice to the court, the adverse party, and often fails also to form a permanent record of what was tried. That is, it too often fails in all of its supposed reasons for existence.

(a) The first reason is that the Code requirement that the written pleadings contain all of the material facts, alleged in the form of operative or ultimate facts, is so difficult of understanding and application that it is not worth the effort in a good many cases. We have, in effect, another Statute of Frauds applied to a procedural matter; and the result is as uncertain and the situation as difficult as that presented by the Statute of Frauds. But it is without any of its substantial benefits.

It is patent that any attempt to require parties to put their ideas in written language is bound to cost much. Written language is a wonderful invention; but its perfect use requires more time and study than most lawyers are willing to give to the project. It is entirely possible (and it not often happens) for the parties to a law suit to state their claims in good faith only to find that the adverse party and the court did not under-

stand the statements in the same sense in which the author did. The discovery only comes during the progress of the trial, with consequent quarreling and delay.

But even a perfect linguist would have uncomfortable difficulties in obeying the rule that the pleader must distinguish between evidentiary facts; ultimate facts and legal conclusions and employ only the happy medium of "ultimate facts." The difficulties are not insurmountable; although their constantly reoccurring and confusing character point again to the suspicion that the effort may not be worth what it costs.

The difficulties arise principally out of our failure to realize that the same word may have several meanings. The same word may be an evidentiary fact; an ultimate fact and a legal conclusion. The distinction between an evidentiary fact and an ultimate fact (if they do not mean the same thing in a given case) is the distinction between words with a simple factual content; and words with a complex factual content. It is made necessary by the code requirement that the pleader be concise. Thus if a series of events can be summed up in one word, that word should be used rather than the words describing the series of events. Thus if D hit X over the head with an axe and X died as a result, a pleading in those words would be one objectionable because it contains evidentiary facts, for the reason that the pleader could say that D killed X and get with conciseness the same result. But an evidentiary fact and an ultimate fact may be the same, if a simple event produces a legal consequence. For example in an action of trespass P could well allege that "D struck him," and he would charge a prima facie trespass. P could testify in those same words and make out a prima facie case. "Struck" is both an evidentiary fact and also an ultimate fact, because the law here gives effect to a simple event.

A legal conclusion is an allegation of law, and the difficulty in distinguishing between it and an ultimate or operative fact arises out of the truth that again the same word may have two meanings; factual and legal ones. "Negligent" and "contract" may be used as illustrations. "Negligent" has a common non-legal usage; it also has a legal meaning (that is, it describes a legal concept). Because the common meaning and the legal meaning are more or less the same we say a pleader may use it as an operative fact. Thus it decides no case to show that a given word has a legal meaning; for the question should be, does it also have a common meaning quite similar to its legal meaning?
On the other hand "contract" in common parlance is something less than "contract" in legal parlance. As a common word it probably entirely disregards the necessity of "value consideration." Thus it cannot be used in pleadings. Similarly "value consideration" in law is quite different from "value consideration" in fact and is a legal conclusion.\(^8\) Probably the best test is that prescribed by the Code itself; would the allegation of fact be intelligible to a person of common understanding? But the test is a broad one, and in any event the requirement that the pleadings be written statements of ultimate facts is certain to result in any case of any complexity whatever in much confusion, misunderstanding and bickering over the meaning to be attributed to the pleader's language.

For this reason pleading reform quite uniformly (except in the simpler cases) has abolished the requirement that the pleadings state all of the ultimate facts. A pleader states his legal conclusions and his exact position and claim is extracted by means of oral statements and examinations.

It is after all quite apparent that in the more complex cases which are finally litigated the pleading of the ultimate facts even if conscientiously and artfully done gives the court and the opponent only a rather sketchy picture of the actual claim. The opponent; if he relies on the pleadings, is more or less bound to get fooled. If he is wise he has ascertained his adversary's real position by a conditional examination under oath, or an exhaustive investigation of the facts. Good common sense usually compels the parties to a law suit to disregard the pleadings as a means of anything more than a very general notice, and to do in an extra-judicial manner what could more easily be done as a part of the pleading stage of the trial.

(b) The pleading of ultimate facts and our Code procedure in general inevitably leads to the development of issues which are too broad. Under a general denial the adverse party can compel his opponent to waste much time and money in the proof of facts which are really not controverted. We have all seen many times the trial of a mechanic's lien case in which the only point in issue is whether the notice of lien was filed in time; and yet under a general denial a plaintiff may be compelled to devote

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\(^8\) The present author is publishing an article on the subject of "Legal Conclusions" which develops in detail the propositions asserted above. Those interested will find the article in the March, 1932, issue of the *Minnesota Law Review.*
hours or days to proving the title of the defendant, and the existence of the debt.

