Washington University Law Review

Volume 22 | Issue 2

January 1937

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FROM COMMON LAW RULES TO RULES OF COURT

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After almost a century of practice and procedure fixed by statutory codes, this country is about to witness an experiment of nation-wide scope in regulation of these matters by court made rules. The Supreme Court of the United States has assumed responsibility, upon request and authorization of Congress,[1] for making rules of practice and procedure in civil cases for all federal courts. The committee, appointed by the court to prepare these rules, presented its preliminary draft for discussion at the 1936 session of the American Bar Association.[2] This great undertaking makes it worthwhile to consider how these matters came to be so minutely regulated by legislative codes; and what attempts have been heretofore made to regulate them by court made rules.

Our practice and procedure, as well as our substantive law, came to us as a part of the common law of England. It seems to be the popular impression that common law procedure was judge made procedure. It was, in fact, neither a set of rules made by courts nor a code adopted by a legislative body. Instead, it was a conglomeration of legislative enactments, rules and orders of courts, ancient usages, and judicial decisions; the haphazard growth of six centuries. Because it was a patchwork which had been patched until it could not be made suitable for modern conditions by more patching, it was finally superseded, about the middle of the last century in most American jurisdictions, by statutory codes fundamentally changing the whole system. Because the legislatures in this country, which enacted these new codes, retained the exclusive right to make any changes therein, our codes have remained to this time substantially the same as then enacted. In England, although agitation for law reform had been going on since the beginning of the century, the same fundamental changes did not come until about twenty-

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1. 48 Stat. 1064, 28 U. S. C. A. secs. 723 b and c (1934).
2. See 22 A. B. A. Journal 780 (1936).

five years after the first procedural codes had been adopted here. A statutory code of procedure was finally adopted there, as part of the Judicature Acts of 1873 and 1875[3] but these acts gave to the Supreme Court of Judicature the power to change this code, and the result is that the original codes have been greatly changed and improved.[4]

It is now being urged that our courts may change our procedural codes without legislative authority. Whether this is true or not, consideration of the English governmental system makes it immediately apparent why an act of Parliament was necessary before English courts could have power to change statutory rules of practice and procedure. Under our state and federal Constitutions providing for separation of governmental functions into three coordinate branches, whether the judicial department has this power, without the consent of the legislative department, is at least a different question. Following the precedent of the English Parliament, American legislatures have always exercised authority to make or change procedural rules, and it is not the purpose of this article to discuss its constitutional basis.[5] The history of English procedure does, nevertheless, give us some light both upon inherent powers of courts in this field and the advisability of having them assume this responsibility.[6]

I

The governmental theory of the early Norman kings of England was very simple. "The will of the Prince was the law of the land."[7] Prior to Magna Charta, all governmental powers, executive, legislative, and judicial, could be directly exercised by the King. He was the final court of justice and, of course, his power to prescribe rules of practice and procedure in his courts was unquestioned. He appointed justices to act in his name because it was too great a burden for him to hear all cases. Magna Charta was partly due to dissatisfaction with the way King John conducted his courts, and it contained several provi-

3. 36 & 37 Vict. chap. 66 (1873); 38 & 39 Vict. chap. 77 (1875).
4. Higgins, English Courts and Procedure (1923) 7 Amer. Judicature Soc. Journal 185.
5. For a recent discussion see 1 U. of Mo. L. Rev. 261 (1936).
6. For a recent discussion see Tyler, Origin of the Rule Making Power (1936) 22 A. B. A. Journal 772.
7. 3 Green, *History of England* (1900) chap. 1.

sions concerning that subject.[8] Magna Charta limited the King's powers by bringing another body into the picture; a council, which the King agreed should be asked to give its consent to certain measures (the principal one mentioned was taxation) before they could become effective. This was the origin of that historic legislative body, the Parliament of England. Magna Charta did not grant the King's legislative power to Parliament (as does section 1, article I, of the Constitution of the United States); but the King only agreed not to exercise certain of his legislative powers without its consent. The distinction between governmental powers was probably not even thought of at the time of Magna Charta. However, through intervening centuries "the King in Parliament was established by the English common law as the English Legislature."[9] That is still the theory, if not the actual practice, of the exercise of legislative power in England.[10] Parliament is now perhaps more like a continuous constitutional convention than it is like our legislatures. Parliament also gained the right to require that the King obtain its consent, or the consent of its representatives (which it came to appoint as the King's advisors), in the exercise of his executive and judicial powers, so that finally all government powers were, in fact, exercised only with the advice and consent of Parliament. One House of Parliament still is the court of last resort to settle all questions of law, so naturally the courts get their authority from this source.

