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The Proposed Regulation of Missouri Procedure by Rules of Court[1]

At the 1915 meeting of the Missouri Bar Association, the committee[2] on judicial administration and legal procedure recommended "that the matter of making rules for the government of civil practice in the trial courts be delegated to the Supreme Court."[3] A similar recommendation was made by the committee on judicial administration and remedial procedure in 1912,[4] and by a special committee on judicial administration and legal procedure in 1913.[5] The proposal was approved by the Missouri Bar Association in 1913 after a long debate, and it was vigorously advocated by the president of the Association in his annual address in 1914.[6] To lawyers now long accustomed to the regulation of the minutest details of judicial procedure by statute, the proposal may seem somewhat radical, but the history of procedure in Missouri would seem to show that it would only enlarge a power which the courts have long exercised.

1. This study was prepared for submission to the Missouri Bar Association's special committee on legislation and remedial procedure, appointed in 1915. Liberal use has been made of the 1915 Report of the New York Board of Statutory Consolidation, and the excellent articles by Dean Roscoe Pound, in 10 Illinois Law Review 163 and 2 American Bar Association Journal 46.

2. Composed of Charles B. Faris, Samuel Davis, John F. Lee, W. O. Thomas and R. F. Walker. It is notable that this committee included two judges of the Supreme Court and two judges of circuit courts.

3. 1915 Report of the Missouri Bar Association, p. 57.

4. 1912 Report of the Missouri Bar Association, p. 51. The committee consisted of P. Taylor Bryan, J. M. Johnson and John D. Lawson. Mr. Bryan's argument was printed in 75 Central Law Journal 168.

5. 1913 Report of the Missouri Bar Association, p. 26. The Committee consisted of F. W. Lehmann, Arch B. Davis, Homer B. Hall and Rees Turpin. Mr. George Robertson did not join in the committee's report.

6. See the presidential address of Edward J. White in 1914 Report of the Missouri Bar Association, p. 60.

HISTORY OF PROCEDURE IN MISSOURI

When the first general court of Missouri was organized in 1804, a statute conferred upon it the "power to direct the writs, summons, process, forms and modes of proceedings to be issued, observed and pursued by the said court."[7] In 1807, a statute of seventy sections established various Missouri courts and provided in general outline for the practice at law. This statute was amended in 1808, and in 1810 a statute of twenty-four sections provided for the practice in chancery. In 1822 a more elaborate statute for practice at law was enacted but it was repealed and superseded by the statute of 1825.[8] None of these statutes, however, purported to deal with pleading and procedure and during this entire period the courts of Missouri necessarily followed the common law rules of pleading and practice. The various courts were forced to supplement the statutory regulation with rules of their own. The Supreme Court had the power to "direct the form of writs and process, not being contrary to or inconsistent with the laws in force for the time being,"[9] and ever since the constitution of 1820 was adopted the Supreme Court of Missouri has been invested with "general superintending control over all inferior courts of law."[10] It was probably in pursuance of this power that in the early case of *Risher* v. *Thomas*[11] the judgment of a trial court was reversed by the Supreme Court because the trial court had exacted compliance with one of its rules which had not been given due publicity.

The General Assembly did not purport to exercise complete jurisdiction over the field of pleading and procedure until 1849, when it promulgated a comprehensive detailed code of procedure of more than two hundred sections,[12] similar to the Field Code

7. 1 Missouri Territorial Laws, p. 55. Missouri was then a part of the territory of Louisiana.
8. Revised Statutes 1825, p. 620.
9. Revised Statutes 1825, p. 268.
10. Constitution of 1820, art. V, § 3; Constitution of 1865, art. VI, § 3; Constitution of 1875, art. VI, § 3.
11. (1828) 2 Mo. 98.
12. Laws of 1849, p. 78.

adopted in New York in 1848. Since 1849 the regulation of court procedure has been very largely in the hands of the General Assembly, but the statutory code has at all times needed supplementing by rules of court and it has never been deemed incompetent for a court to make its own rules supplementing the rules prescribed by the legislature. In *Brooks* v. *Russell*,[13] the Supreme Court said that the authority of a trial court "to adopt any rule of practice not in conflict with the law cannot be questioned," and this statement has often been repeated in the Missouri reports.[14] Furthermore, the Supreme Court has always possessed control of its own practice by rules of court promulgated in addition to the statutory rules. In a very recent case[15] the Supreme Court speaks of this as one of its inherent powers. This power of each of the appellate courts to adopt rules of court for itself is recognized by statute,[16] and the legislature has made it the special duty of every judge of a court of record "to prescribe rules that will procure uniformity, regularity and accuracy in the transaction of the business of the court."[17] The Supreme Court has at all times subjected the rules of itself and of all other courts to conformity with statutes, and it seems to have reserved to itself the right to pass on the propriety of any rule of any other court.

Prior to 1849 common law pleading and procedure were in vogue in all of the trial courts in Missouri. It should be kept in mind that the rules of common law pleading and procedure were largely the result of rules which the English courts had laid down for their own guidance; some of them were due to orders promulgated by the courts themselves, some were due to the growth of precedent thru long lines of judicial decisions. The English Parliament had in some cases exercised a jurisdiction over matters of procedure in the English courts but for the most part the details had been left with the courts themselves.

13. (1864) 34 Mo. 474.
14. See *Johnson* v. *St. Louis, etc. R. R. Co.* (1891) 48 Mo. App. 630; *Pelz* v. *Bollinger* (1903) 180 Mo. 252.
15. *State ex rel. Logan* v. *Ellison* (1916) 184 S. W. 963.
16. Revised Statutes 1909, § 2049.
17. Revised Statutes 1909, § 3859.

