

forms he advocated were “but part of a general movement in all departments of mental activity away from the purely formal, away from hard and fast notions, away from traditional categories which our fathers supposed were impressed upon the nature of things for all time” (p. 77). Pound argued that implementing his practical proposals for procedural reform would do nothing more than mirror changes that were occurring in all areas of intellectual life. Pragmatism in law was part of a

movement [that] is remaking the natural and physical sciences, is rewriting history, is recasting political theories, is making over economic theory, and, under the name of sociology, is changing our attitude toward all problems of social life. It is inevitable that jurisprudence, and ultimately the law itself, be affected profoundly. For whatever its validity in other fields, pragmatism must be the philosophy of the lawyer (p. 77).

Theory and practice were not separate. Theory arose from practical experience in the world, and both theory and experience dictated the practices and procedures which should be adopted in our legal system. But Pound wanted to do more than simply jettison archaic methods and procedures. For example, when he proposed eliminating some of the rules that had evolved from the hoary distinction between law and equity, Pound obviously pursued changes in the everyday practices of lawyers and judges. But he also hoped to change how his world defined the very nature of law and its functions. The measure of his success is that the end-of-the-century American lawyer likely will find that Pound’s proposals to reform legal theory and practice reflect the common assumptions of our time.

A Practical Program of Procedural Reform

Roscoe Pound

ONE NEEDS BUT LOOK about him to see that procedural reform is in the air. The subject has progressed beyond the stage of discussion by jurists and teachers and controversy in periodicals, legal and lay, and has entered upon the practical stage. To say nothing of the elaborate measure pending in this state, bills for reform of federal procedure, including one for a commission to draft a complete federal practice act, are before Con-

gress, and procedural reform has received the weighty approval of the President; a commission on delay in the administration of justice has reported recently in Massachusetts; a committee of the Association of the Bar of the City of New York has put forth a printed report on simplification of procedure; Kansas has adopted, at the instance of the State Bar Association, a revised code of procedure which embodies many notable reforms; the

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Bar Association of San Francisco recently has procured important reforms in the criminal procedure of California; and the American Bar Association now maintains what is practically a standing committee on delay and expense in legal procedure. Even more significant, there are notable signs of increasing liberality in judicial decisions on questions of practice.¹ Thus, after a period of rigidity in practice, in which substance has been sacrificed to form and end has been subordinated to means, we are evidently about to enter upon a period of liberality in which the substance shall prevail and the machinery of justice shall be restrained by and made strictly to serve the end for which it exists.

Such periods of rigidity and liberality in procedure have alternated throughout the history of our law. What Mr. Zane has called the Golden Age of the Common Law, in which the power to make new writs, liberally exercised, indeed assured that no wrong, or at least no type of wrong, should be without a remedy, was succeeded by a period of hard and fast actions in which a statutory attempt to restore the former flexibility could only give us the action on the case. A period of free amendment of the record was succeeded by one in which the final and unalterable nature of the record became a dogma and gave rise to a record-worship from which our procedure suffers still, so that, as Blackstone said long ago, suitors have "suffered as much by this scrupulous

obstinacy and literal strictness of the courts as they could have done even by their iniquity."² The judicial liberality of the year books with respect to proceedings before the court, when pleadings were settled orally and not made part of the record until the legal phases of the case had been thrashed out, was arrested in the fifteenth and sixteenth centuries³ and gave us in the seventeenth century the high-water mark of technicality in pleading. A new period of liberality set in at the end of the eighteenth century, when Lord Mansfield made of the count for money had and received a bill in equity at law,⁴ when he made the equitable defense of non-performance by a promisee of the counter-promise on his part into breach of an implied condition, available at law,⁵ when he took cognizance at law of purely equitable interests and rights where the trusts on an outstanding term were fully satisfied,⁶ and when he went a long way toward breaking down the distinctions between actions at law,⁷ and gave to trover many equitable incidents. This, again, was followed by a reaction which was almost unaffected by the legislation of the reform movement and endured until the drastic changes of the Judicature Act of 1873. In this country, the liberal ideas of the New York Code of 1848 and of the period in which that code swept over the country, was followed quickly by a judicial reaction which went a long way toward nullifying its most important provisions.⁸ A swing of the pendulum toward

1 *Cockerell v. Henderson*, 105 Pac. Rep. 443 (Kan.); *Byeson v. Territory*, 103 Pac. Rep. 532 (Okla.); *People v. Strollo*, 191 N.Y. 42, 61, 66-67.

2 3 Bl. Comm. 411.

3 Cf. Co. Lit. 304a, 304b.

4 *Moses v. Macferlan*, 2 Burr. 1005.

5 *Kingston v. Preston*, 2 Doug. 689.

6 *Doe d. Bristow v. Pegge*, I.T.R. 758, note a.

7 "It is merely a distinction, whether the relief shall be in this form or that." *Hambly v. Trott*, Cowper 271.

8 *Allen v. Patterson*, 7 N.Y. 476; *Reubens v. Joel*, 13 N.Y. 488; *Voorhis v. Child*, 17 N.Y. 354; *Goulet v. Asseler*, 22 N.Y. 225; *De Graw v. Elmore*, 50 N.Y. 1; *Barnes v. Quigley*, 59 N.Y. 265; *Bonesteel v. Bonesteel*, 28 Wis. 245; *Anderson v. Cox*, 28 Wis. 505; *Supervisors v. Decker*, 30 Wis. 624; *Denner v. R. Co.*, 37 Wis. 268; *Maquire v. Vice*, 20 Mo. 419; *Richardson v. Means*, 20 Mo. 495; *Myers v. Field*, 37 Mo. 434.

liberality at this time is but part of a general movement in all departments of mental activity away from the purely formal, away from hard and fast notions, away from traditional categories which our fathers supposed were impressed upon the nature of things for all time. This movement is remaking the natural and physical sciences, is rewriting history, is recasting political theories, is making over economic theory, and, under the name of sociology, is changing our attitude toward all problems of social life. It is inevitable that jurisprudence, and ultimately the law itself, be affected profoundly. For whatever its validity in other fields, pragmatism must be the philosophy of the lawyer. "What are its results; how does it work, and what does it work," must be the questions he puts to every theory and distinction and dogma and category. Adjective law is but an instrument; its categories of actions and proceedings were not stamped upon legal science by the Creator. And whenever pragmatism supersedes the natural law of our historical school in juristic philosophy, so that we look upon action at law and suit in equity, the form of common law actions and the traditional types of proceedings, not as eternal categories, beyond the reach of legislation, but as instruments for the enforcement of the substantive law, to be judged as such, a liberal and flexible procedure is certain to ensue.