Much could be done to compel the parties to arrive at a narrower issue. While there seems to be a general fear on the part of the legal profession that procedural reform might not be framed to give adequate notice to the parties, the exact opposite would be the result. The difficulty arises out of the fact that "Notice Pleading" has been mentioned as a possible alternative. The name has a misleading connotation; because the system of "Notice Pleading" in fact develops much narrower issues, and gives more detailed notice than is ever possible under the code. The difference is simply that whereas the Code uses solely written language, "Notice Pleading" employs both written pleadings and other more effective means of dealing with the problem.

We have been sold to the proposition that written notice thru the pleading of all the ultimate facts is the best of all possible systems. It is true that on paper the proposition presents a beautiful and convincing picture, or theory. But in actual practice it does not work with any reasonable degree of objective satisfaction. There seems to be no compelling reason why anyone should care to obstruct experiment with modifications of it.

(c) But even if we assume that it is possible finally to get the written pleadings of the ultimate facts in such shape that it can fairly be said that they are reasonably intelligible and give a reasonable notice to the court and parties, we find that in any case the perfect result is at best temporary and subject to change without notice. Our waiver and amendment statutes, and our "decision on the merits" statutes render the pleadings as unstable as a South American Government. They are not in truth even prima facie determinative of the issues to be tried; they may be amended in any event; and after trial the Code enjoins the trial court and the courts of appeal to disregard the pleadings and decide all cases on the evidence. The real truth is that in any given case the parties may not know what the issue was until after the case has been decided. We have here reached the other extreme of the Common Law rule that the pleadings were always material; and our Code rule at this point now is that the pleadings are never material. It is, of course true that in some litigated cases the pleadings will have in fact

4 Supra, n. 2.
produced the issues actually tried; but this is solely because the parties have intelligently, honestly and perfectly done their job of pleading. Common observation of the trial work in this state, however, discloses the fact that in too many litigated cases the cases are tried and disposed of only under a forcible and frequent use of the statutes mentioned above.

Just how far the statutes go has never been fully appreciated by the lawyers and judges of this state. Both the waiver and amendment statutes have been amended within recent times with rather far-reaching consequences, which it is worth while to contemplate.

Prior to 1911 the statute on the effect of not demurring made a failure to demur a waiver of all defects apparent on the face of the record, except the insufficiency of the facts stated to state the cause of action, and to show jurisdiction of the subject-matter. In 1911 it was amended so that the first defect was also waived by a failure to demur. The statute now reads: “Where any of the matters enumerated in section 85 (the demurrer statute) do not appear on the face of the complaint, the objection (except for the misjoinder of causes) may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action.”

The very apparent result is that a complaint which is insufficient on its face is rendered valid by the statute, and the cases so holding are innumerable. The statute deals only with the question of pleading involved, and it does not follow that if a plaintiff does not allege facts sufficient to constitute a cause of action a failure to demur gives him a right to recover if he proves what he did allege. It is still usually necessary that he prove a cause of action.

But the provision of the statute as to failure to answer contains much dynamite. On the face of the complaint there is a good cause of action stated. Obviously, under ordinary rules of pleading, if the defendant has a defense by way of confession and avoidance; or must plead specially in order to controvert an allegation in the plaintiff’s complaint and he neglects to plead properly he will be precluded from presenting those issues until he amends his answer. But those situations could hardly be

7 Sec. 366, Burns.
8 Thompson v. Divine, 73 Ind. App. 113 (1920), and cases there cited.
said to be included in "defects" in the plaintiff's complaint which do not appear on the face of the complaint and which must be raised by an answer or be deemed waived under the statute. There is no "defect," for the plaintiff has fulfilled his burden of pleading; and the law puts the remaining burden on the defendant.

If the words "defect" and "matter" here are to be given anything like their ordinary meaning, it can only mean that the "defect" is in not truthfully stating what the plaintiff has in fact stated. Does the statute then impose upon the defendant the burden of setting out specifically and affirmatively his version of the facts? Does it, in other words, abolish the answer in general denial? No case has been found in which the purport of the statute on this point has been discussed, but there certainly are decisions giving it that effect. That is, if here the plaintiff prima facie proves what he alleges, he can recover, even though the facts and law be otherwise.

It is quite clear, for example, that the question as to whether or not a given plaintiff is the real party in interest is a question of substance. A complaint which affirmatively shows that he is not, or does not allege facts showing that he is, is subject to demurrer for insufficient facts. But it has been held that the question can be waived under the clause in question. Thus one who asserts a legal right can recover although in fact and in law he may not be the owner of it.