The Court of King's Bench was independent of the Court of Common Pleas and of the Exchequer. Each of the three made its own rules and in such a treatise on practice as Tidd's, which was the standard work on English practice during the early history of Missouri, the rules of court occupy a very large place. Tidd prefaces his treatise with a chronological table of the rules and orders of English courts,[18] and these rules occupied a place in the English practice quite as important as the statutes of Parliament. Some of these rules, in force in the English courts when early Missouri procedure was fashioned on the English procedure, date as far back as the year 1457 in the reign of Henry VI and many of them go back of the year 1607 in the reign of James I, which was the date of the common law as it was formally adopted in Missouri in 1816. Prior to 1849, therefore, the Missouri courts must have possessed the same control of rules of procedure as was exercised by the English courts and tho the legislature did not entirely abjure the field of procedure, it did not purport to deal with details and these must have been in the control of the courts themselves. Nor were the courts deprived of this power by the code of 1849, for it has been universally admitted since that time that each court may deal with the details of its procedure which have not been covered by the existing code. Indeed, if the courts have an inherent power to make rules, they could not be altogether deprived of it by statute.

Disadvantages of the Statutory Code

Comprehensive and detailed regulation of court procedure by the legislature is subject to numerous objections.

18. 1 Tidd, Practice (3d Amer. ed.) XXXV. See also the table of *regulae generales* printed in 1 Chitty, Pleading (14th Amer. ed.) 726. Edward Jenks, in his *Short History of English Law*, p. 188, says that these rules go back "for a long period in English legal history, and it is impossible without further research into the archives of the fourteenth century, to state definitely when they began.... While the known Chancery Orders go back to 1388, the oldest Common Law Rules date only from 1457; but the oldest of these latter refers clearly to still older Rules, which seem to have disappeared. The oldest published Rules of the King's Bench appear to be of 1604, but it is more than probable that these are not in fact the first made. The oldest Exchequer Rules known to the writer date from 1571."

First, while the courts are responsible in the eyes of the public for their administration of justice, they are frequently powerless to prevent a miscarriage of justice because of the necessity of applying the rules of procedure which the legislature has prescribed.[19]

Second, the control of the details of procedure is now in the hands of legislators many of whom are not lawyers and have had little experience with court procedure.[20] The session of the legislature is so crowded with the numerous subjects to be considered and the work of legislation must of necessity be so hurried that there is frequently little time for a thoro consideration of the changes suggested.

Third, with the legislature meeting biennially, changes can now be made in court procedure only during the biennial sessions. They cannot be brought to the attention of a body that has the power to change them as they are discovered. Frequently, several sessions of the legislature elapse before a change generally recognized to be needed can be effected. Since no perfect system of procedure can ever be devised, a system should be judged not by the degree to which it approaches perfection so much as by its susceptibility to being made more nearly perfect.

Fourth, the statutory rules of procedure bind the courts with too much rigor. Tho the statute may be liberally construed, it cannot be defeated and it ought not to be materially changed by judicial decisions. It must be applied by the court tho it works manifest injustice and it can never be suspended or modified so as to meet situations unforeseen at the time of its formulation.

Fifth, the courts have no latitude in the interpretation of the statutory prescribed rules, but must await cases in which questions of construction are actually involved. The consequence is that our court reports are now full of decisions as to matters of pro-

19. The notorious decision of the Supreme Court in *State* v. *Campbell* (1907) 210 Mo. 202, in which an indictment was held defective because it concluded with the words "against the peace and dignity of State," whereas the Constitution required the conclusion to be "against the peace and dignity of the State," is a frightful example of the effect of binding courts with detailed forms.

20. Of 176 members of the Missouri General Assembly of 1915, only 57 were lawyers.

cedure which turn on technical questions of statutory construction, and statutes enacted for the dispatch of business are not infrequently applied as tho they were enacted for the protection of substantive rights.

Sixth, legislators and lawyers with legislative influence have sometimes secured amendments to the code which will meet individual cases in which they are interested and which they cannot frankly defend as general rules which will facilitate the administration of justice. Statutes prescribing rules of procedure may be the result of legislative trading and log rolling.

Advantages of the Proposed Change

If the control of court procedure be left to the courts themselves, as is proposed, many of the evils of the present system would be obviated.

First, the Supreme Court, as the head of our judicial system, would be enabled to discharge the responsibility which it already has in the eyes of the public and to conform judicial procedure to the varied and changing needs of litigants.

Second, the control of details of court procedure calls for the exercise of expert knowledge. Instead of having this control in the hands of men who have had no experience with courts, it would be in the hands of men who are in a position best to judge the effect of the rules which they promulgate. Changes suggested would receive more careful attention than they would receive in the legislature. Quoting a recent president of the Missouri Bar Association, "the best results can be derived, in the matter of court procedure, from utilizing, rather than ignoring, the genius, ability, study, experience and knowledge of the judges and lawyers who are most nearly concerned in the procedure of the courts."[21]

21. Edward J. White, Esq., in the 1914 Report of the Missouri Bar Association, p. 62.

Mr. Samuel Rosenbaum, who has made a careful study of English procedure, says of the Rule Committee in England that it "is not only more accessible than a legislature, but more reasonable, more learned in the law, and more ready to act when the need is shown." 63 Pennsylvania Law Review 111.

Third, it would be possible to make changes in rules of procedure at any time by appealing to the court which has power to change them. This court would undoubtedly call upon the members of the bar for guidance and might refer all suggestions to a committee of the bar, but it would be open to entertain suggestions as to changes as least nine months in each year. The Supreme Court of the United States did not make frequent changes in its equity rules between 1842 and 1913—only eight in all; but it must be remembered that no organized demand for changes was made by the bar during that period.

Fourth, a rule of court may be suspended by the court which promulgates it;[22] or if its operation in a particular case is shown to work injustice, the rule may be changed on the spot so as to prevent injustice in the particular case and in similar cases.[23]

Fifth, it may be expected that the judges would be more responsive to necessary changes in practice than the legislature would be, and that the members of the bar could exert a more direct influence in securing necessary changes. Experience in England seems to justify this expectation.

