STATE OF MAINE

98th Legislature

Report

of the

Judicial Council

of the

State of Maine

Jan. 7, 1957

To the Honorable Senate and House of Representatives of
The State of Maine:

The Judicial Council herewith reports the results of its findings to the 98th Legislature pursuant to the provisions of Chapter 167 of the Resolves of 1955 entitled "Resolve, Requesting Judicial Council to Study Problem of Common Law Pleading and Procedure."

Under the Resolve, the Council at the request of the Legislature has studied "the problems of common law pleading and court procedure in Maine as they relate to the feasibility and desirability of substituting in Maine the procedure of Federal practice or that of the Code States, so-called; . ." and "the procedural and jurisdictional problems relating to bills of exceptions in both civil and criminal cases with the end in view of eliminating the hardships on the party aggrieved now prevalent under existing statutes; . ."

The study was undertaken by a committee of the Council consisting of Leonard A. Pierce, Chairman, Justice Francis W. Sullivan, Attorney General Frank F. Harding, George B. Barnes and George A. Cowan.

The Council unanimously has accepted their report and adopted their findings set forth in the report attached hereto.

Justice Francis W. Sullivan of the Superior Court and Armand A. Dufresne, Jr., Judge of Probate, ceased to be members of the Council on October 4, 1956 upon becoming respectively associate Justice of the Supreme Judicial Court and Justice of the Superior Court. They have made a valuable contribution to the Council, and at the request of the Chairman met with the Council at its November meeting and have otherwise participated in the work.

The Chairman and Secretary have been authorized by all members of the Council to affix their signatures hereto and to submit this report in their behalf.

Respectfully submitted:
Robert B. Williamson, Ex Officio Chairman
Frank F. Harding, Attorney General
Harold C. Marden
Edward I. Gross
Frank E. Southard, Jr.
George A. Cowan
George B. Barnes
Leonard A. Pierce
Charles F. Phillips
Mrs. Ashmead White
Orren C. Hormell
By Robert B. Williamson,
ex officio chairman
Geo. A. Cowan, Secretary

Dated this 2nd day of January, 1957.

11/14/56

To the Maine Judicial Council:

The undersigned Committee of the Maine Judicial Council were asked to undertake a study, under Chapter 167, Resolves of 1955, of common law pleading and court procedure in Maine and the desirability of substituting in Maine either the Federal Rules or the practice prevailing in so-called Code states.

It so happens that one of the members of the Committee made, insofar as his other engagements permitted, an investigation into this general problem and delivered an address on that at last summer's meeting of the Maine Bar Association. Neither he, however, nor the other members of the Committee feel that at the present time they are in a position to make definite recommendations. We believe that a further study should be made by a committee consisting of members of the Supreme Judicial Court, of the Superior Court and of lawyers who are active in trial practice in both the State and Federal Courts.

It is to be noted that at the present time there are only seven states in the nation which adhere in general to the so-called common law pleading. All of these we would assume have, like Maine, exceptions, modifications and qualifications enacted by statute or by rule of Court.

In England, where common law pleading originated, Parliament some eighty years ago entrusted to the Courts the power to revise the system of pleading and practice, retaining so much of the old practice as the Courts deemed useful, but eliminating such other portions as they deemed best.

The Legislature of New York possessed and used the rule making power; in 1848 it adopted the Field Code. As a result in the course of years the Code became very prolific with exceptions, additions and refinements enacted by the Legislature.

In 1938, when pleading and practice in the Federal District Courts were revised, the rule making power was vested by Congress in the United States Supreme Court, subject to the power of Congress to ratify.

Your Committee respectfully recommends that the Maine Legislature follow the precedent set by Congress and return the rule making power to the Courts where it was at common law, but that the Legislature, as did Congress, retain the right to ratify the action of the Court. It would be our suggestion that the Committee appointed by the Court be given an appropriation sufficient to permit them to employ a competent teacher of procedure. Very few active lawyers or judges have the leisure necessary to do the necessary ground work. We do believe it desirable not to have two radically different systems of procedure, one in the State Courts and one in the Federal Courts. We can see, however, that certain procedures in the Federal Courts might not be practically workable in the State Courts where litigation many times involves much smaller amounts.

On the other hand, we believe that the following should be part of the State procedure: pre-trial procedure, interrogatories, depositions, inspections, summary judgments and pre-trial conferences, to the degree that any or all of the same are found adaptable to our own situation.

Your Committee does not feel that any present system is ideal or that an ideal system can be devised. What is needed is the most practical and least expensive method of instituting litigation, bringing the same up to the point of and through trial with the view to eliminating any elements of surprise and the consequent injustice. Our procedure also should provide for the speedy disposition of pending matters insofar as that is not unduly burdensome upon the litigant. Further, if unnecessary trials could be either eliminated or noticeably reduced, it would certainly be of a great benefit to the people of the State.

