is it not manifestly inconsistent to deny damages because there is proof of no actual injury to health or property? It is submitted that proof of the absence of actual material injury to the plaintiffs' health or property is nothing more than evidence as to the reasonableness of the defendant's conduct.

VENUE

COURT RULES AND SELECTION OF JUDGE

Consonant with the modern trend toward improvement of our judicial system, there has been dissatisfaction with the manner of selecting special judges in Indiana.[1] A segment of the problem is represented by the change of judge under the venue statutes.[2] The proposition here considered is whether the act of 1937,[3] recognizing the power to regulate procedure by court rule,[4] affords a method for accomplishing reform in this field.

The principal consideration is whether the selection of judge upon change of venue is a matter of "procedure," "substance," or "jurisdiction."[5] That it is not within the realm of substantive law seems almost too clear for argument.[6] " . . . 'substantive law relates to rights and duties which give rise to a cause of action' while procedural law 'is machinery for carrying on the suit.'"[7] Although parties have

1. See, for example, Report of the Indiana State Committee on Governmental Economy on the Administration of Justice in Indiana (1934) 10 Ind. L. J. 111, 127.
2. Acts 1907, c. 81, §1, Ind. Stat. Ann. (Burns, 1933) §2-1409; Acts 1903, c. 195, §2, Ind. Stat. Ann. (Burns, 1933) §§2-1412 through 2-1414; Acts 1919, c. 70, §1, Ind. Stat. Ann. (Burns, 1933) §2-1415; Acts 1937, c. 103, §1, Ind. Stat. Ann. (Burns, Supp. 1941) §2-1424; Acts 1937, c. 85, §1, Ind. Stat. Ann. (Burns, Supp. 1941) §2–1430.
3. Acts 1937, c. 91, §1, Ind. Stat. Ann. (Burns, Supp. 1941) §2-4718; Acts 1937, c. 91, §2, Ind. Stat. Ann. (Burns, Supp. 1941) §2-4719.
4. For a comprehensive annotation on rule-making power, see 110 A.L.R. 22.
5. See 1 Gavit, "Indiana Pleading and Practice" (1941) 12, where it is argued that "for the purposes at hand," these three categories classify the entire field of law.
6. The words "practice" and "procedure" together "include mode of proceeding by which legal right is enforced as distinguished from substantive law which declares the right." King v. Schumacher, 32 Cal. App. (2d) 172, 89 P. (2d) 466, 472 (1939). "In general terms substantive law can be defined as including that body of rules which regulates the conduct and relationship of members of society and the state itself as among themselves apart from the field of litigation and jurisdiction." 1 Gavit, "Indiana Pleading and Practice" (1941) 12.
7. Barker v. St. Louis County, 340 Mo. 986, 1001, 104 S.W. (2d) 371, 378 (1937).

an absolute right to a change of venue,[8] they have no right to share in the composition of a court.[9]

In considering the jurisdictional question, our court said in Stephen v. State that "by virtue of this statute [providing for the manner of selection] a special judge derives his jurisdiction to preside in a cause. . . . "[10] It is submitted that this is merely an instance of loose language. In the face of the firmly established rule that a party waives any question as to the authority of the judge to act by failure to plead it before trial,[11] the position thus taken appears untenable.[12] If jurisdiction depended upon adherence to the prescribed statutery methods, judgment pronounced by a judge not so selected would not only be subject to reversal on appeal but also to collateral attack, since it would be completely void.[13]

Also, the constitution does not give the general assembly power to confer jurisdiction.[14] The supreme court has said in connection with one statute that "after he [special judge] has been appointed his power and jurisdiction flow from the Constitution, and not from legislative enactment."[15] It follows, therefore, that jurisdiction is not derived from the appointing process.

Clearly, the term "procedure" fits the situation more satisfactorily.[16] One court has decided that "proceedings to secure a change of venue are within the words 'commencement, pleading, practice and procedure' [in a statute], more especially within the words 'practice