Sixth, court rules would discourage reliance on technical questions of procedure to defeat substantive rights. The rules made by the courts would be interpreted by the courts with a view to accomplishing the result for which they were intended,

22. In *In re Coles* (1907) 1 K. B. 1, 4, the Master of the Rolls said that "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than of mistress, and the court ought not to be so far bound and tied by rules, which are after all intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case." Accord, *Omaha Electric Light Co.* v. *Omaha* (1914) 216 Fed. 848. But in the recent opinion of Faris, J., in *Hermann Savings Bank* v. *Kropp* (1915) 181 S. W. 86, it was said that a rule "made in aid of and under direct authority of a solemn statute has practically the binding force of a statute." The statement was in no way necessary to the decision and it has been criticised in 11 Law Series, Missouri Bulletin, p. 58. In *Kuh* v. *Garvin* (1894) 125 Mo. 546, it was said that "courts have control of their own rules and it rests very much in their discretion as to whether they shall be rigidly enforced or not."

23. The Supreme Court of the United States recently allowed a motion to be argued by the Attorney General of Missouri in spite of its general rule to the contrary. But a rule of court will not be given a retrospective operation. *Dalton* v. *Register* (1912) 248 Mo. 150.

viz., the facilitation of the work of the courts, and they would be at all times subject to change for this purpose.

Seventh, if the courts were permitted to exert a larger measure of control over their own practice and procedure, it would tend to enlarge general respect for the administration of justice and to elevate both bench and bar in the estimation of the public. Procedure is largely a matter of administration and to permit one department of the government to control the details of administration in another department of the government is to unduly elevate the one above the other.

Instead of being a radical innovation, the proposal seems to represent an effort to re-establish a power which courts formerly exercised but which has gradually been taken over by the legislature without satisfactory results. But it does not mean a return to the common law system under which procedure was controlled by judicial decisions and precedents, for it is proposed that all rules of procedure should be formally promulgated, as was not necessary in the earlier common law system.

Disadvantages of the Proposed Change

There seem to be few disadvantages in a system of procedure regulated by court rules which are not present to a larger degree in the existing system of regulation by statute. Any system is dependent, after all, on the character of the bar which uses it and on the willingness of the bar to make it serve the ends for which it was intended.

First, a changable procedure might be fruitful of contention and delay and might put on the courts the burden of constant interpretation. After the present judicature rules in England were promulgated, the English courts were called upon to hand down many decisions interpreting them; between 1875 and 1890 there were said to be four thousand such decisions in England.[24] But unless a complete change is made suddenly this result should not follow and after the change is effected it seems that there should be less litigation over the interpretation of court rules than over the interpretation of statutory rules.

24. Hepburn, History of Code Pleading, § 224 note.

Second, the protection of clients demands a system of procedure with which lawyers may readily be familiar. Unnecessary changes in procedure would work hardship on litigants, but the court which is invested with power to promulgate rules is of course readily responsive to the demands of the bar, and it would seem that the opinion of the bar in this regard would be respected.

Third, the success of a system of court rule procedure will demand a high degree of learning and prudence in the judiciary and stability in the office of judge. Every new judge can not carry out his own ideas of procedure by completely revolutionizing the rules which his predecessors have promulgated. But the personality of courts changes less frequently than the personality of legislatures and experience in the United States seems to justify the expectation that the courts will not be too hasty in changing their rules. Between 1842 and 1913 the Supreme Court of the United States made only eight changes in the federal equity rules.

Fourth, the duty of promulgating rules of procedure would be an added burden on courts which are already overworked, but much of the burden would be borne by bar associations and members of the bar self-appointed to make recommendations to the court. Furthermore, the court must be constantly devoting its attention to the working of any rules of procedure, and it would require little time to promulgate amendments as they may appear to be necessary.

Is the Proposal Constitutional?

When the special committee of the Missouri Bar Association recommended this change in 1913, one member of the committee made a separate report in which he stated that the proposal is unconstitutional, "in that it confers upon the Supreme Court a legislative power which is now vested solely in the General Assembly."[25] This opinion has been frequently expressed by members of the bar. In making his report in 1915, the chairman of

25. See the separate report of George Robertson, Esq., in the 1913 Report of the Missouri Bar Association, p. 129.

the committee on judicial administration and legal procedure, himself a judge of the Supreme Court expressed the "confident belief" that the constitution of Missouri would allow this change to be effected. Close examination would seem to justify his belief.

The separation of powers into executive, legislative and judicial is by no means a hard and fast division. Many functions partake of both a legislative and a judicial character and whether a particular function is legislative or judicial, or in some degree both, can only be determined with reference to the history of the exercise of that function. For when our constitutions made the separation of powers no precise definition was attempted and the history of the time must largely determine the effect of their work. The Missouri constitution of 1820 contained an article on the distribution of powers which provided that "the powers of government shall be divided into three distinct departments" and that none of these departments "shall exercise any power properly belonging to either of the others."[26] This article was continued in the constitution of 1865 and it is now a part of the constitution of 1875. In commenting on the difficulty in determining whether a particular power is to be exercised by the judicial or by the legislative department of the government, the Missouri Supreme Court said in *State ex rel. Lionberger* v. *Tolle*,[27] that the courts have been induced to adopt "very liberal views in determining where any power not easily classified may be properly lodged," and it quoted with approval the statement of the Ohio court, that "whether power in a given instance ought to be assigned to the judicial department is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may properly be assigned to either of the departments."[28] And in speaking of the power to make rules of court, it was said, "as it is essential to the proper administration of justice that the courts shall have power to supplement the rules of pleading and practice enacted by the legislature by such rules not inconsistent therewith as experience may

26. Constitution of 1820, art. III.
27. (1880) 71 Mo. 645.
28. *State* v. *Harmon* (1876) 31 Ohio St. 250.

from time to time demonstrate to be necessary to the proper exercise of their functions, the power to make such rules has always been upheld."

