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The Proposed Michigan Judicature Act

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NOTE AND COMMENT.

THE PROPOSED MICHIGAN JUDICATURE ACT. The Michigan Legislature, at its last session, passed an act (No. 286, Public Acts of 1913) providing for the appointment of a Commission to revise and consolidate the laws of the State relating to procedure. The Governor appointed Alva M. Cummins, J. Clyde Watt, and Mark W. Stevens as members of this commission, and the result of their labors has just appeared in the form of a proposed bill regulating the entire subject of procedure in all the courts of the State. The bill is a long one, embracing 565 printed pages, but it is much less voluminous than the combined mass of provisions dealing with procedure now scattered almost at random through our statutes.

The aim of the Commission has been to eliminate useless and obsolete statutes, to modify those which contained imperfections in substance or form, to consolidate and combine scattered provisions on the same subject, bringing them into logical order under appropriate headings, and to add such new provisions as should be necessary to bring the Michigan procedural system into line with the best modern ideas of procedural reform.

A study of the bill quickly convinces one that the Commission has shown as much ability and good judgment in what they left unchanged as in the amendments which they introduced. Changes have not been made for the

mere sake of change, but only when good cause appeared. Perhaps nine tenths of the bill consists of unaltered sections of the present statutes. Such a revision preserves the interpretations which years of litigation have drawn from the Supreme Court relative to these statutes, and saves the public the expense of obtaining new interpretations of new statutes having doubtful superiority over the old. But wherever amendments seemed necessary the Commission appears to have made them fearlessly. The bill thus displays a sound conservatism coupled with an enlightened appreciation of modern procedural development.

No attempt has been made to engraft upon the Michigan system of procedure the principles of Code Pleading, and in keeping clear of this entangling alliance we think the Commission showed wisdom. The adoption of the Code has not proved to have been an entirely successful venture, and it is very questionable whether its advantages outweigh its serious defects. The modified common law system of pleading which has long been in use in Michigan has given general satisfaction, and while subject to criticism in some respects it does not appear to merit relegation to the scrap heap. The bill under review undertakes to preserve the main principles of pleading as now employed, but it introduces certain innovations which, while not at all inconsistent with the basic notions of common law pleading, are nevertheless of striking interest and importance.

In the first place it abolishes all the common law forms of action except *assumpsit*, *case*, *replevin* and *ejectment*. In other words *assumpsit* swallows up *covenant* and *debt*, while *case* broadens out to include *trespass* and *trover*. This process of elimination might very well have gone further, and reduced all actions to a single form, but for practical purposes there seems to be no objection to the use of a separate form for each of the four great departments of legal litigation, namely, damages in contract, damages in tort, recovery of personalty and recovery of realty. And in further pursuance of this effort to eliminate useless distinctions, the only effect of filing a bill in equity instead of a declaration of law, or *vice versa*, is to necessitate a transfer of the case to the other side of the court.

In the next place certain features of common law pleading which have always been largely responsible for its bad reputation, have been remedied or abolished. Thus, one of the most elusive and unsubstantial distinctions in the ancient science of pleading is that between conclusions of law and ultimate facts. Only the latter should be pleaded. But what are ultimate facts as distinguished from legal conclusions? Nobody knows. To confuse the two is a fatal defect, but there is no certain test to determine which is which. Could any situation be more absurd? And yet this has always been the dilemma presented to the common law pleader, and the Code only made matters worse. The bill under discussion solves the whole difficulty by removing its cause. The test of a good pleading is no longer the accuracy with which the pleader, while pleading according to legal effect, has nevertheless distinguished between conclusions of law and ultimate facts, but the certainty with which he has informed the other party of the case which he is called upon to meet. Substantial sufficiency of notice

takes the place of technical nicety of form. The same test which the Michigan courts have always applied to the notice of special defense, has been applied to the declaration, and "no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend." The language here employed by the statute is that used in Rule 15 of the Rules of the Chicago Municipal Court. Emphasis on the important feature of *notice* is further exemplified by the section which requires a plaintiff, in all actions where particulars might be called for, to incorporate them in the first instance in his declaration or annex them thereto. This merely recognizes the sensible principle that no one ought to be asked to meet an adversary in the dark, nor be forced to go to the trouble of protesting against so foolish a proposal.