Perhaps the worst of the complications of the common law system were the numerous forms of actions. These originated from the ancient requirement of obtaining an original writ out of Chancery stating the nature of the plaintiff's claim, before any suit could be commenced. Blackstone says this was deemed

8. Section 17 provided that common pleas should not follow the king but could be held at a certain place so that people would know where to find the court (pursuant to this provision it was established at Westminster); sections 18 and 19 required regular holding of Assizes in every county four times a year and provided that the session should not end until the business was disposed of; and section 40 contained the famous provisions which prohibited selling, denying, or delaying justice to any man.

9. Dixon, The Law and the Constitution (1935) 51 Law Quarterly Rev. 590.

10. Acts of Parliament still recite: "*Be it enacted by the King's Most Excellent Majesty*, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same."

necessary since "it was a maxim introduced by the Normans, that there should be no proceeding in common pleas before the King's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the Crown, should take cognizance of anything but what was thus expressly referred to their judgment."[11] Therefore, plaintiff's declaration had to be based upon the statement in the original writ. Westminster II[12] made provision for framing new writs to provide for new situations, and the number of forms of action continued to grow. It is said that the early judges were not interested in preventing the increase of forms because in those days they were paid fees according to the number of suits, and by technical construction preventing joinder of similar or related claims into one action they increased their compensation. This demonstrates the necessity of intelligent and faithful administration to make any system work.

In spite of the constantly increasing influence of Parliament, the King's power to appoint judges and remove them at his pleasure lasted until after the overthrow of James II in 1688. During that period, we might have expected to find the courts making all procedural rules. While many such rules were established by court orders and decisions, it is really surprising to find how much of common law procedure was statutory and how early Parliament did enter this field. Chronological Tables of Statutes, Rules and Orders, and cases, which made up common law procedure,[13] show that very soon after Magna Charta, Parliament began to provide rules of practice and procedure by statute. It was soon established that no rule or custom of procedure could prevail against a specific Act of Parliament. "After 1688, no claim was made that any rules of the common law were too fundamental to admit of change."[14] Some procedural statutes were even passed during the reign of King John's successor (his son Henry III); and during the reign of his grandson Edward I, Parliament enacted important procedural statutes, which have remained basic rules of procedure even in America down to our day. Westminster II,[15] among other things, provided for

11. 3 Blackstone's, *Commentaries* (1872) 274.
12. 13 Edw. 1 (1285).
13. See Tidd's *Practice.*
14. Supra, note 9, at p. 593.
15. 13 Edw. 1 (1285).

bills of exceptions as a means to bring matters, not shown by the record proper, before an appellate court, thus making it possible for the first time to obtain appellate review of errors occurring in the course of a trial. Although with modern methods of court reporting, this ancient method is an unnecessarily cumbersome way to make up a record bringing up the trial court's rulings for appellate review, it is interesting to note that Missouri still uses this method of 1279 as the only way to complete the record for appeal.[16] Section 1008, R. S. Mo. 1929, is strikingly similar in language to that passed more than six centuries ago when Edward I ruled England.[17]

The technical rules of bills of exceptions have many times resulted in failure to obtain appellate consideration of important matters on their merits. Especially was this true before 1911 when the present section 1009, R. S. 1929, was amended to permit the allowance of bills of exceptions in vacation at any time prior to the time required by appellate court rules for service of abstracts.[18] When this amendment was made the Legislature declared an emergency to exist due to the fact "that many judgments are affirmed from time to time because the bill of exceptions in the actions in which such judgments are rendered are not filed within the time allowed by the trial court and are not considered upon the merits." It would seem that this emergency might have justified the more drastic remedy of abolishing bills of exceptions. They had, long prior to that time, been abolished in England by the Judicature Act, and the simpler method employed there of appeal by merely giving notice and filing in the appellate court copies of pleadings, documents and evidence. Order 58,[19] provides: "Evidence taken in the court below (orally) * * * shall, subject to any special order, be brought before the Court of Appeal * * * by the production of the judge's notes, or such other materials as the court may deem expedient." Writs

16. Spotts v. Spotts, 331 Mo. 917, 55 S. W. (2d) 977 (1932).

17. 13 Edw. 1: "If the party write the exceptions, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals etc." 2 Tidd's, *Practice* 852. R. S. Mo. 1929 sec. 1008: "Whenever either party shall write his exception and pray the court to allow and sign the same, the person composing the court shall, if such bill be true, sign the same"; as first enacted almost the identical language of the Statute of Westminster II was used, see Vol. 2, R. S. Mo. 1825, p. 631.