Any question as to the effect of the separation of powers in the present constitution must be determined with reference to the meaning of the same clause as it appeared in the constitution of 1820. At that time the procedure of English courts was largely controlled by rules of court and the English Parliament did not substantially interfere with the courts' control of common law procedure until the Act of 1833, in which the formulation of new rules of procedure by the courts was expressly authorized and which led to the promulgation of the Hilary Rules of 1834. Prior to 1820 therefore, the regulation of details of court procedure had for centuries been deemed a judicial function in England, tho there was no constitutional restriction which would have prevented Parliament's exercising the function at any time. Since Parliament did from time to time enact some statutes dealing with practice in a large way, the function might fairly be said to have been one which was both judicial and legislative in England, but it partook more of a judicial than of a legislative character. The English rules of court occupied a very large place in the procedure of English courts during the century prior to the adoption of the Missouri Constitution in 1820. Furthermore, while Missouri was a territory and until 1849, the Missouri courts actually did control the details of their own procedure and the legislature left these details to court control. It was not until 1849 that the legislature assumed the right to exercise this function. Its assumption cannot be said to be unconstitutional, however, in view of the fact that the function had been exercised to some extent by the British parliament and must be construed to be both legislative and judicial.

An analogy is to be found in the history of procedure in the federal courts. The Judiciary Act of 1789[29] and the Process Act of 1792[30] conferred on the federal courts large powers to control their own practice and to vary the rules which prevailed in the

29. 1 U. S. Statutes at Large, p. 83, § 17.
30. 1 U. S. Statutes at Large, p. 276, § 2.

state courts. It was contended in *Wayman* v. *Southard*[31] that in these acts Congress had made an unconstitutional delegation of legislative power to the courts, and in upholding the delegation Chief Justice MARSHALL said: "The line has not been exactly drawn which separates those important subjects which must be regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who may act under those general provisions to fill up the details." "The seventeenth section of the Judiciary Act and the seventh section of the additional act empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example may make rules directing the return of writs and processes, the filing of declarations and other pleadings and other things of the same description. It will not be contended that these things might not be done by the legislature without the intervention of the courts, yet it is not alleged that the power may not be conferred upon the judicial department." In *Bank of the United States* v. *Halstead*,[32] Justice THOMPSON in delivering the judgment of the court said, "Congress might regulate the whole practice of the courts if it was deemed expedient so to do, but this power is vested in the courts and it has never occurred to anyone that it was a delegation of legislative power." The constitutional validity of the power given to the federal courts was also upheld by Justice STORY in *Beers* v. *Haughton*.[33] Furthermore, in 1792 the Supreme Court on motion of the Attorney General stated that "the court considers the practice of the courts of King's Bench and Chancery in England as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may make necessary."[34]

In view of the courts' exercise of the power to regulate procedure by rules for the purpose of supplementing legislative codes of procedure, there can be no question but that the legislature might

31. (1825) 10 Wheaton 1.
32. (1825) 10 Wheaton 50.
33. (1835) 9 Peters 329.
34. 2 Dallas 411.

give to the various courts of the state the power to control their own procedure. If, therefore, the legislature should repeal the entire code of procedure as it now exists, the result would be that the procedure in each of the courts provided for by the constitution would be determinable by that court. But the Supreme Court has frequently assumed the right to review the rules which are adopted by the trial courts for their own guidance. In *Risher* v. *Thomas*,[35] the judgment of a trial court was reversed by the Supreme Court because the trial court had exacted compliance with one of its rules which had not been given due publicity. In *Pelz* v. *Bollinger*,[36] the Supreme Court held that a rule of a trial court adopted in pursuance of a statute was unreasonable and arbitrary and constituted therefore an abuse of the trial court's "inherent power" to control its own procedure. If the legislature should repeal the existing code of procedure and leave the regulation of procedure in the hands of the various courts, the Supreme Court would continue to exercise a jurisdiction to prevent the trial courts from abusing their power and discretion. Is it much of a step beyond this for the legislature to say that all trial courts shall be governed by rules which are promulgated by the Supreme Court? Since the legislature may leave to each court the power to promulgate its own rules of procedure, can there be anything inherently wrong in its delegating the power to control those rules of procedure to some judicial tribunal, particularly to that tribunal which is the head of the state's judiciary and which is invested by the constitution with "general superintending control"[37] over all other courts? If the trial courts must submit to control of their procedure by the General Assembly, it would seem that they must also submit to control by the Supreme Court with the sanction of the General Assembly.

The constitution does not precisely mention rules of court except in providing that the judges of the circuit court of St. Louis may sit in general term for the purpose of making rules of

35. (1828) 2 Mo. 98. Cf., *Kuh* v. *Garvin* (1894) 125 Mo. 546.
36. (1903) 180 Mo. 252, 261.
37. This phrase "general superintending control" has generally been read to refer to control to be exercised by writs of certiorari, prohibition, etc. But is there good reason for so restricting it?

court.[38] This must be interpreted to mean that the rules which each of the judges of the circuit court in special term might promulgate for the guidance of his own court, shall be made uniform by a convention of the judges of the circuit court of St. Louis assembled for that purpose. The Supreme Court has decided in *State ex rel. St. Louis, etc. Ry. Co.* v. *Withrow,*[39] that by virture of this constitutional provision the judges of the St. Louis circuit court in general term have not authority to make a rule which is opposed to a statute. In other words the constitutional power of the judges of the circuit court of St. Louis, sitting in general term to make rules of court, is precisely the same power which all other courts have and the object of the constitutional provision was to provide for uniformity among the various divisions of the St. Louis court. It is conceived, therefore, that this clause in the constitution would not be violated if the Supreme Court were given the same power which the legislature has been exercising to prescribe rules of procedure for the trial courts in St. Louis. In so far as the rules promulgated by the Supreme Court would need to be supplemented by further rules of the trial courts, the convention of the judges of the circuit court of St. Louis would still exercise its constitutional power.