But we must not expect too much from procedural reform at present. In the first place it is not a panacea. There are at least three problems connected with the administration of justice in America which are of equal, if not, some of them, of greater importance. Moreover, these problems are connected intimately with that of procedural reform. The organization of courts, and thereby the organization of judicial business, the personnel, mode of choice and tenure of judges, and the organization, mode of training and traditions of the bar have each at least as much to do with the conditions of effective judicial administration

as the course and rules of practice in the courts. It is not too much, indeed, to say that improvement in these three particulars is a necessary precursor of thoroughgoing reform of procedure. With a modern organization of the courts and an efficient, independent, experienced judiciary, almost any system of procedure may be made very tolerable. Without them, the best considered practice acts will prove disappointing in their actual administration. In the second place, experience has shown that reforms of procedure must not come too soon and must not go too fast for bench and bar, who are to administer them. Much of the difficulty which has attended the operation of the New York Code of Civil Procedure and the codes founded thereon has arisen from the circumstance that the reform was premature. The bench and the bar were not ready for it. For one thing, the old procedure was not yet so thoroughly tested under American conditions as to afford a sound basis for reform. We must remember that when, in 1847, the commissioners were appointed to draft the New York Code of Civil Procedure, there was scarcely half a century of useful experience in the administration of justice in America to draw upon. Written opinions began with the appointment of Kent as Justice of the Supreme Court of New York in 1798. There was a lay Chief Justice in Rhode Island as late as 1820, and one of the Justices of the Supreme Court of that state from 1814 to 1818 was a blacksmith. Two of the three Justices of the Superior Court of New Hampshire after independence were not lawyers. New Jersey and Kentucky at the end of the eighteenth century legislated against citation of English books in the courts. There was a rule of court to the same effect in New Hampshire. In the latter state, one of the Justices in the last decade of the eighteenth century used to boast that he had not read Coke or Blackstone and never would read them. Kent tells us that in New York, while he was upon the supreme

bench of that state, "English authority did not stand very high."⁹ Not only had the old practice been in effective operation too short a time, but it was unreasonable to expect that a generation which had just thoroughly learned the English practice, and learned to apply it under American conditions, should abandon it over night or give up its fundamental tenets without a struggle. The reform of 1848 too often fell far short of the needs of present-day administration of justice. But where it did go to the full extent, judicial jealousy of legislative derogation of the common law and professional tenacity of hard-learned conceptions of English procedure operated to restrict, if not to defeat it. Many common-law ideas in procedure have been worked out to their logical results for the first time in judicial applications of the codes.¹⁰ To-day, after more than a century of American experience, after the country as a whole has been settled and developed and conditions have become stable, we are much better prepared for effective reform of procedure than in 1848. But we should be warned by the example. New York was a too precious and too ambitious pioneer, and over-ambition to achieve a complete and thoroughgoing reform at one stroke may very well have the same results today.¹¹ Thirdly, no amount of procedural reform can obviate entirely dissatisfaction with the legal administration of justice. Administration of law without forms is as impracticable and undesirable as administration of justice without law. But forms and rules will always operate more or less mechanically, and

in consequence will always give rise to dissatisfaction with the justice administered thereby. Because of this inherent difficulty in all judicial administration, we must look for the chief benefits of procedural reform, not so much toward obviating popular discontent with the workings of the courts, although such discontent may be diminished to no small extent, as toward relieving our overworked courts of about twenty-five per cent of the points now submitted to them – points which have no real connection with the substantive rights of the parties litigant – and toward enabling lawyers to study and present their cases on the substantive law more thoroughly and intelligently, so as to assist the courts more effectively, and thus assure greater certainty and precision of application of the rules on which rights depend.¹²

Premising so much, I purpose to consider (1) the best means of achieving procedural reform in an American state today, (2) the leading principles upon which such a reform should proceed and the chief improvements which it should attempt to achieve.

There are three agencies through which reform of procedure may be brought about conceivably. These are (1) judicial decision, (2) rules of court, and (3) legislation. Perhaps at the present time the scope of the first agency is so restricted by legislation as to make it impracticable for the attainment of any large results. Where there are not codes, going into minute detail, there are usually practice acts expressly providing, or at least clearly assum-

9 For the details with reference to this and the foregoing statement, see my paper "The Influence of French Law in America," 3 Ill. Law Rev. 354.

10 See *Mescall v. Tully*, 91 Ind. 96; *Rust v. Brown*, 101 Mo. 586; *Lumber Co. v. Wadleigh*, 103 Wis. 318; *Anderson v. Chilson*, 8 S.D. 64; *Coxey v. Major*, 8 Okl. 665.

11 E.g. it was a considerable time before the Judicature Act in England could be made to work well. See Judge Harris's book, "Farmer Bumpkin's Lawsuit," where many curious examples of the earlier workings of that statute are given.

12 About 35 per cent of the points decided by our highest courts each year are points of practice. If that burden may be lessened, the benefit to courts, lawyers, and the law needs not be argued. I submit that reduction from thirty-five per cent to ten per cent is perfectly feasible, and would be no small relief to our courts.

ing, things of which any effective reform must rid us. With respect to these matters, it is obvious that judicial decision is powerless. Yet we must not overlook the achievements of Judge Doe in New Hampshire. With only an ordinary statute of jeofails and amendments to work upon, perceiving what judges in code states, with the aid of better legislative provisions, had not perceived, that forms of action and distinction between legal and equitable proceedings were formal, not substantial, he did not hesitate to allow the form of action to be changed by amendment,¹³ to allow amendment from law to equity or *vice versa*,¹⁴ and to allow *mandamus*, or relief in the nature thereof, when the case made showed it proper, although a wholly different remedy had been applied for.¹⁵ For these beneficent strokes of judicial audacity, he had the example of legislation in other jurisdictions. But he went beyond this and settled judicially, without waiting for legislation, that where error at a trial requires a reversal of a judgment, the prior proceedings shall be saved so far as and wherever possible, and a new trial had only of the matter affected directly by the error, if the latter is separable.¹⁶ A Mansfield or a Doe, however, is not to be found on every bench, and in the hands of any less than they were, the power to make such decisions would be dangerous. For the great obstacle to judicial improvement of the law is that judicial changes operate retrospectively. It is not fair to litigants to turn the courts into experiment stations in which judicial reformers may try on their ideas of legal improvement retroactively, nor is it fair to judges to ask them thus to sacrifice the interests of individual litigants in order to do what ought to be accomplished by rules laid down in advance of decision. Re-

form by exercise of the power of courts to make rules is free from the latter difficulty. But here again, in most jurisdictions and for most purposes, the detailed provisions of practice acts or codes stand in the way of effective improvement. Hence we may take it that legislation must be resorted to as the direct and immediate agency of reform.

Assuming that legislation is imperative if not as the sole means, at least as a precursor of procedural reform, three methods are open: (1) A succession of brief practice acts dealing with portions of the subject or with special details, (2) a complete general practice act, after the general model of the codes of procedure, covering, or attempting to cover, all details at one stroke, (3) a short, simple practice act laying out the broad lines only, and, so far as possible dealing only with those matters that require legislative change or legislative authority for change, leaving the details to be settled, developed and improved by general rules to be devised or adopted by the judges.

It cannot be denied that the first of these methods has been pursued thus far in this state with no little success. Three notable reforms were brought about in the last practice act, namely, the power of transfer from Appellate Court to Supreme Court and *vice versa*, the power of amendment from law to equity and *vice versa*, and the power of suit by an assignee in his own name. The limitation of double appeals in the *certiorari* act is another instance of what may be done in this way. But the objections to this course are serious. In the first place it makes progress one-sided. Advance takes place here and there, as it were by jerks, but the general system is left as it was. And it happens not infrequently that defects are really in the system as a whole more than

13 See Henning's Life of Doe; in Lewis, 8 Great American Lawyers 239, 254.

14 *Metcalf v. Gilmore*, 59 N.H. 433.