18. Law of Mo. 1911, p. 139.

19. Statutory Rules and Orders, Rev. vol. 7.

of error, the only common law method of obtaining appellate review, were likewise abolished in England in 1873. This is another even more ancient relic, still authorized by the laws of Missouri, which has now little but historical reasons for continued existence. Nevertheless, our status continue to carry an elaborate code of rules for the use of writs of error.[20] Surely a party should be able to decide whether he desires to appeal, within a month after final judgment is rendered, but, under our practice (because of the right to commence further proceedings by writ of error), actual finality of all judgments is delayed for a year, even though no appeal is ever taken.

The vitality of old methods to continue existence, and their resistance to change by legislation is remarkable. Procedural rules come to be looked upon as vested rights for purposes of delay and strategy, instead of means for facilitating the dispatch of business. The personnel of a legislature changes with every session; time is short and there are many problems before them which seem to require more immediate consideration; so it is not difficult to postpone action on such matters as procedure. We should, therefore, be able to understand to some extent why the struggle for law reform, in England, began earlier and took longer than it did in this country. No doubt because England became a great commercial and industrial nation before we did, the inconvenience of delay due to inadequate procedure was noticed sooner, but forces in opposition were well organized and had been long entrenched.[21] We started with a new system of courts in a new country and they were not immediately congested.

Our own state was the second in America to adopt a legislative code of procedure. Some idea of the inconvenience and delay resulting from the adherence to common law forms of actions, both in England and America, may be gained from a statement made in 1848 by Judge R. W. Wells in his successful effort to urge the Missouri Legislature to adopt the New York code. It was, as follows:

> "The old system of actions at law abounds in contradictions and absurdities. Thus you have a promissory note; it

20. R. S. Mo. 1929, secs. 1034-1053.
21. See Sunderland, English Struggle for Law Reform (1926) 39 Harv. Law Rev. 725.

has something like a scroll, by way of seal. You sue in assumpsit, and allege what is always required to be alleged in assumpsit, that the defendant *promised* to pay you the amount of the note. Now every word of your declaration may be *true* and present an undeniable cause of action; yet the court will tell you this flourish near the signature is a scroll by way of seal. You cannot sue in assumpsit; it must be *debt.* You should not have said that the defendant *promised* to pay you, which to be sure is the exact truth, but that he was *indebted* to you. * * * Let me amend my declarations and put it right. O no! the system will not permit it; you must go out of court, pay all the costs and begin anew. In many actions, if you tell nothing but the truth, you cannot recover, although you have an undoubted cause of action. You must tell a falsehood or your declaration will be bad! Thus, in assumpsit, you must state a *promise* to pay, although there was none: In Trover, that you lost the property, and it came to the possession of the defendant by *finding,* none of which is true. In trespass, that the injury was committed with *force and arms;* although there was nothing of the kind used. In these cases, the truth would not answer at all. * * * Then come the distinctions between law and equity. If you mistake here, either as plaintiff or defendant, nothing can save you. If you are sued at law, and have an equitable defence, you must let judgment go against you and pay all the costs, and then bring a suit in Chancery. * * * Almost every suit of any importance has to go through both law and equity."[22]

Whatever may be said about our code it is far better than the common law system. Perhaps the earliest legislative attempts to allow the merits to prevail over the technicalities of common law procedure were the Statutes of Jeofails. By one of the first of such statutes (18 Eliz.), the want of an original writ was aided after verdict. By 21 Jac. I, a reversal was not required for variance in form only between original writ and declaration.[23] Early in the nineteenth century, the efforts of Bentham, Brougham, Dickens and many others gradually produced results in England. The pressure for improvement came from the public rather than from the bar.[23a] The first attempt brought about the Hillary Rules of 1834 providing for simplification of pleading.