The constitution forbids the General Assembly's passing any local or special law "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate."[40] Under this section an act of the legislature prescribing procedure for particular trial courts might be invalid. If the legislature should leave the regulation of procedure to the Supreme Court, would that body be competent to prescribe special procedure for certain trial courts? For instance, could the Supreme Court provide by rule that a motion for a new trial must be filed with-

38. Constitution of 1875, art. VI, § 27.
39. (1896) 133 Mo. 500.
40. Constitution of 1875, art. IV, § 17.

in four days after verdict in the St. Louis circuit court, and within six days after verdict in the Taney County circuit court? Some such local differences in practice may be desirable, and it is submitted that it would be competent for the Supreme Court to make them, just as it is competent for the Public Service Commission to act specially and locally. But if the same restriction would exist on the Supreme Court as on the General Assembly, still the desired result might be achieved by general classifications. Furthermore, general rules may be so framed as to admit of supplementing by the trial courts and in such supplementing variation would be entirely proper.

It seems proper to conclude that the power of regulating court procedure is not one of those essentially legislative powers which must be exercised solely by the General Assembly. It falls rather into that class of powers partly legislative and partly judicial, as to which in Chief Justice MARSHALL's phrase "the line has not been exactly drawn." If the legislature chooses to exercise it, there is no unconstitutional interference with the judicial department of the government; if the legislature fails to act, the courts must of necessity control their procedure, each court for itself as in England prior to the modern judicature acts. Since the power is not strictly legislative, and since if its exercise were left to the various courts the Supreme Court would still exercise a superintending control and would determine the propriety of any rules adopted by the trial courts, it would seem to be competent for the General Assembly to delegate to the Supreme Court the power of regulating procedure in all the courts of the state.

RULES OF COURT IN OTHER JURISDICTIONS

(1) *In England and the British Empire.*[41]

Dissatisfaction with the common law system of procedure in

41. The history and operation of court rule procedure in England has been very thoroly treated by Samuel Rosenbaum, Esq., in his valuable *Studies in English Civil Procedure*, published in 63 University of Pennsylvania Law Review 105, 151, 273, 380, 505; 31 Law Quarterly Review 304; the Journal of the Society of Comparative Legislation for July 1915; and the Law Magazine and Review for February 1915. See, also, Professor Kales' address on *The English Judicature Acts* in 1913

England led to the enactment of the civil procedure act of 1833,[42] which authorized eight of the common law judges to make rules for the reform of pleading and under the authority of which the Hilary Rules of 1834 were issued. These rules were a compromise "between the conservatism of six centuries and the demands of modern criticism and modern convenience."[43] But their result was found to be beneficial and a statute of 1850[44] enlarged the rule-making power. When the English county courts were organized in 1846,[45] the power to make rules for their procedure was vested in five judges of the superior courts at Westminster, but in 1849 it was conferred upon a committee of five county court judges whose rules were subject to the approval of three judges of the superior courts. The common law procedure acts of 1852 and 1854, and the chancery amendment act of 1858, all left the control of procedure to rules of court. When the more comprehensive judicature acts of 1873 and 1875 were enacted, the principle of leaving the regulation of procedure to the courts themselves was one of their principal features and this has been true of all the subsequent judicature acts.[46] The act of 1875 left the authority to promulgate rules of procedure in a general council of the judges. In 1876 a definite rule committee was authorized, and in 1881 the number of members was increased to eight, including the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division and four judges of the high court named by the Lord Chancellor. In 1894 the rule committee was enlarged by the addition of active practitioners and it now consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges of the Supreme Court, two barristers and two solicitors. In 1884 this rule committee was given authority to make

Report of the Illinois State Bar Association, p. 325; and Jenks' Short History of English Law, p. 188.

42. 3 & 4 William IV, c. 42.

43. Hepburn, History of Code Pleading, p. 77.

44. 13 & 14 Victoria, c. 35, §§ 30, 32.

45. 9 & 10 Victoria, c. 95. See 1 Law Quarterly Review 305.

46. Judicature Acts were enacted in 1877, 1879, 1881, 1884, 1890, 1891, 1899, 1902, 1909, 1910.

rules for the county courts. It now possesses the exclusive power to make rules of procedure for the Supreme Court, with a few exceptions.[47] "In its discretion lies the making or amending of all rules affecting the sittings of court, the duties of its officers, pleading, practice and procedure and costs of proceedings."[48] The judicature act of 1875 provides in very broad terms that "rules of court may be made for regulating the pleading, practice and procedure of the Supreme Court and in general for regulating any matters relating to the practice and procedure therein." The rules promulgated by the rule committee may be vetoed by Parliament and they are put before both houses of Parliament within forty days after they are made. No rules are promulgated until notice has been given and opportunity is afforded for discussion of proposed changes by members of the bar.

Contrary to the view which is sometimes expressed in this country the English judicature acts are in no sense practice codes. They do not lay down general principles of practice and procedure which are to be supplemented by rules of court, but they leave the field of procedure entirely to court rules and the power of the rule committee is so broad that it may abrogate any act of Parliament prior to 1875 having to do with procedure. The act of 1875 did, however, carry with it a set of rules recommended for adoption, but these were entirely subject to alteration and amendment and few of them still obtain.[49]

The English example of regulating procedure by rules of court alterable by the local judges with the approval of the local executive has been followed thruout the British Empire with a few exceptions.[50] In Ireland, the Judicature Act of 1877 followed the English Acts of 1873 and 1875. The Irish Rule Committee

47. The most important of the exceptions is that the President of the Probate, Divorce and Admirality Division regulates the procedure as to divorce. See Rosenbaum, *Studies in English Civil Procedure*, 63 Pennsylvania Law Review 166, note.