15 *Boody v. Watson*, 64 N.H. 172; *Atty.-General v. Taggart*, 66 N.H. 369.

16 *Libson v. Lyman*, 49 N.H. 582.

in the details. In that event, the detailed improvements have to take their place in the system and are molded thereto by construction until they fail of effect. A more serious objection is that such a succession of acts, when the work is complete, will give us a mass of enactment with all the characteristics of a code. In other words, it will give us a complete scheme in all its details, laid down in advance by legislation, and to be altered only by more legislation. Hence, all the arguments that may be urged against a code of procedure or a general practice act going into minute detail, apply with equal force, in the end, to such a succession of acts. On the other hand, the advantage of this method – and it must be conceded to be a real advantage – namely, the gradual introduction of changes as bench and bar are ready for them, may be achieved equally by leaving details to be worked out by rules of court.

It would seem, therefore, that the choice must be between the second and the third of the three methods named. And herein is the first and most vital problem in devising a program of procedural reform. At the very outset, every jurisdiction must choose between a brief, scientific outline of, say, one hundred sections, to be developed by rules which may be enacted, revised, amended, or abrogated by the judges, in the light of experience of their actual operation, or a detailed code of some two thousand sections, at least, amendable only by means of further legislation, to be developed by judicial constructions which will be unalterable except by legislation, and thus to furnish material for forensic strife and legislative tinkering indefinitely.

Hence, the first item in a practical program or procedural reform should be, I submit, the following principle:

I. A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time

as actual experience of their application and operation dictates.

Discussion of this question need not be theoretical only. We have abundant experience to draw upon. Undoubtedly more than one cause contributed to the untoward fate of procedural reform in New York. But the chiefest factor was that the reform proceeded upon a wrong principle. I have discussed this at no little length in another place, and beg to repeat what I then said:

No one can lay down details of procedure in advance with much assurance that they will not require modification. Even if they do not require modification, the rules may acquire meanings through judicial construction, which will demand a change. Such changes of detail ought to be easy to make. The original New York Code unhappily went into detail and made no provision for change. Minute details could only be altered by legislation. When, as a result of judicial hostility in the earlier years of its history, narrow and illiberal constructions became fastened upon it, resort to legislative amendment was the sole resource. Thus legislative interference grew to be a fixed habit, and a revision supervened, swelling the code to some 3,000 sections, which has been characterized aptly as "revision gone mad". Compare with this the method employed in the English Judicature Act. That act contained but 100 sections, with a schedule of 58 rules of practice appended, leaving details to rules of court to be framed by the judges. In drawing up the first rules a mistake was made analogous to that made by the framers of the New York Code. The latter had their eyes chiefly on practice at law and in consequence made rules at many points which proved awkward of application to equity proceedings. Those who drew the Judicature Act and the first rules thereunder were equity lawyers, had their eyes too much on equity, and hence, at first, proceedings at law were made cumbersome and dilatory. ... But legislation was not necessary to effect a change. The judges themselves were able to and did change the rules as experience of actual application dictated, until the present rules were developed. How unfortunate the results of hard and fast legislation as to the details of

procedure may prove in practice is demonstrated by later English legislation with respect to workmen's compensation. Instead of leaving the details of procedure in such cases to general rules to be framed by those who were to administer them, Parliament enacted where appeals should go and in what manner, in such a way that in the reports styled "Workmen's Compensation Cases," we meet frequent examples of appeals dismissed because taken to a Divisional Court instead of to the Court of Appeal or *vice versa* – about the only vestige of appellate procedure left in England.¹⁷

I have said that when the first rules under the Judicature Act in England, having been framed too much with a view to equity practice, proved unfortunate when applied to procedure at law, the judges gradually found the cure by improved rules. Compare with this what happened in New York. There the provisions as to joinder and as to cross-demands were framed with a view to practice at law only, and, in their application, threatened to abrogate the equitable doctrine of complete disposition of the cause and the equity of joining all persons interested in the subject of the suit and proper to complete relief.¹⁸ But the judges were powerless. They were bound by hard and fast legislative rules. Only legislative amendment could effect a cure. But the amendment, when it came, was subject to the same difficulty. It was rigid and unalterable. Hence, as might have been expected, the cure was but partial, and the new section and provisions founded upon it have been prolific sources of litigation in New York and in the

other code jurisdictions ever since.¹⁹

Rules of court, as a means of developing the details of procedure, are no experiment. Not only was this an ancient common-law power, both in courts of law and in the court of chancery, but it was given to the Supreme Court of the United States, with respect to equity practice and admiralty practice, by an act of 1842.²⁰ It was given to the same court by the Bankruptcy Act of 1898²¹ and by the Copyright Act of 1909.²² It has also been given, within fairly wide limits, to the Municipal Court of Chicago.²³ According to newspaper reports it is also to be given to the new federal Court of Commerce. And if, in some of these cases, as, for instance, the federal equity rules, no great things have resulted from this power, at least no harm has followed, and the power is at hand to be used whenever the demand for improvement becomes acute. Moreover, the orders in bankruptcy, which are much more modern than the equity rules, and have been improved by amendment since their adoption, show the possibilities of such a system.

This principle of development of the details of procedure through rules of court, rather than through minute legislation, is submitted and discussed at length in the report of the special committee of the American Bar Association to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation presented to the Detroit meeting in 1909.²⁴ It has been approved as a principle of procedural reform by President Taft.²⁵ The advantages of the principle have

17 Some Principles of Procedural Reform, 4 Ill. L. Rev. 388, 403-04.

18 See the sarcastic remarks of Comstock, J., in *Railroad Co. v. Schuyler*, 17 N.Y. 592, 604.

19 See Pomeroy, Code Remedies §§ 464-78, for the details.

20 Comp. Stat. U.S. § 917 (1901).

21 National Bankruptcy Act of 1898, § 30.

22 Chap. 320, 35 Stat. U.S. 1075, § 25. See 214 U.S. 533.

23 Municipal Court Act of 1907, § 20, Laws of 1907 at 235.

24 34 Rep. Am. Bar. Ass'n 578, 595-600.