22. Wells, *Law Reforms, Pleadings and Practice,* 90-91.

23. For a History of these and later statutes see 2 Tidd's *Practice* 823; as to recognition of right to amend see 1 Tidd's, *Practice* 697.

23a. Supra, note 21.

These rules were made by the judges of the Superior Courts and laid before Parliament, but, after receiving its sanction, they were considered statutory.[24] Further progress was made by the common law procedure acts of 1852 and 1860.[25] But a real remedy was not found until the Judicature Act of 1873 consolidated Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce, Bankruptcy and other courts into the Supreme Court of Judicature with both trial and appellate divisions. This act also adopted a code of procedure which like our American codes abolished forms of actions and the distinctions between actions at law and suits in equity. But this code of procedure instead of regulating every detail of procedure left much to be filled in by court rules. More important still, it provided that the rules of practice enacted could be "annulled or altered" by the new court. Limitations on making rules by the court were that "any rule made in the exercise of this power, whether for altering or annulling any then existing rule, or for any other purpose shall be laid before both Houses of Parliament"; that either House by majority vote within 40 days could have any rule annulled; and that no rule should change the mode of oral examination of witnesses, rules of evidence or the laws concerning juries.[26] The court was likewise authorized to make rules for "practice and procedure in all criminal causes."[27]

In 1875 the Judicature Act was amended and a new and much more comprehensive code of procedural rules, with model forms for pleadings, was adopted. It was, however, clearly stated that these rules and all others whether made before or after the act might "be annulled or altered" by the court, but concurrences of the Lord Chancellor, Chief Justice, other designated presiding judges of divisions, and Justices of Appeal were required rather than only a majority of the judges, as provided by the 1873 Act. It was evidently soon found that it was not satisfactory to place the function of rule making entirely upon judges. Rules are now made by a Rules Committee composed of the Lord Chancellor, Chief Justice, Master of the Rolls, President of the Probate Division (which also has jurisdiction of Divorce and Admiralty)

24. 1 Tidd's, *Practice* 675, note 1.
25. 2 *Blackstone* (Cooley's ed. 1872) 1194-5 note.
26. Secs. 68-74 Judicature Act.
27. Sec. 71, Judicature Act.

four other judges of the Supreme Court, two practicing barristers who are members of the Bar Council, and two practicing solicitors. The last eight are appointed by the Lord Chancellor, who with four other members may make rules. Rules must still be laid before Parliament and may be annulled as provided in the original act.[28] It is said that no rule has ever been so annulled.

The first complete code promulgated as Rules of Court was completed in 1883. They have been amended and added to by subsequent sets of rules, but many of them are still in force as then written. The Consolidation Act of 1925 (15 and 16 Geo. V) brought all legislation since 1873 into one act with such changes as were deemed necessary. The Criminal Justice Act of 1925[29] provided similar improvements in the organization and functions of the criminal courts. It is significant that not only was the rule making power, both for civil and criminal cases, continued in the Rules Committee, as above composed, but provision was also made for a council of judges to meet and report annually "on what amendments and additions they think expedient for the better administration of justice." This council is charged "to consider the operation of the Supreme Court of Judicature Consolidation Act, 1925, and the rules of court and the working of the offices of the Supreme Court, and to inquire into any defects which may appear to exist in the procedure of or administration of law in the High Court or the Court of Appeal, or in any inferior court."[30] Thus England not only has provided means for promptly making needed changes in procedure but has now required also regular and frequent investigation to determine such need. Who should be better qualified to perform these functions than lawyers and judges who work by these rules all the time?

It must not be assumed that the method of regulating practice by rules of court was immediately satisfactory to everyone in England, or that all evils were cured at once. It takes time and lessons from experience to make any system work well. The reason that this method will work well is not that courts make no mistakes in regulating procedure by rules but that they have the means of knowing when they have done so, by daily contact with

28. Supreme Court of Judicature Consolidation Act of 1925 (15 & 16 Geo. V); 8 Halsbury's, *Laws of England* (2nd ed. 1933) 595.
29. 15 & 16 Geo. V. c. 86.
30. 8 Halsbury's, *Laws of England* (2nd ed. 1933) 594.