Such an interpretation would, if followed to its logical conclusion, be so revolutionary that it is to be doubted whether in any event the courts would be justified in accepting it. But certainly it is true that a failure to demur allows the plaintiff to prove much that he has not alleged, and the oft-repeated objection that proposed evidence "is not within the issues" is in most instances under any fair interpretation of the code, an invalid one. There are no issues, for the reason that the defendant has not accepted his burden of forcing the plaintiff to write a perfect complaint. Once he has collaborated with the plaintiff to the extent that the code requires there is no evidence which the plaintiff could have which is not within the written issue.

But once we get beyond the demurrer and answer stage of the proceedings we find that all that has been done can be undone, and the parties have no right to work upon the assumption that

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10 City of Indianapolis v. National City Bank, 80 Ind. App. 677 (1923).
the issue to be tried has been determined. The amendment and variance statutes allow the changing of the issue almost without limit. Section 421 of Burns allows unlimited amendments before answer, and amendment by leave after answer or during trial. Section 423 allows amendment by leave after trial. The latter statute in this respect was materially changed in 1921. Prior to that the amendment could only be made if it did not "substantially change the claim or defense"; but by an act of 1921 that restriction was stricken out of the statute.

Thus a party may change from one cause of action or defense to another entirely different one. This is true before trial,\(^\text{1}\) during the trial,\(^\text{2}\) and under the amendment of 1921 after trial. Cases will be found which say the contrary, but an investigation of them will disclose that they were decided under the statute restricting amendments after trial to those which did not "substantially change the claim or defense"; or they really merely hold that action of a trial court in allowing or disallowing a radical amendment during trial was not an improper use of his discretionary power. There is no question that our amendment statutes allow the widest discretion in the matter and that a party may well be (and often is) called upon to meet a situation materially different from the one originally outlined in the pleadings.

No-one could sensibly urge that any system of pleading could dispense with some provisions for amendment. But the constant use of the amendment provisions of the Indiana Code, and their enlargement, indicates that the theory of producing an issue for trial by the exclusive use of written pleadings does not work in practice. Their frequent use in practice is a bugbear to every trial lawyer and judge, and a continual source of expense and delay to litigants. We cannot get along without them under our present system, but it ought to be rather patent that some

\(^{11}\)Farrington v. Hawkins, 24 Ind. 253 (1865); Poundstone v. Baldwin, 145 Ind. 139 (1896); Cohoon v. Fisher, 146 Ind. 533 (1897); Frankel v. Garrard, 160 Ind. 209 (1903); Royal Ins. Co. v. Stewart, 190 Ind. 444 (1921). The case last cited impliedly overrules the case of Thomas v. Hawkins, 13 Ind. App. 318 (1895).

\(^{12}\)Burr v. Mendenhall, 49 Ind. 496 (1875); Adams v. Main, 3 Ind. App. 232 (1891); Frankel v. Garrard, 160 Ind. 209 (1903); Denny v. Reber, 63 Ind. App. 192 (1916). There are many cases holding that an amendment may change a cause of action, but the statute of limitations becomes a defense. See, e.g., Boyd v. Caldwell, 95 Ind. 392 (1882); Blake v. Minker, 136 Ind. 418 (1898); William v. Lowe, 49 Ind. App. 606 (1911).
improvements could be made, and the necessity for the application of any rule on amendments minimized.

When it comes to the decision of a litigated case, either by the trial court or the courts of appeal the Code enjoins the courts to disregard the pleadings and to decide all cases on the evidence.\textsuperscript{13} It may well be that there might originally have been some question as to the constitutionality of those statutes (as an invasion of the judicial function\textsuperscript{14}) but it is certainly too late now to raise that question. The courts have resorted to them as a basis for decision in many cases. The full import of them is again that if a plaintiff plead one cause of action and prove another he is entitled to judgment.\textsuperscript{15} The erroneous overruling of a demurrer where the plaintiff afterwards proves a cause of action is not reversible error.\textsuperscript{16} The sum total of the result is that the courts cannot apply the doctrine of “the theory of the case,” and the decision on the merits statutes to the same case, and that although “the theory of the case” bobs up in an occasional decision it has lost any real foothold. The pleadings are no longer material in the determination of the case. Why? Because they ought not to be. Cases ought to be decided on the evidence, without regard to what the parties thought they were trying, in the absence of an affirmative showing that one side or the other has not presented all of his evidence because he was misled by the pleading.

But why cannot they determine before hand what real turn the trial is to take? The answer is that they can, once we repudiate the archaic notions that the burden of pleading is exclusively on the parties; that it is ethical to deceive the court and the adverse party as to one’s real position; that the written pleadings so produced can be relied upon to produce the real issue between the parties. It takes a sharper instrument than the Code to function properly here and the profession should be given an opportunity to attempt to find it.

\textsuperscript{13} See supra, n. 6.