Again, demurrers and dilatory pleas are abolished. This is not very revolutionary. England abolished demurrers thirty years ago, and New Jersey, in the newest American practice act, has done the same thing. Instead of a demurrer the party wishing to raise a point of law on the pleadings is to use a motion to dismiss or may point out the defect complained of in a notice attached to his plea. In the latter case the point of law will be disposed of in advance of the trial upon notice given by either party. Whether dilatory defenses may be raised by motion to dismiss supported by affidavits, as well as by notice attached to the plea, is not clear from the wording of the bill (Chap. XIV, Sec. 5). Such practice would seem to be convenient and unobjectionable if the right of trial by jury were not thereby impaired, and much excellent authority would sustain it.

On the subject of parties to actions the bill is thoroughly modern. Parties are to be designated as plaintiff and defendant both at law and in equity. Every action is to be prosecuted in the name of the real party in interest, excepting legal representatives, trustees and persons authorized by statute to sue. This is the familiar provision of the Codes, which has been construed so frequently by the courts that its meaning is pretty well established. The greatest latitude is given to third parties to intervene at law as well as in equity. And in the matter of joinder of parties, that historic quagmire in which lawyers have floundered since the common law began, the bill points out a plain, straight road where no one can lose his way. "No action at law or in equity shall be defeated by the non-joinder or mis-joinder of parties. New parties may be added and parties mis-joined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require." (Chap. XII, Sec. 13). "It shall be lawful for any plaintiff to include in one action as defendants, all or any of the parties who may be severally, or jointly and severally liable, and to give judgment and execution according to the liability of the parties." (Chap. XII, Sec. 15.)

Proceedings incident to the trial have also received attention. Causes can no longer enjoy perpetual existence on the calendar, but must be tried or dismissed. Cases at issue go on the calendar automatically without notice of issue or notice of trial, and cases reaching issue too late for the regular docket may be brought to trial without going over the term.

Summary judgment in contract actions may be rendered on plaintiff's affidavit of claim, unless defendant shall file an affidavit of merits. This statute authorizes a practice which has proved highly effective where used, and will help to convince the layman that the law really takes an interest in speedy justice.

Another important reform relates to withdrawing the case from the jury. Under the present practice, after a motion to direct a verdict has been made and overruled and the jury has rendered a verdict for the other party, it is impossible thereafter for either the trial court or the supreme court to set aside the verdict and enter the judgment for the party who made the motion, even though they are convinced that as a matter of law a verdict should have been directed as asked. The only remedy is a new trial. But such a remedy is wholly inadequate. If the verdict should have been directed in a party's favor why not correct the error by doing what should have been done? If a party is entitled to a judgment why offer him only a new trial, which is clearly no equivalent for what the court unjustly deprived him of! The court should have power in such a case to render a judgment notwithstanding the verdict, in favor of the party lawfully entitled to it, and the supreme court should have power to order such a judgment to be entered. Such power is granted in the bill now proposed, in Chapter XXI, Section 15, and Chapter I, Section 32, and the constitutionality and expediency of the rule are well argued by the Commission in the report to the Governor with which they preface the bill.

Other features of this bill might be mentioned, but enough has been said to indicate the scope and character of the revision which the Commission has prepared. The task was a laborious one, and it has been done with great thoroughness and unusual skill. No hobbies or pet ideas seem to have found their way into the bill, but from beginning to end it is a sound, sensible and progressive document, neither too conservative to meet the just demands of the public, nor so radical as to unsettle the procedure of the State.

E. R. S.