the working of the rules, and they have the power to correct mistakes, as soon as they are observed, by changing rules. After the new system was established, many felt as did one English lawyer, who said: "The only thing I ever knew was special pleading, and the moment I had learned that, the law reformers went and abolished it."[31] In an English work on evidence in 1884, Taylor, a former English Judge, said: "The fusion of law and equity, which was to overthrow such a phalanx of abuses, and to frustrate so many knavish tricks, has resulted not only in confusion, but, to use the vigorous language of our blind bard, in 'confusion worse confounded'."[32] Cooley even quotes Sir Frederick Pollock, the great English law writer, as saying in the early nineties "that for several years (after fusion of law and equity) the latter state of the suitor was worse than the former"; and that "repeated revision of the rules of court and some fresh legislation was needed before the reconstructed machine would work smoothly."[33] The thing that should not be overlooked is that when these conditions developed there was the means at hand to do something about it, *and it was done.*

How well this was done can be better judged now, after sixty years' trial, than was possible in the nineties when it had been in operation for only one-third of that time. Certainly it can now be said that much has been done to eliminate delay and to save judicial time, from construction of procedural technicalities, for the consideration of the merits of cases. It is not possible, without making this discussion too long, to go into the details of the code now in operation there, but the following outstanding features, which show how this is done, might well be mentioned.

First: Trial judges are not required to waste court time for attacks on pleadings, default judgments, or for proof of formal matters, and other details that tend to delay and prolong trials. This is accomplished by proceedings before masters who dispose of cases in which no trial is necessary and narrow the issues to be heard in cases which must go to trial. Some of the methods employed are:

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31. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 17.
32. 2 *Blackstone* (Cooley's ed. 1872) 1196 n.
33. For a failure of judges to agree upon what some of the early rules meant, which was at first not unusual, see Haunay v. Smwithwaite, 69 L. T. N. S. 677 (1893).

(a) *Simplification of Pleadings.* While pleadings must state sufficient ultimate facts to make a case, or a defense, simple forms are provided to eliminate unnecessary details, and prolixity or other violation of the rules may be penalized by assessment of costs. General denials are not permitted and a party "must deal specifically with each allegation of fact of which he does not admit the truth."[34] Demurrers are not allowed, but a case may, by leave, be set down for trial on the pleadings.[35] These rules of pleading are very effective in eliminating dilatory pleas or concealment of real issues, and tend to materially reduce the disputed issues to be tried. Rules authorizing imposition of costs upon a party who either asserts or denies a fact without any reasonable basis therefor, go far to prevent smoke screens of false issues for strategic purposes.

(b) *Disclosure and Discovery.* Orders specifying the disclosures required are made by a master, after a conference with counsel on what is known as Summons for Directions. These include admission of facts, formally in issue, but not actually disputed (unreasonable refusal to admit them will be penalized by assessment of costs of proof); production of documents for inspection; information as to documents not in the possession of the parties; and examination of witnesses as to material facts (similar to our Missouri deposition practice).[36] As to the results of these preliminary preparations for trial, Professor Sunderland of Michigan University, after a study of English procedure, said: "With the facts on each side mutually understood by both parties when the trial opens, leading questions no longer become objectionable on many features of the case and the witness is brought at once to the point in controversy * * * the necessity for cross examination is greatly reduced, * * * formal admissions of facts, and answers to interrogatories, eliminate many features of the case which with us would call for extensive proof, * * * there is no occasion for that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist on every objection, * * * which not only prolongs and complicates the

34. Higgins, English Courts and Procedure (1923) 7 Amer. Judicature Soc. Journal 185 at 209-217.

35. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 17.

36. 23 Halsbury's, *Laws of England* (1st ed. 1912) 143, 145; 7 Amer. Judicature Soc. Journal 217-220 (1923).

trial, but helps to make the outcome of an American lawsuit turn as much upon the skill of counsel as upon the merits of the case."[37]

(c) *Summons for Directions.* An ordinary action in King's Bench or Chancery is commenced by writ of summons, prepared by plaintiff's solicitor, sealed by the proper officer, and indorsed with a statement of the nature of the claim made or relief sought.[38] After service or acceptance, defendant makes appearance, which may be conditional or unconditional, usually within eight days although more time may be given.[39] At one time a Summons for Directions could be had before pleadings, but since 1932 plaintiff usually delivers his statement either with the writ or within ten days after appearance thereto, and defendant delivers his defense within fourteen days after appearance or receipt of plaintiff's statement. Plaintiff may within seven days thereafter deliver a reply.[40] The Summons for Directions is usually the next step, and by it the parties are notified to appear before a master who may then make orders in the case concerning the following matters: Pleadings, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial, and any other interlocutory matter.[41] The parties informally come before the Master, talk over the nature of the case and the procedural steps they think necessary to bring it to an issue. He makes the required orders. How much time in court can be thus saved is apparent.