\textsuperscript{14} See, Noble v. Enos, 19 Ind. 72 (1862).

\textsuperscript{15} See, e. g., Cleveland, C. C. & St. L. Ry. v. Gillespie, 173 N. E. 708 (1930) and note 6 Ind. L. J. 402. Cf., Southern Indiana Gas & E. Co. v. Winstead, 175 N. E. 281 (1931) and note 6 Ind. L. J. 575.

\textsuperscript{16} See, e. g., the Gillespie case, cited supra, n. 15, and cases cited in that decision. The court has reversed two cases where the trial court instructed the jury that the plaintiff was entitled to a verdict if he proved the allegations of his complaint, but those cases are clearly distinguishable. Such an instruction is a dangerous one in any law suit.
We have struggled for the ideals embodied in the Code, and we have struggled to protect the litigants from the more unfortunate results of its application in practice. As a result we have the greatest set of contradictory rules yet known. On the one hand the Code says the parties shall do so and so; on the other hand it says, it makes no difference if they do not. The resulting situation is so chaotic that it is not far wrong to generalize by saying that the rules of pleading destroy themselves and leave us in a state of anarchy. The pleadings have actually become immaterial, and we should go back and re-frame our entire system of pleading on that theory, but at the same time we must develop some system which will in a large percent of cases really cut out the issue to be tried.

IV

The bill in question sponsors no patent remedy. It starts at an obvious beginning; takes the subject matter out of legislative control and puts it in the hands of the Supreme Court. It can there be dealt with by experts and revised to meet practical necessities. That the Court would attempt to adopt any system at variance with local needs or so radical as to be destructive is unthinkable.

Laymen are going to insist on procedural reform, and unless the lawyers and judges of the state tackle the problem, it is quite likely that they will have a new Code of procedure thrust down their throats by laymen. Prior to the last session of the Legislature there were several proposals by lay organizations to tackle the problem, but they were apparently headed off by the action of the State Bar Association.

While this paper has dealt so far quite exclusively with the civil side of the problem, it is only because the criminal and appellate procedure problems are so acute as to need no emphasis. As to the criminal procedure side of the situation much work has already been done in the publication of a model Code of Criminal Procedure by the American Law Institute, which could undoubtedly be suited to Indiana needs by the Court.

In conclusion the author would call attention to some of the points in the Bill on Appellate Procedure, attached as Appendix B. To start with the time for appeal is cut down in the ordinary case from 180 to 120 days. The proposed Bill abolishes the distinction between term time and vacation appeals, and
provides simply that an appeal is taken by the filing of a transcript of the record. A supersedeas bond may be filed in either the trial or upper court; and notice of appeal may be served before or after the filing of the transcript. In this connection Sec. 11 contains the present statutory requirements as to the substance of the appeal bond. It provides merely that appellant “will duly prosecute the appeal and abide by and pay any judgment that may be affirmed against him.” Under such a bond the appellee is not adequately protected; for in the event of a voluntary or involuntary dismissal his damages are slight, for the appellant’s promise does not in that event include the payment of the judgment below. In the author’s opinion the bond should include that and the Bill amended to provide for it.

The most radical change made by the Bill is in its provisions for the Record including the evidence and other proceedings without special or general bills of exceptions. The reasons for the old system are purely historical, and today they have no persuasive power. Under the Common Law system there was originally no review of the facts and trial procedure; the verdict of the jury was inescapable. The record on appeal or review therefore contained only the pleadings, verdict and judgment. When the verdict became reviewable the evidence and trial proceedings were brought into the record by bills of exception. Today, if there has been a trial on the merits, under the statutes discussed above, and particularly Section 725 of Burns, which enjoins the court of review to decide the appeal on the merits, few cases can be properly presented without a complete record and all of the evidence. The present law compels the clerk to keep a record of other proceedings, and there is no reason why the evidence, and the instructions should not be included in the record without any affirmative action on the part of the parties. The Bill therefore provides that everything which transpires during the proceedings is a part of the record, and it makes provision for the formal inclusion of the testimony. All instructions offered and given are a part of the record without further action, just as pleadings now are.

The Bill abolishes the exception. This is on the theory that it has become a purely formal thing, serving no good purpose and in fact merely adding unnecessary language to the record. In most trial courts the exception is entered as a matter of course, and there seems no sense in requiring that formality. The Bill does not of course obviate the necessity of an objection.
The Bill also provides for the correction of the record after the record has reached the upper courts. Too many formal defects are now regarded as jurisdictional, and the Bill attempts to do away with the harshness of that result. And finally it provides that no formal assignment of errors need be made. The action is thus an action to review and while the Court may by its rules provide for the formal presentment of error, the present law of assignment of errors will not stand in the way of the consideration of any material point.