8. State ex rel. Smith v. Chambers, Judge, 211 Ind. 640, 6 N.E. (2d) 542 (1936); Farmers Deposit Bank v. State ex rel. Symons, State Bank Comm'r, 89 Ind. App. 302, 166 N.E. 287 (1929); State ex rel. McGarr v. DeBaun, Judge, 198 Ind. 661, 154 N.E. 492 (1926).
9. See Herbster v. State, 80 Ind. 484, 486 (1881); McClure v. State, 77 Ind. 287, 289 (1881); Curtin v. Barton, 139 N.Y. 505, 512, 34 N.E. 1093, 1095 (1893).
10. 207 Ind. 388, 393, 193 N.E. 375, 377 (1934).
11. Pattison v. Hogston, Adm'r, 90 Ind. App. 59, 158 N.E. 516 (1929); Love et al. v. Jones et al., 189 Ind. 390, 127 N.E. 549 (1920); Lille v. Trentman, 130 Ind. 16, 29 N.E. 405 (1891); Schlungger v. State, 113 Ind. 295, 15 N.E. 269 (1887); Feaster v. Woodfill, 23 Ind. 493 (1864); Case v. State, 5 Ind. 1 (1854).
12. Even in Stephen v. State, 207 Ind. 388, 193 N.E. 375 (1934), cited supra note 11, the party had raised the question seasonably.
13. Pease v. State, 74 Ind. App. 572, 576, 129 N.E. 337, 339 (1929); Weaver v. Ferguson, 68 Ind. App. 169, 180, 117 N.E. 659, 663 (1918); Bd. of Comm'rs of White County v. Givin, Sheriff, et al., 136 Ind. 562, 590, 36 N.E. 237, 246 (1893). See also Calumet Teaming and Trucking Co. v. Young, 218 Ind. 468, 472, 33 N.E. (2d) 109, 110 (1941); 31 Am. Jur. 68.
14. State ex rel. Hovey v. Noble et al., 118 Ind. 350, 367, 21 N.E. 244, 250 (1888). See also State ex rel. Youngblood v. Warrick C. C. et al., 208 Ind. 594, 604, 196 N.E. 254, 258 (1935); Shugart et al. v. Miles et al., 125 Ind. 445, 447, 25 N.E. 551, 552 (1890).
15. State ex rel. Youngblood v. Warrick C. C. et al., 208 Ind. 594, 604, 196 N.E. 254, 258 (1935).
16. " 'The word means those legal rules which direct the course of proceedings to bring parties into the court and the course of the court after they are brought in.' " Kring v. Mo., 107 U.S. 221, 232 (1882) quoting Bish. Cr. Proc. §2.

and procedure.'"[17] And the Supreme Court of Indiana has remarked pertinently that "procedure not only embraces practice in courts, but regulation of the court itself wherein such practice takes place."[18] That which transpires in selecting a judge upon change of venue would seem to be covered by this language. "The method of trial . . . is procedural . . . and in the absence of a specific constitutional provision affecting the matter, may be regulated by rules of court."[19]

In the case of Bowlus et al v. Brier et al.,[20] the court was called upon to decide whether a statute prescribing the manner of selecting a judge pro tempore was procedural and therefore fell within the terms of a subsequent statute which repealed all enactments relating to procedure. Holding that it was not procedural, the decision nevertheless recognized that change from the judge in a particular case was distinguishable.[21]

It therefore seems to be established that the selection of judge upon change of venue is procedural and to that extent comes within the grant of power to the supreme court.[22] However, the Indiana Constitution introduces a complicating factor by conferring upon the general assembly authority to provide for special judges.[23] This has been construed to mean that their selection may be governed by statute.[24]

It might well be argued that the purpose of Section 10 of Article 7 of the Indiana Constitution was only to validate the appointment of a special judge "as against the objection that he had not been elected."[25] There is nothing in the language alone to indicate that the appointment of a substitute is a matter solely within the province

17. Clark v. Baxter, 98 Minn. 256, 258, 108 N.W. 838, 839 (1906).
18. State ex rel. Dearbeyne v. Greenwald, Judge, 186 Ind. 321, 325, 116 N.E. 296, 297 (1917).
19. State v. Pierce, 59 Ariz. 411, 414, 129 P. (2d) 916, 917 (1942). The St. Louis Circuit Court, under statutory authorization to make rules of procedure, properly provided by rule for interchange of judges among the divisions of the court. Hagardine-McKittrick Dry Goods Co. v. Gareschke et al., Judges, 227 S.W. 824 (Mo. 1921).
20. 87 Ind. 391 (1882).
21. Bowlus et al. v. Brier et al., 87 Ind. 391, 395 (1882).
22. See note 3 supra.
23. Ind. Const. Art. VII, §10.
24. State ex rel. Spencer, Pros. Att'y v. Marion C. C., 212 Ind. 54, 57-58, 7 N.E. (2d) 993, 995 (1937); Perkins v. Hayward, 124 Ind. 445, 448, 24 N.E. 1033 (1890); Starry v. Winning, 7 Ind. 311 (1855). See also Shugart et al. v. Miles et al., 125 Ind. 445, 447, 25 N.E. 551, 552 (1890).
25. 2 Gavit, "Indiana Pleading and Practice" (1941) 1436.
26. "The General Assembly may provide, by law, that the Judge of one Circuit may hold the Courts of another Circuit, in cases of necessity or convenience; and in case of temporary inability of any Judge, from sickness or other cause, to hold the Courts in his Circuit, provision may be made, by law, for holding such courts." Ind. Const. Art. VII, §10.
27. It was provided by statute at one time that the regular judge