Second: Great benefits accrue to the commercial community, as well as a saving of judicial time, from having machinery for prompt collection of debts in cases where the claim is not actually controverted. The means is provided for getting an immediate judgment on such a claim without delay or expense. When there is no appearance this is done by allowing default judgment to be entered by a master. If defendant does appear, plaintiff may file affidavit stating the facts of his claim and his belief that there is

37. Sunderland, An Appraisal of the English Procedure (1925) 50 A. B. A. Reports 242, 248.
38. 23 Halsbury's, *Laws of England* (1st ed. 1912) 109-110.
39. 23 Halsbury's, *Laws of England* (1st ed. 1912) 124.
40. Supra, note 31, at p. 18-19.
41. 23 Halsbury's, *Laws of England* (1st ed. 1912) 136; 7 Amer. Judicature Soc. Journal 204 (1923).

no defense. He may then have summary judgment unless defendant can make affidavit showing a fair probability of a real defense. Generalities, conclusions and sham defenses for delay are of no avail. However, if a master refuses leave to defend, defendant is protected by the right to appeal to a judge in Chambers. If the judge grants leave, plaintiff cannot appeal and the case proceeds for trial, but if he refuses it, defendant can still appeal to the Court of Appeals. Those appeals are immediately decided.[42] This speedily disposes of a great number of cases seeking only to put in operation the legal machinery for collecting debts.

Third: A remedy is provided for immediately determining rights dependent upon the construction of deeds, wills, contracts, and statutes by Declaratory Judgments settling the rights of parties before they have acted thereunder and before any damage has been sustained from such action. Concerning this practice, Professor Sunderland has said: "The service rendered by the courts under the declaratory judgment practice is quite analagous to that rendered by modern hospitals which diagnose and treat diseases in their incipient stages and thereby prevent the development of more dangerous conditions. So useful and effective has this practice become in England that several judges of the High Court are frequently engaged simultaneously in making declarations of rights, and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work can be done.[43] Since our last Legislature adopted a Declaratory Judgments Act[44] precedents and procedure therefore under the English practice should now be of particular interest to Missouri lawyers.

Fourth: The conduct of a trial is under the control of a judge, who has life tenure, and who, although chosen by the leaders of his political party in control of Parliament, is selected only if he has really demonstrated legal ability. Englishmen believe the judge's control is impartially exercised for the purpose of finding

42. 23 Halsbury's, *Laws of England* (1st ed. 1912) 134: Sunderland, supra, note 37, at 244; 7 Amer. Judicature Soc. Journal 223; 51 Law Quarterly Rev. 15 (1935).

43. Supra, note 37, at p. 246.

44. Laws of Mo. 1935, p. 218. See for discussion Note, Declaratory Judgments with Recent Missouri Developments (1935) 21 ST. LOUIS LAW REVIEW 49.

the truth of the controversy so that the merits may prevail. This belief is shown by the fact that most civil cases there are now tried before the court without a jury.[45]

Fifth: The rules of procedure are flexible. They not only can be changed by the method authorized by Parliament, but they are meant to be applied according to the circumstances of the case. Discretionary powers are granted to the judges throughout the rules to give special leave for additional time and to allow amendments; and it is provided that "non-compliance * * * with any rule of practice * * * shall not render any proceedings void unless the court or judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."[46] Violation of procedural rules does not prevent a consideration on the merits but may bring assessment of costs as a penalty. Costs do not follow the result of the case, but are awarded as the court deems to be proper.