48. 63 Pennsylvania Law Review 165.

49. A new set of rules was adopted in 1883, one hundred of which were amended by 1890. In 1893 some new rules were adopted and numerous amendments and additions have since been made.

50. See Rosenbaum, *Rule-Making in the Courts of the Empire*, 15 Journal Comparative Legislation (n. s.) 128, upon which the statements in the text are largely based.

has three practitioners in its membership and it possesses very plenary powers. The Irish Rules were revised in 1905. The courts of Scotland have exercised the power to control their procedure since the sixteenth century. In Ontario procedure has been controlled by rules of court since 1881,[51] tho the rule committee was not established until 1913. In Manitoba, Nova Scotia, and New Brunswick, the courts may make rules governing their procedure but the legislatures have not entirely kept out of the field. In South Africa the courts' control of procedure dates from 1834. In Australia the courts control their own procedure by rules, except in New South Wales and Tasmania; and the 1908 Code of India conferred the power on the High Courts there.

(2) *In the Federal Courts.*

The Judiciary Act of 1789 providing for the organization of the federal courts conferred on them the power "to make and establish all necessary rules for the orderly conduct of business in said courts, provided such rules are not repugnant to the laws of the United States."[52] In the Process Act of 1792, it was provided that the procedure in the federal courts should be "subject to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time to prescribe to any circuit or district court."[53] It was under the authority of this act that in 1822 the Supreme Court promulgated the first rules of practice for the equity courts.[54] In 1842 a new set of equity rules was substituted.[55] Numerous amendments were made to these rules from time to time and three new rules were added, one as to

51. See Herbert Harley, *Ontario Courts and Procedure*, 12 Michigan Law Review 339, 447.

52. 1 U. S. Statutes at Large, p. 83.

53. 1 U. S. Statutes at Large, p. 276. The present statute is of similar effect as to suits in equity and admiralty. U. S. Revised Statutes, § 913.

54. These rules were first published in 7 Wheaton.

55. First published in 1 Howard. The Supreme Court's authority was confirmed by the Act of 1842, c. 188.

foreclosure of mortgages in 1864, one as to injunctions in 1879 and one as to stockholders' bills in 1882.[56] Of course dissatisfaction with the equity rules grew up as they became obsolete, but there was no organized effort of the bar to secure their revision. In 1911, the Supreme Court on its own initiative, tho with the President's encouragement, appointed a committee of its members to consider the revision of the equity rules and this committee requested each of the Circuit Courts of Appeal to appoint a committee of three members of its bar to cooperate by submitting suggestions for changes in the rules. In 1913, a wholly new set of rules based on these suggestions was promulgated and the new rules have on the whole proved satisfactory.

In 1842, Congress conferred on the Supreme Court general power to regulate practice in admiralty and the rules were promulgated in the same year and amended in 1896.[57] Since the Bankruptcy Law of 1898, the procedure in bankruptcy cases has been controlled by rules promulgated by the Supreme Court in 1898 and amended in 1905.[58] In 1909, the Supreme Court was invested with power to control procedure in copyright cases.[59]

The exercise of these powers by the Supreme Court has met with such general approval among members of the bar that it is now sought to confer on the Supreme Court the power to control the procedure at law in the various federal courts by rules. The Act of 1872[60] which is still in force requires the procedure at law in the federal courts to conform to the procedure "existing at the time in like causes in the courts of record of the State." The American Bar Association has recommended that the procedure in all federal courts be made uniform,[61] and the pending bill would confer on the Supreme Court the power "to prescribe, from time to time and in any manner, the forms and manner of service of writs and all other process; the mode and

56. Amendments were made in 1850, 1854, 1861, 1869 and 1871.
57. See 160 U. S. 693.
58. See 172 U. S. 653.
59. See 214 U. S. 533.
60. Now U. S. Revised Statutes, § 914. For the previous history of legislation as to federal procedure at law, See 1 Rose, Code of Federal Procedure, § 883.
61. 1910 Report of the American Bar Association, p. 614.

manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law" in all the district courts.[62] The bill has been approved by forty-two state bar associations.

The federal Commerce Court exercised complete control over its own procedure and the court of claims still does so.[63] The Interstate Commerce Commission has long had control of its own procedure,[64] and similar power was conferred on the Federal Trade Commission, established in 1914.

(3) *In Other States.*

The common law procedure which prevailed thruout the American states prior to the modern codes was really nothing more than court-made procedure. Some of these rules of court still prevail either as code provisions or as parts of unwritten codes. A New York rule of 1799 as to "enumerated motions" still has a place in the New York Code.[65]

In several states the highest court is given power to regulate procedure in other courts, but subject to the continued and superior control of the legislature. Since 1849, the so-called Code of Virginia has authorized the Supreme Court of that state to make general regulations for the practice of all the courts.[66] The Delaware Code of 1852 contained a similar provision.[67] In 1850 the Michigan constitution provided that the Supreme Court should by general rules establish, modify and amend the practice for the various courts of the state,[68] but the

62. See 1915 Report of the American Bar Association, p. 502, 508; Report of Committee on Judiciary in the 63d Congress, H. R. 462. For a definition of the term "procedure" as it is used in such statutes, see *Kring* v. *Missouri* (1883) 107 U. S. 221, 231.
63. See 3 Foster, Federal Practice (5th ed.) 2964.
64. See Fuller, Interstate Commerce, p. 429.
65. Demarest, American Jurisprudence, p. 91.
66. Virginia Code of 1904, § 3112.
67. Delaware Revised Code of 1852, c. 106.
68. Michigan Constitution of 1850, art. VI, § 5. A similar provision may be found in the Michigan Constitution of 1909, art. VII, § 5.