25 "In the first place, the codes of procedure are generally much too elaborate. It is possible to have a code of procedure simple and effective. This is shown by the present procedure in the English courts, most of which is framed by rules of court." *The Delays of the Law*, 18 Yale L. J. 28. Again:

been summarized, in the report already cited, as follows:

(1) No one can anticipate in advance the exact workings of a detailed rule of practice. Change and adaptation to the exigencies of judicial administration is inevitable. The judges are best qualified to determine what experience requires and how the rule is actually working. (2) The opinion of the bar as to the working of a rule may be made known to and made to affect the action of the judges in framing new rules or improving old ones much more easily and with better results than where the legislature must be applied to. (3) Small details do not interest the legislature, and it is almost impossible to correct them. (4) Too often details in which some one member of the legislature has a personal interest are dealt with by legislation, and not always in accord with the real advantages of procedure. (5) As experience shows that changes are needed and what they are, there ought to be a possibility of speedy adjustment of details of procedure. Only rules of court can meet this demand.²⁶

The case against the principle for which I am contending was argued fully and ably by Mr. Gilbert in his address before this association last year.²⁷ Stated summarily, his objections are four: (1) That the evils to be cured are chiefly the result of judicial legislation and that the agency which has produced the condition to be cured ought not to be entrusted with administration of the remedy; (2) that since in the past bench and bar have been hostile to new modes of procedure and have pre-

vented their beneficial operation, it follows, to use his own language, that "to leave to them [the judges] too much discretion, would be likely to result in the adoption of many rules more suited to their own convenience than to the convenience of litigants and to the prompt and proper transaction of business"; (3) that to leave the details to be settled by rules of court would result in confusion and uncertainty; and (4) that even if the judges had the ability and the disposition to enact good rules, they have not the time. In addition to these objections, others have urged that the proposed system is unconstitutional, as involving a delegation of legislative power to the courts. The latter objection is obviously untenable. The power to make rules for practice in the courts has always belonged to the judiciary. Except so far as statutes have prescribed details, that power still exists and is still exercised. Mr. Justice Brown has argued that a great deal of our procedural legislation, intended to tie the judges hand and foot, and to regulate their every act from the time they enter the court room, is of doubtful validity as involving undue legislative encroachment upon the judicial department.²⁸ Be this as it may, the example of the grant of this power to the federal Supreme Court which has stood unchallenged since 1842, should convince the most skeptical. With respect to Mr. Gilbert's objections, it may be said, first, that the present condition of American procedure is by

"The English system, consisting of a few general principles laid down in the practice act and supplemented by rules of court to be adopted by the Supreme Court of Judicature, has worked with great benefit to the litigant, and has secured much expedition in the settlement of controversies, and has practically eliminated the discussion of points of practice and pleading in the appellate courts. My impression is that if the judges of the court of last resort were charged with the responsibility within general lines to be defined by the legislature for providing a system in which the hearings on appeal should be as far as possible with respect to the merits and not with respect to procedure, and which should make for expedition, they are about as well qualified to do this as anybody to whom the matter can be delegated." *Id.* at 31.

²⁶ 34 Rep. Am. Bar. Ass'n at 597.

²⁷ The Administration of Justice in Illinois, 1909 Proc. Ill. Bar Ass'n 328.

²⁸ Judicial Independence, 12 Rep. Am. Bar Ass'n 265.

no means to be laid solely or even chiefly to the bench nor to bench and bar. Not only has ill-advised legislation contributed its fair share in more than one jurisdiction, but the most active causes have been deep-seated. An extended discussion of these causes here would be out of place. But at least six may be traced, namely: (1) survival of conceptions and rules originating in the archaic administration of justice by the mechanical following of form; (2) the circumstance that the characteristic features of our legal procedure became fixed and its chief details were fully developed in the seventeenth and eighteenth centuries – in what is for the modern world the period of formalism of over-refinement in every department of human activity – and so acquired a highly formal and artificial character; (3) the influence of Puritanism in the formative periods of our law, both in England and America, whereby the Puritan jealousy of the magistrate took an extreme form as jealousy of the judge, and hard and fast rules of procedure, absolute and unyielding rules of evidence, and strict review of the details of practice by a series of reviewing tribunals were deemed necessary to hold him in check; (4) the influence of the frontier and of the exaggerated importance of the advocate and the free rein accorded him in frontier communities; (5) the weakness of an elective judiciary before encroachments by the bar and the sharp line between courts of first instance and courts of review in America, whereby the trial judge, without the commanding position which the common law contemplates, hard-pressed by advocates and held in check by reviewing tribunals, removed from his difficulties, has been driven to a cautious, timid, dilatory course that does not comport with the business-like administration of justice; and (6) modern conditions of professional employment in America.²⁹ If this

view of the causes of our present situation is sound, the situation was for a time inevitable, and no blame attaches to those who sat upon the bench or pleaded at the bar. The present generation of judges did not create it – they found it. So long as they are trusted to determine the constitutionality of statutes and to wield the common-law power of judicial law-making involved in our system of case law, it is idle to say we may not trust them to frame general rules of procedure in advance of action.

Mr. Gilbert's second objection, so far as it is not met by what has just been said, appears to involve the assumption that judges who are hostile to a practice act, while they may be expected to develop it by *rules* so as to render it nugatory, may be prevented by legislation from *construing* it so as to defeat its objects. Such has not been the experience with practice legislation elsewhere. No one, as yet, has succeeded in tying down unwilling courts, whether by express statutory provisions or by elaborate interpretation clauses, so as to preclude judicial molding of statutes to what the judges conceive is practicable and just. Indeed, Mr. Gilbert's objection is in reality an argument for the principle objected to. It is because the earlier constructions of a practice act are likely to express the ideas and breathe the spirit of the old practice, rather than of the new, that we ought to be cautious about enacting much detail in a form making it difficult of change. In case rules of court develop a practice act in a conservative or reactionary spirit, we have but a continuance of the existing situation till a new generation of judges comes along to supersede the old rules by a new body of rules conceived in more liberal fashion. On the other hand, if a detailed code is construed narrowly or in a reactionary spirit, we have a substitution of one illiberal system by another,

²⁹ For detailed discussion of these points, see my paper, "Some Principles of Procedural Reform," 4 Ill. Law Rev. 388, 395-400.

which has the disadvantage of being unknown, and further legislation is the sole escape. Moreover, it is no small advantage to have the rules of practice construed by the same agency that drafts them. With respect to the third objection, it may be remarked that the first rule in a judge-made body of rules would undoubtedly be a provision retaining the existing practice unless and until and except so far as changed by the rules.³⁰ In time, when the body of rules had become fully developed, this rule would disappear. This very thing happened in England.³¹ Consequently, so far from there being danger of a period of confusion and uncertainty, development of the general principles of a practice act by rules of court is the most certain method of minimizing, for one may hardly hope to obviate entirely the difficulties involved in any change of procedure. Rules devised, added to and amended as the courts and the bar are ready for them, are less likely to cause confusion than rules laid down in detail in advance, no matter how wise and learned the lawyer who frames them.

As to the fourth and last objection, namely, that our judges have not the time to make rules of practice, one might give Diogenes' answer. The Supreme Court of the United States is a hard-worked court, and yet it found time between March 4 and June 1, 1909, to promulgate the Copyright Rules, and between July 1, 1898, and November 21, 1898, to promulgate thirty-eight General Orders in Bankruptcy, accompanied by a schedule of sixty-three forms. Certainly the pressure of business before legislatures is quite as great as that before courts. Moreover, it is not necessary that the judges actually draw up the rules themselves, any more than that legislators themselves actually draw up every detail of a code or practice act. For example, bar-association

committees may devise proposed rules for submission to the court as easily as proposed statutes for submission to the legislature.