Sixth: Appeals are promptly heard and decided. New trials are few and can be granted only by the court of appeal and they may be limited to specific issues instead of a retrial of the whole case. Writs of error, bills of exceptions, and assignments of error have been abolished. Written or printed briefs are not required and appeals are heard, on copies of the records of the trial divisions, upon oral argument and the decision is usually announced then and there. The trial and appellate divisions are part of the same court and sit in the same court house, except where cases are heard in assizes or county courts, but since there is no local venue of actions, most important civil cases are tried in London. Order 58[47] provides that all appeals "shall be by way of rehearing" on "the whole or any part of any judgment or order * * * whether final or interlocutory"; that the appellate court has "discretionary power to receive further evidence upon questions of fact"; ("without special leave upon interlocutory applications" but "upon appeals from a judgment after trial * * * on special grounds only and not without special leave"); that the court of appeal shall have power to draw inference of

45. See secs. 99-101 Consolidated Act of 1925, 15 & 16 Geo. V.
46. Order 70, 7 Statutory Rules and Orders Rev. 179.
47. 7 Statutory Rules and Orders Rev. 142.

fact and to give any judgment and to make any order which ought to have been made"; and that "such powers may also be exercised in favor of all or any of the respondents or parties although such respondents or parties may not have appealed." The court of appeal, therefore, has supervisory power over the trial divisions at all stages of the case and this provides safeguards against arbitrary or erroneous action before rights are prejudiced thereby. Furthermore, the purpose of appellate review after judgment is to afford a full rehearing on the merits and end the case. A complete new trial of a case once tried is very unusual. Of course a system of appeals from all interlocutory orders grafted onto our present system would result here in endless delay. It does not do so under the English system because such appeals are quickly decided on summary hearing and because unreasonable appeals are penalized by assessment of costs. The English bar has been educated not to attempt to gain advantage by mere delay.

An idea of the kind of procedural system, that the English method may ultimately make possible, can be gained from a statement, which the writer heard made by Lord Wright, Master of the Rolls (as such he is presiding judge of the Chancery Division of the Supreme Court of England, and a member of the Rules Committee), at the Harvard University Law School's recent conference on the Future of the Common Law. He said, in substance, that it was now hoped that the rules could soon be further simplified and rewritten; that the courts could then stop taking any space in opinions to discuss the construction and application of procedural rules; and that they would work smoothly enough so that it would only be necessary for members of the bar to become familiar with how the court applied them, through experience in their practice. Thus procedural rules would truly become working tools of lawyers to bring controversies to prompt decision on the merits, rather than (as some of ours have become) obstacles to overcome before they can get their cases decided. It seems to an American lawyer that much progress has already been made toward this goal. A comparison of points of law decided in recent English cases, with those ruled in cases in any jurisdiction in this country, very strikingly shows that procedure is now rarely discussed in English decisions, but that

our books are filled with rulings upon how our statutory procedural rules are to be construed and applied.

II

The writer does not hold the opinion that the English system is perfect, or that everything which works well there would necessarily do as well here. Nevertheless, a system of procedure which does work well in a great commercial and industrial nation, where the fundamental principles of our laws and institutions were developed, is worthy of our examination and study, especially in view of increasing dissatisfaction with our own. We may justly say that England did not have satisfactory procedure for modern times until she came to us for the idea of abolishing common law forms of action and removing the distinctions between law and equity. We may now well consider whether the method adopted there, of procedural rules made by courts (or councils or committees under their guidance and control), will better enable our system of code pleading to be brought up to date and to continue in the future to keep pace with the times, so that it will function efficiently in the increasingly intricate and changing conditions, created in business and industry by modern science and invention. The English people, during the last six centuries, have perhaps endured about as much bad government as any other people, but they have to their credit much worthwhile accomplishment, in modern good government, due to ability to learn from their experience, and we could profit by it too. A recent English review of their own system points out these results: "That of every hundred actions commenced by a writ in the Supreme Court only one comes to trial"; that "the other ninety-nine" by means of the interlocutory administration of details by masters "undergo a process of elimination"; and that this method usually disposes of cases without a trial in one of the following ways: "The defendant * * * may pay out on the writ"; the case may end because disclosure may reveal that "defendent may have no defence" or "plaintiff no real case"; or "parties may come to terms" because "Master or Judge suggests a *via media* which leads to the amicable settlement of the action."[48] To waste judicial time by dilatory tactics intended

48. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 23.

only to delay action, in cases which could be thus disposed of, in an economic loss to everybody.