We are not unmindful of the fact that at the present time civil litigation in the Federal Courts is largely confined to lawyers practicing in the larger counties of the State. In one sense a change to the Federal Rules would be a hardship to those practicing in the smaller counties. On the other hand, once the attorneys in the smaller counties have familiarized themselves with the procedure under the Federal Rules, there is no reason why they could not carry through to termination litigation in the Federal Courts to the advantage of their clients and likewise to themselves exactly as well as under the present system which, as above noted, tends to centralize Federal practice among the lawyers in the larger counties.

From the point of view of the younger lawyers coming along, they are being trained in the recognized law schools in the Federal practice and not in the common law practice now used in this State.

We appreciate that there are litigated questions under the Federal Rules, so much so that there is a separate system of reports of decisions under those rules. If Maine should adopt in substance the Federal Rules, it would necessitate lawyers having access to that system of reports. It does not, however, seem to us that this would be any great burden on the Law Libraries in the different counties and further, matters which are of sufficient importance to be in the Federal Courts would justify a trip by counsel from one of the smaller communities to Portland, Augusta, Auburn or Bangor, for example.

In the judgment of your Committee an adequate survey of the subject, plus the necessary legislative action to give the rule making power to the Supreme Court, would involve several years. It is, however, obviously a matter in which haste should be made slowly and it certainly would be much more profitable to adopt for Maine that system which the combined judgment of the professional specialist, plus the Committee of Judges and the Bar deem best than to rush haphazard into any change.

In short, your Committee is not prepared to recommend forthwith that Maine adopt the Federal Rules. No more is it prepared to recommend that it deliberately resolve that the present system is preferable. We believe the question requires study and time, plus a reasonable appropriation to provide adequate remuneration for some specialist in procedure.

Your Committee was also directed "to study the procedural and jurisdictional problems relating to bills of exceptions in both civil and criminal cases with the end in view of eliminating the hardships on the party aggrieved now prevalent under existing Statutes."

We have done so and believe that the statute would be improved if reenacted to read somewhat as follows:

Suggested Redraft Sec. 14, Chap. 106, R. S. 1954.

The provisions of this section shall apply to exceptions filed in any civil or criminal proceedings in the superior court, without impairment, however, of the provisions for exceptions of section 39 of chapter 113.

When the court is held by 1 justice, a party aggrieved by any of his opinions, directions or judgments in any civil proceeding may, within 10 days after the verdict is rendered or the opinion, direction or judgment is announced in a case, and notice thereof has been mailed by the Clerk to the party or his attorney to an address supplied by either the party or attorney or to the party or attorney at the town of his residence, and in any criminal proceeding before term adjournment but within 30 days, present written exceptions in a summary manner signed by himself or counsel, and when found true they shall be allowed and signed by such justice.

If the presiding justice deems such exceptions frivolous and intended for delay, he may so certify on motion of the party not excepting; and such exceptions may then be transmitted at once by such justice to the chief justice and, unless the presiding justice for good cause enlarges the time, they shall be argued in writing on both sides within 30 days thereafter.

Such exceptions shall be considered and decided by the justices of said court as soon as may be and the decision certified to the clerk of the county where the case is pending.

If the justice of the supreme judicial court or the superior court disallows or fails seasonably to sign and return the exceptions or alters any statement therein, and either party is aggrieved, the truth of the exceptions presented may be established before the Law Court by petition setting forth the grievance and thereupon, the truth thereof being established, the exceptions shall be heard and the same proceedings had as if they had been duly filed and brought up to said court with the petition.

All motions for new trials, as against law or evidence, shall be filed during the term at which verdict is rendered, but in no case later than 30 days after verdict is rendered.

The supreme judicial court shall make and promulgate rules for settling the truth of the exceptions alleged but not allowed.

(For convenience in our discussion, we have, as you will note, treated each sentence as a paragraph. We suggest that the reenacted section be so treated for facility of understanding.)

We at least can understand that statute better if so redrawn and broken into paragraphs. The only substantial change suggested is that our redraft eliminates in civil matters the necessity of filing exceptions before the term adjourns.

If counsel will follow the statute and read carefully the opinion of Fellows C. J. in **Bradford v. Davis,** 143 Maine 128, which contains a complete exposition of the functions of and the method to be utilized in preparing an adequate bill of exceptions, we do not believe they will have any serious trouble.

In Senate Chamber
January 16, 1957
Pursuant to Senate Order
1,000 copies ordered printed
in pamphlet form
Chester T. Winslow, Secretary