It has been suggested, and Mr. Gilbert's Act in Relation to Courts now contains such a provision, that there should be a complete set of detailed rules in the first instance, in order that the new practice may start full-fledged, with power in the court to amend, abrogate or develop the several details by general rules. If we are to have an elaborate-made code, this is undoubtedly a wise feature. It would obviate much of the difficulty that has attended the administration of the New York Code. But if such a plan is adopted the scope of judicial power of abrogation and amendment should be made very plain, designating clearly those things which are to stand beyond the reach of the judicial rule-making power and those which are to be subject thereto. Probably the best device would be that adopted in the English Judicature Act of 1873 – to put the permanent and unalterable provisions in the form of sections and append a schedule of rules of practice to serve as rules of court until set aside, amended or added to by the Supreme Court. Such a course may well be entirely proper. But if the rules intended to serve such temporary purpose are inserted in the body of the act with nothing to distinguish them outwardly from those intended to be permanent, or if the whole act, and every section thereof, is to be made subject to the judicial power, one may well hesitate.

Whether practice legislation takes the form of a detailed code or of a legislative outline leaving details to be developed by rules of court, only second in importance is the question how such legislation shall be drafted. Here again three agencies are conceivable: (1) a single draftsman, (2) a public commission,

³⁰ U.S. Equity Rule 90; General Orders in Bankruptcy No. 37; U.S. Copyright Rules No. 1.

³¹ Judicature Act of 1873, Rule 1, paragraph 2; Rules of the Supreme Court, 1874 (see Charley, *Judicature Act*, 3 Ed. 353); Judicature Act of 1875, Sec. 21. The provision has now disappeared.

(3) a private committee or commission. In Europe, a public commission would be a matter of course. Even in individualist England, a series of royal commissions framed the Judicature Act. But American experience with legislative commissions has not been satisfactory, and executive commissions appear to have no place in our polity. On the other hand, the Commissioners on Uniform State Laws, a purely private organization, originating in connection with the American Bar Association, have, on the whole, given us a model of conservative but thoroughgoing code-making. We have an example also in the revised Code of Civil Procedure of Kansas, drawn by a committee appointed by the State Bar Association, submitted to the bar and examined and approved by the Bar Association, and adopted by the legislature.³² No public commission, in recent times, has done such work as that of these purely private agencies. Indeed the rise and development of bar associations throughout the country has made such private commissions not merely feasible but highly desirable as means of careful study and scientific drafting of legislation of a non-political character. It would seem therefore, in view of the difficulties always involved in legislative provision for the expense of public commissions, that the bar associations, through committees or commissions appointed at their instance, are the agencies to which we must look in practice. On that theory, I propose the following as a second proposition in a practical program of procedural reform:

II. *A practice act should be drawn in the first instance by a commission or committee appointed under the auspices of the State Bar Association, upon which judges, both of appellate and nisi-prius courts, practitioners, law-writers and law-teachers are all represented; the draft drawn by such a body ought to be published and submitted to the bench, the bar, the*

several local bar associations, and critical jurists generally, for examination and criticism; after a sufficient period of criticism, the results thereof should be compiled, and the draft should be re-examined, in the light of such criticism, section by section, by an enlarged commission or committee, and amended, added to, or redrawn whenever desirable changes or additions have been suggested. Only the final and perfected draft, so arrived at, upon approval by the State Bar Association, should be submitted to the legislature.

In framing this program, I have tried to devise one which would be practicable in any of our jurisdictions. Hence I have assumed that the draft must be the work of more than one man. Probably no one in this country had a greater genius for code-making or labored more diligently or for a longer period in that work than David Dudley Field. It is not fair to charge to him the huge mass of detail now known as the New York Code of Civil Procedure. But in that code as he first drew it, for it was chiefly his work, there proved to be deficiencies of the most serious character; and his later codes have been pronounced by one of the ablest of modern juristic critics striking examples of misguided ambition.³³ In this state, however, we have a draft at hand, in Mr. Gilbert's proposed Act in Relation to Courts, which may well serve as a basis of work for a commission. No one can read that proposed act in its final form without respect and admiration for the industry, learning and practical sense of its author and above all for his great skill as a draftsman. But it is no reflection upon any one to insist that important legislation must represent the combined wisdom of many and must be subjected in advance to criticism from every point of view from which light may be shed upon it. Hence we ought to insist that a practice commission be completely representative. And the work of the

³² See Judge Allen's account, 21 Green Bag 266.

³³ Pollock, Law of Fraud in British India 122. See also *id.* at 20, 95, 99.

late Dean Ames upon the proposed Uniform Partnership Act and of Professor Williston upon the Uniform Sales Act, at the instance of the Commissioners on Uniform State Laws, shows the utility of placing writers and teachers upon such committees along with men of action. But, more than anything else in this connection, we ought to insist upon thorough work in the first instance, at the risk of making slow progress, to the end that when done the work shall be done indeed.

The New York Code of 1848 was provided for by statute in April, 1847, the commission appointed thereunder was organized in its final form in September, 1847, it reported its draft to the legislature in March, 1848, the draft, with some amendments, was passed about the middle of April, and the new code took effect in July, 1848 – about fifteen months after the statute creating the commission.³⁴ From that time to the present the bane of procedural legislation has been hurry.³⁵ It is better to wait for the new act than to be forced to recur to the legislative *deus ex machina* after its enactment, to do what should have been done in the first instance. While no American state may be asked to imitate the snail's pace of procedural reform that culminated in the English Judicature Act, where, beginning with 1826 and ending with 1874, five commissions put forth nine reports,³⁶ nor the characteristic completeness of preparation and slow-going minuteness of execution that marked the

framing of the new German Civil Code,³⁷ the example set by the Commissioners on Uniform State Laws³⁸ should be before the eyes of legislators and codifiers in the future rather than the precedent of 1848.

Turning now to the principles upon which a practice act should be drawn and the lines it should lay out to be developed by rules of court, I venture to think that the first principle which those who frame such an act should have in view should be to *make it unprofitable to raise questions of procedure for any purpose except to develop the merits of the cause to the full*. So long as any advantage may be derived from the raising of procedural points as such, diligent and zealous counsel will raise them and the time of courts will be wasted in passing upon them. We have the testimony of an American observer of the American and the British Consular Courts in China, who saw them working side by side, that whereas in the American court we have "the wearying, formal, perfunctory round of motions and demurrers," in the British court, points of practice "being unsuccessful in achieving any advantages, such objections tend to lapse into disuse."³⁹ The point, then, is to make the rules of procedure rules to help litigants, rules to assist them in getting through the courts, not, as Professor Wigmore has put it, "instruments of stratagem for the bar and of logical exercitation for the judiciary."⁴⁰ Although it will not do the whole work, a prime factor in achieving this

34 Hepburn, Historical Development of Code Pleading 83-88.

35 Indeed one may go further. Until the new German Civil Code, haste had marked the drawing up and enactment of all codes, and the total or partial failure of so many of them is chiefly attributable thereto. Cf. Austin, Notes on Codification, 2 Jurisprudence (5 Ed.) 1035.

36 Lord Eldon's Commission, 1826; Royal Commission of 1829, 1830, 1832; Commission on Pleading and Practice in Courts of Common Law of 1851, 1853, 1860; Chancery Commissioners of 1852, 1854, 1856; Judicature Commissioners, 1869, 1874.