Michigan Supreme Court has very sparingly exercised this power and has submitted to legislative direction.[69] In 1892, the Texas legislature gave to the Supreme Court power to promulgate rules of procedure for all of the courts of the state, but it did not give authority to replace the statutory rules of procedure.[70] A similar provision has obtained in New Mexico since 1897.[71] The New Hampshire Supreme Court has revised procedure in the trial courts without any statutory authority.[72]

In most of the states the trial courts have authority to supplement the statutory rules with rules of their own. This authority is frequently confirmed by statute. In Massachusetts the trial courts have very broad powers, and it is expressly provided that their rules shall not conflict with those of the Supreme Judicial Court.[73] In Connecticut, the judges meet in convention for this purpose.[74] In the recently established municipal courts in Chicago and Cleveland, the procedure is largely in the hands of the courts themselves. The same policy is now quite generally followed in the creation of administrative tribunals such as public service commissions[75] and industrial commissions.

But much more significant is the recent general movement toward the abandonment of statutory codes of procedure and the concentration of control over procedure in one court to

69. See Willis B. Perkins, *Remedies in Court Procedure*, 12 Michigan Law Review 362, 367.

70. Sayles' Texas Statutes 1914, § 1524.

71. New Mexico Statutes 1915, § 4258.

72. See *Owen* v. *Weston* (1885) 63 N. H. 599, 604. In 1859 the Supreme Court of New Hampshire adopted rules regulating the practice in chancery. 38 N. H. 604. This seems to have been authorized by statute in 1842. See 10 Illinois Law Review 364.

73. Massachusetts Revised Laws 1902, c. 158, § 3.

74. Connecticut General Statutes 1902, § 467.

75. The Missouri Act of 1913, creating the public service commission, provided that "the hearings before the commission shall be governed by rules to be adopted and prescribed by the commission." Laws of 1912, p. 569.

It is interesting to note that the Commissioners on Uniform Laws in drafting the Uniform Land Registration Act have provided that procedure in the proposed courts of land registration shall be governed by rules promulgated by the highest state court. In this form the Act was approved by the Commissioners at their 1916 meeting; and the Virginia land registration act of 1916 embodies this provision. See Virginia Acts of 1916, p. 70.

which is given power to promulgate rules for all the courts. The lead was taken in the New Jersey Practice Act of 1912 which is to some degree fashioned on the English judicature acts of 1873 and 1875. The New Jersey legislature did not completely relinquish control but enacted a statute of thirty-four sections which cover the more general principles of procedure and supplemented them with legislative rules which were to be "considered as general rules for the government of the court and the conducting of causes," but which were made subject to being "relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice." Any of these rules may be changed by the Supreme Court at any time and the same court is given power to replace prior statutory or traditional regulations of procedure with its rules.[76]

In 1913, the Colorado legislature enacted a short court-rules act, providing simply that "the Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute." This statute gives the Supreme Court complete control without attempting to lay down any general principles. The rules promulgated under it have encountered strong opposition, but the Court has shown a disposition to make the changes demanded.[77] A strong but unsuccessful effort was made to repeal the Colorado Act in 1915. The Colorado Bar Association has recently requested the Supreme Court to "appoint a Standing Rules Committee consisting of several judges of that court, several judges chosen by them from the district and county judges of the state, and several practicing lawyers whose duty it shall be to consider and recom-

76. On the New Jersey Act, see 3 Virginia Law Review 18; 75 Central Law Journal 144. The Act was entirely the work of a committee of the New Jersey Bar Association and its passage was due to its efforts. See the report of the association for 1912-13, p. 61.

77. See the 1915 report of American Bar Association, p. 853, for an account of the Colorado practice by Chief Justice Gabbert; and the 1916 Report of the Colorado Bar Association for a criticism of the rules by E. L. Regennitter, Esq. Rule 2 met strong opposition from the bar and was repealed by the court.

mend to the Supreme Court such rules and amendments as they may deem proper."[78]

In 1913, also, the New York legislature approved the plan of judicial control of procedure by directing the board of statutory consolidation to prepare a practice act to be "supplemented by rules of court to be adopted by the courts which shall regulate the important details of practice, minute statutory details of practice being omitted."[79] The act now proposed in New York follows the New Jersey Act in laying down general principles and leaving details to rules of court; the act consists of seventy-one sections, while the proposed rules number four hundred and one.[80]

In 1915, the legislature of Alabama gave the Supreme Court "full plenary power to adopt such rules and to regulate the practice and proceedings as they may deem proper, and to furnish forms of indictments, complaints, bills, pleas and process, and to mould the procedure in all the courts and prescribe rules of evidence in the same, from time to time, as experience may determine that the existing rules do not fully meet the ends of justice."[81] The Alabama Court has not yet promulgated any new rules under this authority. Obviously the statute gives broader power than is possessed by any other state court.

In 1915, also, the Michigan legislature made it the duty of the Supreme Court "by general rules to establish, and from time to time thereafter to modify and amend the practice in such court and in all other courts of record" and to periodically revise such rules with a view to attaining the following improvements in the practice:

> "2. The abolishing of all fictions and unnecessary process and proceedings."
>
> "3. The simplifying and abbreviating of the pleadings and proceedings."

78. Thru a committee of which E. L. Regennitter, Esq., of Idaho Springs, Colo., is chairman. This committee's report was approved at the 1916 meeting of the Colorado Bar Association.

79. N. Y. Laws of 1915, c. 713.

80. See volume one of the 1915 report of the board of statutory consolidation where the various proposals of the board are very fully and very ably discussed.

81. Alabama Laws of 1915, p. 607.

"6. The remedying of such abuses and imperfections as may be found to exist in the practice."