The Bill leaves much to the Rules of Court, and of course it is anticipated that they will be amended to carry into effect the changes suggested by the Bill, as well as those necessary to remedy the defects pointed out by Mr. Bomberger.

It is increasingly apparent that the Bar of this state must accept primary responsibility for an improvement of the Administration of justice. The changes suggested here are but a beginning. The Bar Association has before it a proposal for a Judicial Council whose function it will be to accept that responsibility and deal with it. The adoption of that proposal and the passage of the necessary legislation are two very important propositions now facing the Association.

APPENDIX A

SENATE BILL No. 120

A Bill for an Act relating to legal procedure in the courts of this state conferring certain powers upon the Supreme Court to make, prescribe and enforce rules and regulations in regard thereto; authorizing said court to employ persons to be used in the preparation of such rules and regulations; and repealing all laws in conflict therewith.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That the Supreme Court of this state shall have the power to make, prescribe, promulgate, regulate and enforce by rules the forms of writs and all other process; the mode and manner of framing and filing proceedings, papers and pleadings; of giving notice, serving and returning writs and process, of all kinds; of giving, taking and obtaining evidence; drawing up, entering and enrolling orders and the keeping of all other records of the court; regulating costs; and generally to regulate and prescribe the entire procedure, including pleading, evidence and practice, to be used in all the courts of this state, including the Supreme Court. Separate rules shall be made for civil and for criminal trial procedure.

Sec. 2. The Attorney General of Indiana, the chairman of the committee on Judiciary A of the Senate and the House of Representatives of the General Assembly of the State of Indiana, the president and the vice-president of the Indiana State Bar Association and two circuit court judges
of the State of Indiana, to be appointed annually by the Governor of the State of Indiana, shall constitute an advisory council whose duty it shall be to recommend and assist in the revision of the rules of court from time to time. The Attorney General shall be the chairman of said council. Said council shall be advisory only and shall have no power to change any of the rules. The members of said council shall serve without pay but shall be reimbursed out of the state treasury for expense necessarily and actually incurred by them in attending meetings of said council outside the county of their residence.

Sec. 4. Any rule or regulation made or adopted, as provided in section 1 hereof, shall be filed by said court in the office of the clerk of said court, and said court shall by order fix the time for the taking effect of any such rule or rules, and may contract for the printing and arrange for the distribution of copies of such rules and pay for the costs thereof out of money appropriated for that purpose.

Sec. 5. Any provision or rule provided by statute or rule of court relating to any procedure referred to in section 1 hereof, in force at the time this act becomes effective, shall remain in full force and effect until the Supreme Court shall by a rule or rules, made and adopted hereunder, prescribe procedure inconsistent with or in lieu thereof. After any such rule or rules are made and adopted by the Supreme Court, as herein provided, then from and after the time fixed by order of said court for the same to be in force all legal procedure in all the courts of this state shall be had in conformity with such rules and all of said courts shall be bound thereby.

Sec. 6. All laws or parts of laws inconsistent with this act are hereby repealed.

MINORITY COMMITTEE REPORT

Mr. President:

A minority of your Committee on Judiciary A, to which was referred Senate Bill No. 120, has had the same under consideration and begs leave to report the same back to the Senate with recommendation that said bill be indefinitely postponed.

CUTHBERTSON.

ADAMS.

MAJORITY COMMITTEE REPORT

Mr. President:

A majority of your Committee on Judiciary A, to which was referred Senate Bill No. 120, had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be amended by striking out all of section 3.

And when so amended that said bill do pass.

HOFFMAN.

KETCHUM.

NIBLACK.

CLOUSER.

MOORHEAD.

GARROTT.

BERKEY.

Adopted.
A Bill for an Act entitled an act concerning appeals to the Supreme and Appellate Courts, and repealing all laws and parts of laws in conflict therewith.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That all appeals authorized to be taken to the Supreme and Appellate Courts, except those enumerated in sections 2, 3, 4 and 5 of this act, shall be taken within 120 days from the time the judgment is rendered in the trial court, or in case a motion for a new trial is filed and not disposed of before judgment is rendered or motion to modify the judgment is filed, then within 120 days from the time such motion or motions are overruled. Where the appellant is under legal disability he may take his appeal at any time within 120 days after the disability is removed.

Sec. 2. Appeals by the state in criminal cases as now provided for by law shall be taken within sixty days.

Sec. 3. Appeals from interlocutory orders shall be taken within thirty days from the date thereof.

Sec. 4. An appeal by any person considering himself aggrieved by any decision of a probate or circuit court or a judge thereof in vacation growing out of any matter connected with a decedent's estate shall be taken within thirty days.