37 See Mr. Smithers' historical introduction to the translation of the German Civil Code by Loewy (1909), and Mr. Schuster's paper, "The German Civil Code," 12 Law Quarterly Rev. 217.

38 See, for instance, the report of the Committee on Commercial Law of the American Bar Ass'n, 34 Rep. Am. Bar Ass'n 523, 524 (1909).

39 42 Am. Law Rev. 745, 749.

40 1 Evidence § 21.

result will be to distinguish between rules intended to secure the orderly dispatch of business, on the one hand, and rules intended to protect the substantial rights of the parties, on the other hand. The former, that is, rules intended to provide for orderly dispatch of business with consequent saving of public time and maintenance of the dignity of tribunals, ought to be no concern of the parties unless under exceptional circumstances. It should be for the tribunal, not the party, to object in such cases, and decisions with respect to such rules should be reviewable only for abuse of discretion. To quote from a discussion of this matter on another occasion:

This principle is recognized to some extent in practice, as it stands. The order in which testimony shall be adduced, whether a party who has rested shall be permitted to withdraw his rest and introduce further testimony, the order of argument, in most jurisdictions, the time to be devoted to argument, and many other matters of the sort are left to the discretion of the trial judge. The reason is that such rules as exist upon these points exist in the interest of the court and of public time and not in the interest of the parties. But there are other rules resting upon the same basis which, unhappily, are not dealt with in the same way. This is notably true in the law of evidence. Many rules of evidence are in the interest of expedition and saving of time, rather than of protecting any party; prejudice to the dispatch of judicial business is the objection rather than prejudice to a party. In such cases how far the rule should be enforced in any cause should be a matter for the discretion of the court in view of the circumstances of that cause. Some courts, indeed, recognize this. But for the most part it has been assumed that there must be an absolute rule or no rule in these cases also, as if substantive rights depended upon them. With respect to all other rules of procedure, we should make nothing depend upon them beyond securing to each party his substantive rights – a fair chance to meet his adversary's case and a full opportunity to present his own.

No party should be permitted to defeat his opponent, or to throw him out of court and compel him to begin anew because of them. He should be able to use them simply to obtain a fair opportunity of meeting the case against him and of making his own case. For example, in case of a variance, the inquiry should be, did the party who complained ask for time or opportunity to meet the point of which he was not fairly apprised and for which he was not prepared, and was he given a fair chance to meet it? Where no other advantage could be had than securing a fair opportunity to meet proof adduced without fair notice, very few complaints of variance would be made. What this would mean may be understood by turning to a paper on "Taking Advantage of Variance on Appeal,"⁴¹ in which it took twenty pages and citation of 338 decisions of the courts of this state to set out the mechanics of the subject.⁴²

Put simply, this means that rules intended to save time and advance the business of the court are not to be permitted to waste time and obstruct the business of the courts by becoming the subject of contest between the parties, and that rules intended to protect the parties are to be available to that end only. The objection urged is that it is unsafe to give discretionary power to judges and that the discretion they now have should not be extended. But the judge need have no more discretion than he has now, with respect to rules intended to protect the parties, and yet the parties may be limited to use of those rules in such way as to secure fair notice of the case against them and fair opportunity to present their own case, and nothing more. Without giving the trial judge any additional power, we may insist that parties use procedural rules, not to lay the foundation of an appeal in the future, but to obtain a substantial right in the present.

Accordingly, I should propose the following

⁴¹ Kales, *Taking Advantage of Variance on Appeal*, 2 Ill. Law Rev. 78.

⁴² *Some Principles of Procedural Reform*, 4 Ill. Law Rev. 388, 400-01.

proposition as one by which those who draft a practice act should be guided:

III. *Rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals should be distinguished carefully from rules intended to secure to parties a fair opportunity to meet the case against them and a full opportunity to present their own case; rulings upon the former class should be reviewable only for abuse of discretion and nothing should depend on or be obtainable through the latter class except the securing of such opportunity.*⁴³

Another object in drafting a practice act should be to insure trial of the case, rather than the record. Our attitude of record-worship, partly a remnant of the old mode of determining causes, so far as possible, by some arbitrary, mechanical agency, partly a survival of the old writ of error, now superseded in most states by the more modern appeal, and partly due to a just fear of fraud, when amendments could only be made by erasure of a parchment record, the reasons for which have been obsolete for centuries,⁴⁴ serves no useful end and should be abandoned. No cause which has been heard on evidence should be reviewed solely upon pleadings and, if a case was made at the trial, the question should be whether the adverse party was fairly notified

thereof and had a fair chance to meet it and to present his own case, not whether the record would sustain a judgment at common law.⁴⁵

In consequence, we may lay down as a further principle:

IV. *The court should be able at all stages to try the case, not the record, and except as a record of what has been done may be necessary to protect substantive rights of the parties as the suit progresses, the sole concern of the court with respect to the record should be to see to it that at the termination of the litigation it records the judgment rendered and the causes of action and defenses adjudicated.*

As a corollary of the foregoing principle, pleadings should exist, not to furnish a necessary formal basis for the judgment, but solely to afford notice to the respective parties. Professor Whittier has argued this in a recent paper which deserves careful reading.⁴⁶ In my paper already cited, the proposition is discussed as follows:

What is claimed now is that pleading separates issues of fact from those of law. But it does so most imperfectly. What is accomplished in this direction by the common counts and general issue? On the other hand, where the declaration does not set out all the elements of a cause of action and a demurrer is interposed, the separation of law and fact is formal only. In substantial result, nothing has been achieved.

43 Judge Allen puts the same idea thus: "The essentials of procedure are fair statements of the claims of the parties, reasonable notice of every hearing at which any question is to be presented for decision, and a fair opportunity to produce evidence and be heard on the facts and the law; and these the legislature should require. Hard and fast rules of pleading and procedure in minor particulars are far more likely to prevent than to facilitate the administration of justice." Address, "The Revised Code of Procedure in Kansas," before the Missouri Bar Ass'n, Sept. 18, 1909, at 4.

44 3 Bl. Comm. 409-10.

45 For an example of trying the case, rather than the record, see *Hyams v. Stuart King*, 2 K.B. 696 (1908). Here defendant had given plaintiff a check in a betting transaction. Afterward in consideration that plaintiff would not present the check and injure defendant's credit, defendant promised to pay it. The action, according to the endorsement on the writ, which stood for a pleading, was on the consideration for which the check was given. The trial court held that although there could be no recovery upon the consideration for the check or upon the check itself, because the transaction was a wager, yet as the evidence showed the new contract, upon a new consideration, to pay the check, there could be a recovery upon that contract, and rendered judgment accordingly. On appeal, this was affirmed, the Court of Appeal saying that in such a case the judge should make or direct a formal amendment, so that the record would show what was the basis of the judgment rendered.