"7. The abolishing of all unnecessary forms and technicalities in pleading and practice."[82]

The Supreme Court of Michigan has acted in response to this statute and has approved and promulgated a complete revision of circuit court rules, prepared by a committee of the Michigan State Bar Association.

More recently, in 1916, the legislature of Virginia has amended its early statute referred to above and directed that "the supreme court of appeals shall, from time to time, prescribe the forms of writ and make general regulations for the practice of all the courts of record, civil and criminal; and shall prepare a system of rules of practice and a system of pleading and the forms of process to be used in all the courts of record of this state, and put the same into effect." [83]

In numerous other states, bar associations have approved the principle of judicial control of court procedure. Indeed, the principle seems to be accepted wherever reform is being agitated.[84] The reforms actually accomplished in New Jersey, Colorado, Alabama, Michigan and Virginia seem to presage a general movement in this direction thruout the country, just as the Field Code led the general movement toward statutory control of procedure a half-century ago.

The Details of the Proposal

If it be decided that it is desirable to re-commit to the courts the control over rules of procedure which they formerly exercised, it will be necessary to work out the details of the proposal.

82. Michigan Judicature Act of 1915, c. 1, § 14. The language of an earlier statute of 1851 was not dissimilar. See Michigan Laws of 1851, p. 106. See Professor Sunderland's articles on the recent Judicature Act, 14 Michigan Law Review, 273, 383, 441, 551.

83. Virginia Acts of 1916, p. 939. The earlier statute was only permissive, and clearly contemplated the necessity of legislative assent to new rules.

84. At the recent 1916 meeting of the California Bar Association a committee presented a somewhat elaborate report recommending that the procedure be regulated by rules of court and the recommendation was approved by the association by a practically unanimous vote. The

On whom shall the rule-making power be conferred? On the Supreme Court? On a judicial convention to be composed of both trial and appellate judges and perhaps some practitioners? Or on the trial judges themselves, acting in such unison as to insure uniformity thruout the state? In favor of conferring the power on the Supreme Court alone, it may be said that it is almost constantly in session and no special convening would be necessary which might cause delay; no new appropriations would have to be made for the expense of the work; the Supreme Court must in any case be the ultimate judge of the propriety and constitutionality of the rules adopted and it would seem simpler to permit it to formulate them. It may be argued that appellate judges are frequently not in touch with the conditions prevailing at the trial; but it is not likely that the court would ever proceed to make important changes without consulting the bar and it may be expected that it will depend almost wholly upon the guidance of practitioners and judges. It would seem the proper course for the Supreme Court to refer all suggestions of changes to a committee of the bar association and to have a report from such a committee before taking action. Just as persons are now admitted to the bar by the Supreme Court upon the recommendation of a board of bar examiners, so ought the Supreme Court to exercise the power of promulgating rules of procedure upon the recommendation of a committee of the bar association. If the proposal is adopted and if the bar wishes it, there is every reason to believe that the court would follow this practice.

It would then seem desirable that the power should be with the Supreme Court rather than with any convention of judges or of judges and practitioners. In New Jersey, Colorado, Alabama and Michigan the Supreme Court alone has the power, and in each of these states the bar has had a large if not controlling influence in framing the rules. In England, Ireland, and Canada, the power is exercised by a committee of the Supreme Court and of chosen practitioners. In framing the

Recorder (San Francisco) for August 19, 1916. The Ohio Bar Association, at its 1916 meeting, gave extended consideration to the proposal and approved it. 61 Ohio Law Bulletin 241.

new equity rules in 1913, the Supreme Court of the United States appointed a committee of its own members and this committee sought the cooperation of practitioners from each of the circuits.

Another question arises as to the extent of the power to be conferred upon the Supreme Court. Shall the legislature put the entire subject of court procedure in the hands of the Supreme Court, or shall it enact a short practice code laying down general principles and prescribing the general outlines of practice to be followed, but leaving the details to be fixed by rules of court? In 1912 the committee of the Missouri Bar Association recommended the latter course. In 1913 the committee recommended the repeal of all statutes relating to pleadings, the amendments of pleadings, issues, continuances, trials, new trials, arrest of judgment and bills of exceptions, and the substitution therefor of court-made rules. This recommendation would leave a shorter practice code than we now have, but it would continue to deal with various matters of detail. Both committees based their suggestions on the New Jersey Act. It would seem more desirable to follow the Colorado, Alabama, Virginia and English practice in conferring on the Supreme Court the larger power to deal with procedure without restriction; but for a beginning and until the general acceptance of the principle of judicial control has been vindicated by success, it may be expedient to retain a statutory frame-work. The few principles which ought to be beyond court control may easily be summarized, and they are for the most part contained in the constitution itself.

As the proposal is usually framed, it does not include the suggestion that the regulation of all appellate procedure be left to rules promulgated by the Supreme Court. For the most part, each of the four appellate courts in Missouri now controls its own procedure by rules of court and tho uniformity in some details is lacking, no serious inconvenience results. The Supreme Court will, if necessity arises, pass on the propriety of a rule of a court of appeals, for this seems to be a part of its "general

superintending power," and little advantage would be gained from the uniformity which might ensue from its larger control. But since many cases are carried from the courts of appeal to the Supreme Court, it seems desirable that the latter's rules of appellate procedure should prevail in all the appellate courts.[85] The Code Commission of 1914 recommended an amendment of the present statute looking toward this result.[86]

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85. In *Wolf* v. *Harris* (1916) 184 S. W. 1139, an appeal was perfected to the Kansas City Court of Appeals which transferred the case to the Supreme Court. The rules of the latter court concerning the perfecting of appeals had not been complied with, but the court said it would not scrutinize too closely "lest an appellant caught unwittingly between their rules and ours should be pinched out of any appeal at all."

86. See the report of the Missouri Code Commission of 1914, p. 60, proposing a substitute for Revised Statutes 1909, § 2049.