It cannot be fairly denied that during the last quarter of a century, many new problems arising from modern industrial and urban conditions have been unable to get quick and efficient treatment in our courts. Because of popular demand for a forum for prompt settlement of these new questions, new administrative tribunals have been created. It is indicative, of the popular attitude toward the ability of lawyers and courts to dispatch business promptly by the methods they have been using, that members of these new tribunals are not usually required to be learned in the law, and that they are allowed to determine their own procedure. Laymen are authorized to decide questions of law and determine facts without requiring that they be guided by knowledge or instructions concerning the law. Usually their determination of facts is made binding upon courts in whatever judicial review is provided, so that there is no appeal from or review of decisions of these laymen as to many ultimate facts, in the determination of which the application of rules of substantive law are necessarily involved. Many relations of employer and employee, public utilities and their customers, railroads and shippers, and rights and duties of other agencies of transportation have been largely removed from the courts. Measures are being proposed to also place in the hands of law administrative bodies such matters as injuries caused by operation of motor vehicles, labor relations, insurance, and many other problems of commerce, industry and agriculture. This development has only begun. Where it will lead to we cannot know.

It is especially worthy of notice, that acts creating such administrative tribunals usually emphasize the provisions that hearings shall be simple and summary and that these bodies shall have the power to make their own rules of practice and procedure. In our Workmen's Compensation Commission Act,[49] provides: "All proceedings before the Commission or any commissioner shall be simple, informal and summary. * * * Except as herein otherwise provided, all such proceedings shall be according to such rules and regulations as may be adopted by the Commission." In our Public Service Commission Act,[50] provides:

49. R. S. Mo. 1929, sec. 3349.
50. R. S. Mo. 1929, sec. 5144.

"All hearings before the Commission shall be governed by rules to be adopted and prescribed by the Commission." Similar examples will be found in other states and in Federal legislation.

Why do not legislatures, in creating administrative tribunals, provide them with a complete statutory code of practice and procedure? Undoubtedly it is because they do not want to hamstring and delay their action, impair their efficiency, and limit their ability to promptly determine the merits of questions entrusted to them for solution. Why then are the courts kept in strait-jackets of strict statutory procedural codes which provide so many means for delaying and evading a determination of the merits of cases? Surely lawyers and judges are not less capable than laymen of making rules of procedure, which will make possible prompt determination of cases on the merits. At least they have shown, in England, that they can do so when given the opportunity and responsibility.

Let it be recognized that the adoption of our statutory codes marked a tremendous advance, although they carried over and continued many ancient common law practices. Their great defect was that, in failing to provide adequate means for improvement, they froze the rules of practice and thereby lost the opportunity to continue that advance so well begun. Procedural codes made for conditions of the times of circuit riders of the eighteen forties could not be expected to function, in all respects, for prompt and efficient dispatch of business under modern urban industrial conditions. Rules of substantive law, which establish fundamental rights and determine the principles upon which they are based, determine *what rights* an individual shall have. They should not be changed without most careful and extended deliberation and then only when such a change is a vital necessity to prevent future injustice to others. Rules of procedure only determine *how and when* a dispute about such rights shall be brought to an issue. Whenever a rule operates to prevent bringing such a dispute promptly to an issue it ought to be abolished. Whenever a rule can be improved to bring the disputed question to definite issues in a clearer way within a more reasonable time it ought to be amended. It is often a complete denial of the benefit of a substantial right to unduly delay a decision concerning it, because changed conditions may make the right valueless before it can be established.

New means of communication and transportation have speeded up all business, and new procedural methods are required to promptly transact the great volume of judicial business arising from these new relations and new conditions of today. There would be more legal business for lawyers to transact if this could be done, because unquestionably the surest way for lawyers to have more business is for courts and lawyers to handle business that comes to them promptly and efficiently. People will not tolerate forever any system which delays unreasonably the determination of questions they seek to have decided. If courts do not function without vexatious delay, they will find means to have them decided outside of the courts. Surely, lawyers ought to see that what is in the public interest is in their own interest. Surely, if this matter is given intelligent consideration, both lawyers and laymen would see, from its results in England and its adoption in our federal courts, that regulation of practice and procedure by rules of court is worth a trial in our state courts. Of course the details of a system fitted to our needs would differ from those of England where ten times the population of this state live in an area little more than half its size. If both lawyers and laymen desire that it be tried, it will not be difficult to devise either the means of putting it into operation or the broad outlines to be followed in its development. Will our bar lead such a movement for improvement, or will it overlook this great opportunity for leadership toward worthwhile accomplishment to fulfill a pressing public need?