Sec. 5. Appeals from orders appointing or refusing to appoint a receiver shall be taken by any party aggrieved thereby within ten days from the date of such order, without awaiting the final determination of the case. In case a receiver has been appointed the supersedeas bond referred to in section 8 of this act shall be in such sum as may have been required of the receiver.

Sec. 6. The court to which an appeal is to be taken may grant an appellant a reasonable extension of time in which to file his transcript of the record upon a positive showing in a petition under oath that the reporter who reported the case will be unable within the time provided for by this act to complete said transcript either because of the illness of such reporter or because the said transcript will be of such size that it will be physically impossible for the reporter to finish it within such time. Such petition shall state the date upon which it will be submitted to the court for action and shall be accompanied by a showing that notice has been served upon or has been waived by all other parties to the action or their attorney at law more than five days before the date set for such submission.

Sec. 7. Appeals shall be taken by procuring from the clerk of the court in which judgment was rendered a certified transcript of the record or proceedings, or such portion thereof as is necessary to present the error relied upon by the party appealing, and filing the same in the office of the clerk of the Supreme Court, which clerk shall endorse thereon the time of such filing.
Sec. 8. All parties to the action in the trial court shall be notified of such appeal. The party or parties taking the appeal, before filing such transcript in the office of the clerk of the Supreme Court, may serve on the other parties to the action notice that such appeal will be taken, and attach to and file with such transcript written acknowledgment by said party or parties or by their attorneys at law of record of the receipt of such notice, or proof of the service on such parties or attorneys at law duly verified under oath by the person serving the same. If acknowledgment of notice or proof of the serving of notice on any party or parties is not made and filed with the transcript, the clerk of the Supreme Court shall issue to such party or parties a notice showing the filing of such appeal and cause the same to be served forthwith upon said party or parties by the sheriff of the Supreme Court, or by the sheriff of the county wherein such party or parties reside or maintain a resident agent. If any party to an appeal be a non-resident of the State of Indiana and no acknowledgment of service be filed as to such party, it shall be the duty of the Supreme Court to give notice by publication to such party, one time each week, for three successive weeks in a daily newspaper published in Indianapolis.

Sec. 9. If an appeal be taken by a defendant in a criminal case the notice provided for in section 8 of this act shall be given to the prosecuting attorney. Immediately upon the filing of the transcript of the record in every criminal case the clerk of the Supreme Court shall notify the Attorney General thereof.

If an appeal be taken by the state in a criminal case notice as provided for in section 8 of this act shall be served upon the defendant or his attorney.

Sec. 10. The party or parties taking the appeal shall file with the transcript and at the time the same is filed a bond for costs payable to the clerk of the Supreme Court with such penalty and surety as he shall approve conditioned upon the due prosecution of said appeal and the payment of the costs occasioned thereby.

Sec. 11. An appeal shall not stay further proceedings upon the judgment of a trial court unless a supersedeas bond shall be filed, except that in appeals by executors or administrators or by the state or any municipal subdivision thereof the judgment shall be stayed without bond. Upon the filing and approval of a supersedeas bond the judgment of the trial court shall be stayed until the further order of the court of appeal. Before the transcript is filed on appeal such supersedeas bond may be filed and approved in the trial court, and after the transcript is filed on appeal such bond may be filed and approved in the court to which the appeal is taken. Such supersedeas bond, with such penalty and surety as the court may approve, shall be payable to the appellee with condition that the appellant will duly prosecute the appeal and abide by and pay any judgment that may be affirmed against him.

If the appeal is taken from a judgment for the recovery of real property or possession thereof, by the party against whom the judgment for the recovery is rendered, then the condition of the bond shall further provide that the appellant shall also pay all damages which may be sustained by the appellee for the mesne profits, waste or dam-
age of the land during the pending of the appeal; and if from a judgment for the recovery or return of personal property, or such property or its value, that he deliver or return the property, he shall also pay a reasonable value for its use or any damage it may sustain during the pending of the appeal.

Sec. 12. Appeals in criminal cases shall not stay the execution of the judgment unless the appellant shall give bail in the manner provided by law.

Sec. 13. A complete transcript of the record on appeal shall consist of all pleadings and papers filed and all action taken in the case by the parties and by the trial court before and during the trial and disposition thereof, including the examination of the jury, opening statements and arguments of counsel, all of the evidence both oral and written, all objections, all instructions tendered, refused, modified and given, all agreements of counsel, and any and all other matters or actions which occurred. Either the original papers or copies thereof may be used in making the transcript of the record. Every pleading, motion in writing, deposition or other paper filed, or offered to be filed in any cause or proceeding whether received by the court, refused or stricken out, shall be a part of the record from the time of such filing or offer to file. Any order or action of the court in respect to any pleading, motion in writing, report, deposition or other paper and every oral motion and the ruling of the court thereon shall be entered by the clerk on the minutes or record of the court, and the same, when so entered, shall be a part of the record.