of the general assembly.[26] That this body has so assumed[27] may be regarded as an incident of the history of joint participation in prescribing procedure on the part of the general assembly and the judiciary.[28] If so, the inspiration for such lawmaking was not necessarily the constitution but rather an asserted power on the part of the legislative branch which was voluntarily surrendered in favor of regulation through rules of court,[29] the legislature abandoning the field.[30]

Even assuming that Section 10 of Article 7 does actually assign to the general assembly full authority over selection,[31] the act in question[32] delegates full control to the supreme court. This may be done validly, since it is not intrinsically legislative in character.[33] In the much cited case of In re Constitutionality of Section 251.18 Wisconsin Statutes,[34] the court said: "The fact that the Legislature has acquired a power, whether by express constitutional provision or otherwise, does not inevitably characterize the power as purely legislative. The power may be essentially a judicial power, and if it is such a power, it may be delegated to the courts."[35] And further, "The authorities clearly establish that the power to regulate procedure . . . never was considered to be a purely or distinctively legislative power."[36]

It seems logical to conclude that either upon the theory that the

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should call in another judge. 1 Watson's, "Works' Practice" (1918) 1056. See also note 2 supra.

28. See Parkison v. Thompson, 164 Ind. 609, 626, 3 N.E. 109, 115 (1905); Smythe v. Boswell et al., 117 Ind. 365, 20 N.E. 263 (1888); 1 Gavit, "Indiana Pleading and Practice" (1941) 33. For cases indicating that the general assembly may prescribe procedure, see Wright, Ex'x et al. v. Manns et al., 111 Ind. 422, 12 N.E. 160 (1887); Johnson v. Stephenson et al., 104 Ind. 368, 4 N.E. 46 (1885); Fletcher v. Holmes, 25 Ind. 458 (1865). For cases sustaining the inherent power of the court, see Roberts v. Donahoe, 191 Ind. 98, 104, 131 N.E. 33, 38 (1921); Epstein v. State, 190 Ind. 693, 696, 128 N.E. 353-354 (1920); Solimeto v. State, 188 Ind. 170, 171, 122 N.E. 578 (1918); and also Gertner, "The Inherent Power of Courts to Make Rules" (1936) 10 U. of Cin. L. Rev. 32; Wigmore, "All Legislative Rules for Judiciary Procedure Are Void Constitutionally" (1928) 23 Ill. L. Rev. 276.

29. See note 3 supra.

30. By reason of a similar statute, it was held in Burney v. Lee, 129 P. (2d) 308, 311 (Ariz. 1942) that the legislature had withdrawn from the field, citing in support State v. Roy, 40 N.M. 397, 60 P. (2d) 659 (1936).

31. State ex rel. Spencer, Pros. Att'y v. Marion C. C., 212 Ind. 54, 57-58, 7 N.E. (2d) 993, 995 (1937).

32. See note 3 supra.

33. Burney v. Lee, 129 P. (2d) 308 (Ariz. 1942); State v. Roy, 40 N.M. 397, 60 P. (2d) 646 (1936); State v. Super. Ct. for King County, 148 Wash. 27, 267 Pac. 770 (1928). See also 16 C.J.S. 139.

34. 204 Wis. 501, 236 N.W. 717 (1931).

35. In re Constitutionality of Section 251.18 Wisconsin Stat., 204 Wis. 501, 236 N.W. 717, 718 (1931).

36. In re Constitutionality of Section 251.18 Wisconsin Stat., 204 Wis. 501, 236 N.W. 717, 719 (1931). Similarly, Burney v. Lee, 129 P. (2d) 308, 310 (Ariz. 1942); State v. Roy, 40 N.M. 397, 419, 60 P. (2d) 646, 659 (1936).

Rule-Making Act of 1937[37] was "a negation of the exercise of power by the legislature"[38] or a delegation by inclusion within the concept of procedure, the matter of selection of judge upon change of venue was made subject to regulation by court rule.

37. See note 3 supra.
38. 1 Gavit, "Indiana Pleading and Practice" (1941) 32.