46 Judge Gilbert and Illinois Pleading Reform, 4 Ill. Law Rev. 178.

It is rare indeed that a cause may be disposed of finally upon the questions of law raised by demurrer. Others insist upon pleadings containing all the elements of a legal statement of the case as necessary to a proper record and to give to litigants the advantage of a plea of *res judicata*, if molested again for the same cause. But pleadings need not and do not perform this function. Who can tell from a record in *assumpsit*, with common counts, plea of the general issue, verdict and judgment, what was in fact tried and adjudged? Long ago men resorted to extrinsic evidence for that purpose. On the other hand, there are many jurisdictions where claims against the estates of deceased persons are litigated with no other pleadings than an informal statement of claim in which no attempt is made to state a cause of action, and no difficulty from want of sufficient record has arisen. The truth is, a system of pleadings designed solely to afford notice to the respective parties will meet this need completely. If it provides a method by which the parties have sufficient notice, we may be sure that others who have occasion to know will find the statement and indorsed summons of a simpler procedure entirely adequate. The better it fulfils the purpose of notifying the parties of the claims and defenses of their adversaries, the better a system of pleading will meet the requirement of a record by which to maintain a defense of *res judicata*. As Mr. Justice Holmes has put it so aptly, the basis of requirement that a pleader set out all the legal elements of his case in the form of averments of issuable facts, is "the inability of the seventeenth-century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert." The principle of making nothing depend upon rules of procedure beyond securing to the parties fair opportunity to meet the case against them and full opportunity to make their own case, is decisive. Requiring a statement of a cause of action affords opportunity for procedural points as such without any gain to sub-

stantive rights. Notice to the parties is enough. Neither court nor counsel requires to be told what the elements are that must go to make up the claim or defense asserted.

Hence a further principle may be laid down:

V. *The sole office of pleadings should be to give notice to the respective parties of the claims, defenses and cross-demands asserted by their adversaries; the pleader should not be held to state all the elements of claim, defense or cross-demand, but merely to apprise his adversary fairly of what such claim, defense or cross-demand will be.*

Another principle may be suggested without discussion:

VI. *No cause, proceeding or appeal should be thrown out solely because brought in or taken to the wrong court or wrong venue, but if there is one where it may be brought or prosecuted, it should be transferred thereto and go on there, all prior proceedings being saved.*

This principle, which obtains now in the appellate procedure of Illinois,⁴⁷ should be extended to every part of procedure. Especially should this be done with respect to venue. It was an abuse ever to introduce the idea of venue as a place where suit *must be brought*. This is particularly true in equity, where there never was such a thing as venue until introduced by statutes in some of our states. At law, the question should be one of *place of trial*, as it was at common law, and if fixed wrongly, the cause should be transferred to the proper county, if any one asks for such an order.⁴⁸

VII. *The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full content and applied to every type of proceeding.*

To carry out this principle fully, five propositions may be made:

⁴⁷ Practice Act of 1907, § 102.

⁴⁸ See California Code Civ. Proc. § 30; New York Code Civ. Proc. § 987; Colorado Code Civ. Proc. § 30; Wisconsin § 2621. But the Wisconsin Code prescribes too much detail as to making the change and all our codes lay down too many rules as to where causes *must be tried*. Cf. Consolidated Rules of the Supreme Court for Ontario, rule 529.

(1) *The courts should have power and it should be their duty in every sort of cause or proceeding to grant any relief or allow any defense or cross-demand which the facts shown and the substantive law may require.*

This proposition is argued fully, so far as it involves administration of legal and equitable remedies in the same proceeding, in the paper already referred to.⁴⁹ But a further question arises, not there discussed, as to the advisability of maintaining separate forms of action for legal relief. Mr. Gilbert does this, providing an elaborate scheme of distinct actions and proceedings.⁵⁰ The Massachusetts Practice Act took the same course, but simplified the system of actions, providing for four only: real actions, contract, tort, and replevin.⁵¹ The New York Code abolished all forms of actions and provided for one civil action.⁵² Because the earlier decisions, still adhered to in some states, insisted that the common law actions inhered in nature and could not be done away with, and hence held that a plaintiff was bound irrevocably to the theory of his case which he appeared to intend to put forward in his pleading, many have asserted that this provision of the New York Code was a failure.⁵³ But the growing tendency today in Code states is to do away with this doctrine of "theory of the case" and carry out the spirit of the code.⁵⁴ In view of these decisions, it is an anachronism to set up a system of distinct actions at law in 1910. Whenever this is at-

tempted, whether by legislation or, as in some of the code states, by judicial decision, there is always danger that the new system will outdo the old in rigidity.⁵⁵

(2) *No cause or proceeding should fail or be dismissed for want of necessary parties or for non-joinder of parties, but provision should be made to bring them in.*⁵⁶

(3) *Joinder of all parties to a complete disposition of the entire controversy should be allowed in every sort of cause and at every stage thereof, even though they are not all interested in the entire controversy.*⁵⁷

(4) *Courts should have power in all proceedings to render such judgment against such parties before them as the case made requires in point of substantive law, to render different judgments against different parties or in favor of some and against others, whether on the same side of the cause or not, and to dismiss some and grant relief against others, imposing costs in case of misjoinder or unnecessary joinder upon the party or parties responsible therefor.*

(5) *Joinder of causes of action should be permitted although they do not all affect all of the parties to each, subject to the power of the court to order separate trial or separate prosecution of one or more of them, if they cannot be tried or prosecuted together conveniently.*

This is the English practice.⁵⁸ The Revised Code of Kansas, which contains the best provision upon the subject to be found in the United States, permits free joinder of any and all causes of action subject to the one limitation (except in foreclosure proceedings) that

49 4 Ill. Law Rev. 491, 498-501.

50 Act in Relation to Courts § 1.

51 Pub. Stat. Mass., c. 167 § 1.

52 N.Y. Code Civ. Proc. § 3339.

53 E.g., 2 Andrews, American Law (2 Ed.) § 635 *et seq.*

54 *White v. Lyons*, 42 Cal. 279; *Rogers v. Duhart*, 97 Cal. 500; *Cole v. Jerman*, 77 Conn. 374; *Gartner v. Corwine*, 57 Ohio St. 246; *Cockerell v. Henderson*, 105 Pac. Rep. 443 (Kan.).

55 See Mr. Hornblower's remarks quoted in 2 Andrews Am. Law (2 Ed.) § 635, n 29.

56 See Kansas Revised Code Civ. Proc. § 93, which does away with demurrers for misjoinder or defect of parties.

57 Cf. Mr. Gilbert's amended draft, §§ 184-86, permitting joinder in the alternative and joinder in case of doubt. These are excellent provisions.

58 Rules of the Supreme Court, Order 16, rule 11.

all of the causes of action joined must "affect" all of the parties to the cause.⁵⁹ The limitation does not seem necessary. The question is one of convenience. Hence it would seem preferable to permit the court to direct a severance or to direct separate trials, in the interest of convenience and the orderly dispatch of business, where expedient in particular causes.