Sec. 14. An appellant need not file a complete transcript of the record on appeal, but may present only such portion thereof as will clearly present the ruling or matter called in question, together with a succinct recital of the substance of such part of the evidence and proceedings as shall be necessary to advise the court on appeal of the pertinency or materiality of the matters sought to be reviewed.

Sec. 15. It shall not be necessary for the transcript of the record to contain all the evidence given in the cause or proceeding unless the decision of the trial court or the verdict of the jury shall be called in question as being contrary to law or not sustained by sufficient evidence.

Sec. 16. No bill of exceptions shall be necessary to bring into a record on appeal to the Supreme or Appellate Courts anything that was before the trial court or any decision, ruling or action that was taken by the trial court. An exception shall be deemed by law to have been taken for every party to every decision, ruling or action of a trial court adverse to such party and it shall not be necessary for any party to save, reserve or take an exception either orally or in writing to any decision, ruling or action of a trial court.

Sec. 17. There is hereby imposed on the clerk of every trial court, with the aid and assistance of the judge and reporter thereof, the duty of keeping a complete record of the trial of every action, including all matter which has heretofore been preserved for record through the use of bills of exceptions and any and all other matters which may be requested and which may be made the basis for review by the Supreme and Appellate Courts.

Sec. 18. It shall be the duty of the official reporter to take down in
short-hand all evidence given, objections made and all action taken in connection with the trial or disposition of cases which are not otherwise a matter of record, for the purpose of preserving an accurate report thereof for the possible future use as a part of the record on appeal. The performance of such duty may be waived by agreement of all the parties with the consent of the trial court. In the event any action is not thus preserved it shall be the duty of the trial judge, when requested, with the assistance of the parties, to prepare and file with the clerk of the trial court, a condensed recital of the evidence given, objections made and all action taken so that the same may and it will thereby become a part of the record.

Sec. 19. A party desiring to take an appeal from a judgment of a trial court to the Supreme or Appellate Court shall file a written request or precipe with the clerk of such trial court for a complete transcript of the record, or if a complete transcript is not desired, for such portions and so much thereof as the party shall in writing indicate, of the cause of action in which said judgment was rendered.

In the event any other party to the judgment shall desire a complete transcript of the record upon such appeal, or shall desire a part or parts of the record not required by the precipe so filed, he may file with the clerk his precipe in like form. Such precipe or precipes shall constitute a part of the record and shall be included therein.

It shall be the duty of such clerk to prepare and certify such record. The clerk shall obtain from the reporter or the judge the material necessary to complete the record: Provided, That the clerk and reporter before performing any duty hereunder shall be entitled to demand and receive security for the costs and fees which may properly and legally accrue to either in the performance of such duties. The portion of the record prepared by the reporter shall when completed be certified to under oath by the reporter as being a true and correct report of the proceedings and when so certified it shall be submitted by such reporter or by the clerk to the judge who tried the case either in term or in vacation and he shall promptly correct it if correction be needed, settle it, and sign it, whereupon it shall become a part of the record to be included by the clerk in the transcript on appeal.

In case of the disability, absence, removal from office or death of the judge trying the case the clerk of the court shall certify to such fact, following the reporter's certificate under oath and thereupon such transcript furnished by the reporter shall become a part of the record.

Sec. 20. The certificate of the clerk to the transcript of the record shall be in substantially the following form: State of Indiana, County of-----------------. I __________________________ Clerk of the ------------------ Court, within and for said county and state, do hereby certify that the above and foregoing transcript contains full, true and correct copies or the originals, of all papers and entries in said cause required by the above and foregoing precipe (or precipes). Witness my hand and the seal of said court at ______________________, this __________ day of ____________________, ___________________________Clerk.

Sec. 21. If the court to which the appeal is taken shall be of the opinion that the record brought up by an appellant does not contain suf-
ficient matter to present the question raised in his brief or if there be some defect or informality in the transcript or other proceedings in connection with the appeal, the appeal shall not by reason thereof be dismissed, but the appellant shall have the right, within a reasonable time to be prescribed by the court of appeal, to correct such informality or defect or to bring up any additional part of the record by a writ of certiorari directed to the clerk of the trial court. When an appeal has been dismissed for want of prosecution, the court may reinstate it at the same or next term, good cause being shown.

Sec. 22. Any co-party not joining in the appeal, may within the time allowed for the appeal, or within thirty days after the transcript of the record has been filed on appeal, file in the court to which the appeal is taken a statement that he desires to present the errors as to himself and have all questions properly presented decided by the court, and he shall then have all rights in relation to such appeal that he would have had if he had joined in the appeal originally.

Sec. 23. All error of the trial court shall be before the court on appeal without assignment of error therein, but the Supreme Court may make reasonable rules as to the presentation of errors and cross-errors and the waiver thereof in the briefs filed on appeal.

Sec. 24. Other procedure as to the conduct and disposition of appeals shall be governed by the rules of the Supreme Court.

Sec. 25. This act shall be in effect beginning July 15, 1931, and shall not govern the appeal of any case the trial of which was begun or had before that date.

Sec. 26. The following acts and parts of acts are hereby repealed: Sections 403, 405, 406, 407, 629, 632, 633, 635, 636, 637, 638, 639, 640, 642, 643, 646, 647, and 660 of an act entitled “An act concerning proceedings in civil cases approved April 7, 1881, and all amendments of said sections, the sections referred to being sections 683, 685, 686, 694, 696, 698, 699, 700, 701, 702, 703, 707, 711, 716, 717, 819, 721, and 724 of Burns revised statutes of 1926.

An act entitled “An act in relation to appeals to the Supreme and Appellate Courts,” approved March 9, 1895, section 1 thereof being section 706 Burns revised statutes of 1926.

An act entitled “An act prescribing the manner in which evidence given in any civil or criminal cause may become a part of the record upon appeal to the Supreme or Appellate Court; repealing all laws in conflict herewith and declaring an emergency,” approved March 8, 1897, section 1 thereof, being section 691 Burns revised statutes of 1926.

An act entitled “An act to amend section 629 of an act entitled an act concerning proceedings in civil cases, approved April 7, 1881, and declaring an emergency,” approved January 20, 1899, being section 707 Burns revised statutes of 1926.

Sections 3, 4, 5, 6, 7, and 8 of an act entitled “An act concerning proceedings in civil procedure,” approved March 9, 1903, and all amendments of said sections, the sections referred to being sections 684, 688, 689, 692, and 693 of Burns revised statutes of 1926.

An act entitled “An act providing for the extension and re-extension of time within which to file bill of exceptions,” approved February 25, 1905, being section 687 Burns revised statutes of 1926.
An act entitled "An act concerning proceedings and appeals in criminal cases," approved March 6, 1905, being section 2379 Burns revised statutes of 1926.


An act entitled "An act providing for a re-extension of time within which to file a bill of exceptions containing the evidence when the court reporter fails or is unable to furnish a transcript of the evidence within the time given and repealing an act entitled 'An act providing for the extension and re-extension of time within which to file bill of exceptions,' approved February 25, 1905," approved March 3, 1911, and being section 687 Burns revised statutes of 1926.

An act entitled "An act to amend sections four hundred and eight (408) and six hundred and forty (640) of an act entitled "An act concerning proceedings in civil cases," approved April 7, 1881, and to amend section one (1) of an act entitled "An act to amend an act entitled 'An act to amend section two hundred and twenty-nine (229) of an act entitled "An act providing for the settlement and distribution of decedent's estates," approved April 14, 1881, which section is numbered 2455 in the revised statutes of 1881, approved April 11, 1885,' the same being section 2455 of Horner's annotated statutes of 1897, approved March 3, 1899," approved February 26, 1913, and being section 696 Burns revised statutes of 1926.

An act entitled "An act to amend section three (3) of an act entitled 'An act concerning proceedings in civil procedure' approved March 9, 1903, and declaring an emergency," approved March 15, 1915, and being section 684 Burns revised statutes of 1926.

An act entitled "An act to amend section 289 of an act entitled 'An act concerning public offenses' approved March 10, 1905, and declaring an emergency," approved March 5, 1915, being section 2332 Burns revised statutes of 1926.

An act entitled "An act to amend section six hundred and thirty-two (632) of an act entitled 'An act concerning proceedings in civil cases' approved April 7, 1881, and declaring an emergency," approved February 27, 1917, and being section 698 Burns revised statutes of 1926.

An act entitled "An act concerning proceedings in civil cases of appeals from interlocutory judgments and orders," approved March 11, 1921, said act being sections 712, 713, 714 and 715 of Burns revised statutes of 1926.

MINORITY REPORT

Mr. Speaker:

A minority of your Committee on Judiciary B, to which was referred Engrossed Senate Bill No. 227, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be indefinitely postponed.

WATSON.
SIMMONS.
VANDERVEER.

Lost.
Mr. Speaker:

A majority of your Committee on Judiciary B, to which was referred Engrossed Senate Bill No. 227, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

McClain.
Dean.
Bates.
Simpson.
Egan.
Bachtenkircher.
Haines.
Street.
Grimm.
Ale.

Adopted.