VIII. *So far as possible, all questions of fact should be disposed of finally upon one trial.*⁶⁰

In furtherance of this principle, four propositions may be suggested:

(1) *Questions of law conclusive of the controversy or of some part thereof, should be reserved and a verdict should be taken subject thereto, if the questions are at all doubtful, with power in the court, and in any other court to which the cause may be taken on appeal, to enter judgment either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require.*

This is a common-law practice, still in use in some states. It ought never to have been abandoned. The proposition was recommended in the report of the committee of the American Bar Association already referred to and, after debate, was adopted overwhelmingly.⁶¹ It is discussed in that report⁶² and also in the paper heretofore referred to.⁶³

(2) *In case a new trial is granted, it should only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.*

The judicial working out of this rule was one of the triumphs of Chief Justice Doe. His argument is unanswerable:

There is no general rule that when there has been an error in a trial, the party prejudiced by it has a legal right to a new trial. He has a legal right to a cure of the error, but not a choice of the remedies. ... When the erroneous part of a case is cured, the general principles of our jurisprudence do not require the application of the remedy to other parts of the case which do not need it.⁶⁴

The rule is adopted in the Revised Code of Kansas.⁶⁵

(3) *Wherever a different measure of relief or measure of damages must be applied, depending upon which view of a doubtful question of law is taken ultimately, the trial court should have power, and it should be its duty, to submit the cause to the jury upon each alternative and take its verdict thereon, with power in the trial court, and in any court to which the cause may be taken on appeal, to render judgment upon the one which its decision of the point of law involved may require.*

(4) *Any court to which a cause is taken on appeal should have power to take additional evidence, by affidavit, deposition, or reference to a master, for the purpose of sustaining a verdict or judgment, whenever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent.*⁶⁶

Perhaps, in one respect, the rule should go further. If, though in form the matter is one for the jury, yet the nature of the proof is such that the finding of the jury would be directed,

59 Kansas Rev. Code Civ. Proc. § 88.

60 This principle requires abolition of the second trial of course in ejectment wherever that anachronism still exists.

61 34 Rep. Am. Bar Ass'n 82.

62 *Id.* at 582-85.

63 4 Ill. Law Rev. at 503-04.

64 *Lisbon v. Lyman*, 49 N.H. 582.

65 Kansas Rev. Code Civ. Proc. § 307. This is also the English practice. Order 39, rule 7.

66 Cf. Rules of Supreme Court (English), Order 58, rule 4; Kansas Revised Code Civ. Proc. § 580. See discussions in 3 Ill. Law Rev. 586; 4 Ill. Law Rev. 505; 34 Rep. Am. Bar Ass'n 598-600.

the appellate tribunal should be able to receive the evidence.

IX. *No judgment should be set aside or new trial granted for error as to any matter of procedure unless it shall appear to the court that the error complained of has (a) resulted in a violation of substantive law or (b) deprived a party of some right given by adjective law to insure a fair opportunity to meet his adversary's case or a full opportunity to present his own, provided it appears that he had a case to present or had a real interest in meeting his adversary's case.*⁶⁷

This principle has been approved twice by the American Bar Association by more than a two-thirds majority of those voting and was embodied in the recent proposals of the judges of Cook County.⁶⁸

X. *The jurisdiction to prevent controversy by construction of instruments should be extended to all cases upon deeds, wills, contracts or other instruments upon which questions of construction arise or the rights of parties are doubtful; it should also be extended to questions of statutory construction and constitutionality by a simple proceeding analogous to the "originating summons" of the English practice.*

So long as only questions for the court are involved and there is nothing calling for a jury, the jurisdiction to construe instruments ought not to be confined to directions to trustees and cases where equitable interests are involved. The preventive jurisdiction should be extended at this point. It should not be necessary to break a contract in order to ascertain what it means. It should not be necessary for a law-abiding citizen to break the law in order to find out what are his duties or to ascertain the constitutionality of a statute. It ought not to be that unless a case for a bill of peace can be made, often presenting the unseemly spectacle of one department of the government tying up another, one must submit to an unconstitu-

tional statute or else to an arrest. It should be possible to notify all persons who are or whom, in case of constitutionality, the court by general rule or otherwise may determine to be entitled to notice, and to present the question of construction or constitutionality to the court without the fiction of a "test case." An excellent example of the possibilities of such a jurisdiction is furnished by the English practice of "originating summons" under Order 54a. That order provides that "any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested." The wide scope of this practice has obvious advantages in preventing long and expensive litigation. But its simplicity of form is also noteworthy. Instead of the formal pleadings of a suit for construction, the summons reads:

Let _____ within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of _____, who claims to be [state the nature of the claim] for the determination of the following questions: [State the questions.]

XI. *An appeal should be treated as a motion for a rehearing or new trial or for vacation or modification of the order or judgment complained of, as the cause may require, before another tribunal.*

At common law, after trial at *nisi prius*, the cause was heard by the court in bank upon rule for a new trial or motion in arrest or for judgment *non obstante*. In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical

67 Cf. Wigmore, Pocket Code of Evidence xi & rule 23; Report of Committee on Simplification of Procedure of Association of the Bar of the City of New York 7-8; Kansas Rev. Code Civ. Proc. § 307; 33 Rep. Am. Bar Ass'n 542-46; paper of Everett P. Wheeler, 21 Green Bag 57; 4 Ill. Law Rev. 505-06.

68 3 Ill. Law Rev. 586.

character, is the true analogy for appellate procedure. Unhappily, the other has been followed. In consequence four per cent of the points decided annually by our courts of review are points of appellate practice. In ten years, 1896–1906, our courts decided 2377 points of appellate practice – almost as many as the combined points of Master and Servant and Municipal Corporations, or of Carriers, Constitutional Law, Corporations, Negligence and Sales added together. Indeed appellate procedure is by far the bulkiest single topic in our digests. This is wholly unnecessary. Procedure on appeal may be and should be as simple as procedure upon a motion.

In aid of this proposition, two subordinate proposals may be suggested:

(1) *So far as they merely reiterate objections already made and ruled upon, exceptions should be abolished; it should be enough that due objection was interposed at the time the ruling in question was made.*⁶⁹

(2) *Upon any appeal, in any sort of cause, the court should have full power to make whatever order the whole case and complete justice in accord with substantive law may require, without remand unless a new trial becomes necessary.*

There should be no occasion for the cases involving construction of mandates of which

our reports show so many. Wherever possible, the reviewing court should be able to and should do its work completely.

In the foregoing program I have said nothing of criminal procedure, which presents many features demanding special treatment, of the charge of the court, a subject to which forensic subtlety, which once busied itself with the writ and later with the pleadings, now chiefly attaches itself, nor of discovery. Each of these is of great importance in procedural reform; but each would demand a separate paper, if treated adequately.

If some of the propositions in the latter portion appear radical, it should be observed that as to these, a practice act such as is proposed would not require that all of them be put in the form of fixed rules and imposed on bench and bar at one stroke; rather the courts would be *empowered* to give effect to them, as the practice could be developed by rules of court and as use of such power became expedient. Moreover, nothing has been suggested which has not been tried and found practicable in some common-law jurisdiction. Let us remember that not England merely, but Canada and Australia, have put these principles, and others more far-reaching, into actual practice. *GB*

⁶⁹ Judicature Act of 1873, rule 49; Kansas Rev. Code Civ. Proc. § 574; Gilbert, Act in Relation to Courts § 1703.