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SUGGESTED CHANGES IN MISSOURI CIVIL PROCEDURE¹

"Every lawyer knows that the continued reversal of judgments, the sending of parties to a litigation to and fro between the trial and appellate courts, has become a disgrace to the administration of justice in the United States. Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves to tangle justice in the name of form. It is a disgrace to our law, and a discredit to our institutions."

ELIHU ROOT.²

It has long been generally recognized that, in many respects, Missouri civil and criminal procedure has become antiquated. The chief ground of complaint is that this system of court procedure causes unnecessary vexation, delay, and expense to the citizens and to the state.

The present civil code was adopted in 1849. Starting with 273 short sections it has grown by amendments and additions to nearly 1000 sections,⁴ some of which are of great length and cover many subjects. The code has, however, in substance remained the same, with the exception of a few improvements. The legislature even during the revision sessions has never had time to make a general revision. Since no other body has had the authority, no general revision has ever been attempted.

The present code, although antiquated, has many good features. Criticism has most frequently been levied against its rigidity, its invitations to delay, and its many pitfalls. It has further been contended that the code places undue importance on the "record proper" with the result that in many cases the proceedings de-

1. The writer wishes to acknowledge his indebtedness to Col. Arthur Freund, a member of the Missouri Bar, for his invaluable aid in the preparation of this note. The following materials have also been freely consulted and liberally used: Hudson, Proposed Regulation of Missouri Procedure by Rules of Court (1916) 13 Mo. Law Bull. 3; Pound, Regulation of Judicial Procedure by Rules of Court (1915) 10 Ill. L. Rev. 163, 2 A. B. A. J. 46; Morgan, Judicial Regulation of Court Procedure (1918) 2 Minn. L. Rev. 81; Perkins, Remedies in Court Procedure (1914) 12 Mich. L. Rev. 362; Procedure Through Rules of Court (1917) 1 J. Am. Jud. Soc. 17; Pound, Reforming Procedure by Rules of Court (1913) 76 Central L. J. 211; Rosenbaum, Studies in English Civil Procedure (1914) 63 U. Pa. L. Rev. 103, 151, 273, 380, 505; Williams, The Source of Authority for Rules of Court Affecting Procedure (1937) 22 WASHINGTON U. LAW QUARTERLY 459.

2. 15 J. Am. Jud. Soc. 117, 119.

3. The Act was passed by the General Assembly of Missouri on Feb. 24, 1849. See Mo., Laws of 1848-1849, 73. See also Clark, *Code Pleading* (1928) 19; 1 Clark, *Cases on Pleading and Procedure* (1930) 25, fn. 12.

4. R. S. Mo. (1929) secs. 696-1647.

volve into a trial of the "record" instead of the cause upon its merits.⁵ Finally it has been argued that the present system permits too much retrial, and too many trials based on non-meritorious issues and defenses. The result of all this is said to be that trials take longer and cost more in Missouri than in most other states. Whether this is true or not, it cannot be denied that our system tends toward excessive and unnecessary accumulation of costs and extension of time required for trials. On a careful consideration of many of the present statutory provisions, it will be found that some of them can be either modified, entirely eliminated, or other simpler provisions adopted in their place so as to expedite the progress of trials and lessen the expense of litigation.

SITUATIONS ILLUSTRATIVE OF THE NEED FOR CHANGE

The Missouri Constitution declares that justice shall be administered "without sale, denial or *delay*."⁶ At least three or more years generally elapse between the time a contested suit is first instituted and the time in which an ordinary litigant can reasonably expect a final decision of his case in the highest court in this state. If there is a reversal and a remanding for trial, the whole process must be repeated, with the result that the litigation may be extended to six and even ten years. In many instances, this delay is said to amount to an absolute denial of justice. The result has been a general loss of public respect for our entire judicial system. This criticism has not been directed towards the courts or judges but against our system of civil procedure.

Thorough, and in some cases radical, changes in our judicial and procedural system are required. The scope of desirable changes in civil and criminal procedure is exceedingly extensive. Discussion will therefore be limited to five typical examples of the need for change in the field of civil procedure. Innovations in court procedure in England, New York, Illinois, and especially in the new Federal Rules of Civil Procedure⁷ furnish the models for Missouri procedural changes. It might be noted that the first item on the agenda of the Missouri Institute for the Administration of Justice⁸ is consideration of these changes in court procedure.

Parties—It may be said, generally, that at common law, and under Missouri practice in cases of a common-law nature, those

5. See *infra*, notes 48 and 49.

6. Art. II, sec. 10.

7. *Infra*, note 60.

8. *Infra*, note 61.

persons having a joint interest may join as plaintiffs or be joined as defendants.⁹ Only he who has a joint interest may join as plaintiff, and only he whose liability is joint may be joined as defendant.⁹ This rule is based upon the common-law supposition that the jury was incapable of determining both group liability and separate liability within the group.⁹ The Missouri statute sets forth classes of joinder following the now abandoned New York rule,¹⁰ and adds the requirement that they "must affect all the parties to the action."¹¹ This latter requirement has been construed to mean that where different causes of action are joined, they must each affect all the parties to the action, and that different causes of action against different parties cannot be joined.¹² It has been held, however, that persons otherwise unconnected may be joined as defendants where there is a common interest among them.¹³

Recent developments in other states, whether they are code or common-law states, have shown a tendency to depart from this concept of joint rights as the test of joinder, and to make the question depend more or less upon administrative convenience, as in chancery. The result is a tendency toward unlimited joinder of parties and actions. In this way, the rights of all persons may be determined in one proceeding, thus eliminating the needless repetition of evidence, and reducing costs and time.¹⁴ A typical example of liberal joinder is found in a recent Ontario case in which a driver and two passengers were permitted to join as plaintiffs and recover separate damages, in a suit against the driver of the other automobile.¹⁵

*Summary Judgment*¹⁶—Many cases arise in which no valid defense exists. Despite that fact, the plaintiff is often hindered in obtaining his judgment in these cases by the defendant who

9. For an excellent discussion of this rule and collection of Missouri cases, see 1 Houts, *Missouri Pleading and Practice* (1936) secs. 7-10.

10. See New York Civil Practice Act, sec. 258 before amended in 1935; compare Kan. Rev. Stat. Ann. (1923) secs. 60-601; Wis. Stat. (1931) sec. 263.04.

11. R. S. Mo. (1929) sec. 765.

12. Liney v. Martin (1859) 29 Mo. 28; Robinson v. Rice (1855) 20 Mo. 229; Fernandez v. La Mothey (1910) 147 Mo. App. 644, 122 S. W. 408; Rounds v. Strang et al. (1915) 192 Mo. App. 568, 180 S. W. 1069.

13. Bobb v. Bobb (1880) 8 Mo. App. 257.

14. See Ill. Rev. Stat. (1935) sec. 172; N. J. Comp. Stat. (Cum. Supp. 1911-1924) tit. 163, sec. 287 as modified by N. J. Sup. Ct. Rules (1926) Rule 31; New York Civil Practice Act, sec. 258 as amended by Laws of 1935, ch. 339.

15. Drury v. Stump (1921) 50 Ont. L. 319, 64 Dom. L. R. 412.

16. Summary judgments are not permitted in Missouri except in a few surety cases. See R. S. Mo. (1929) sec. 2941.

interposes defenses under which there is no possibility of ultimate success. Many states have adopted the summary judgment procedure which affords a means of segregating these cases for prompt disposition.¹⁷ The plan contemplates that defendants may be required to file searching affidavits containing all the facts upon which they will base their defense. The court then examines the facts set up in this affidavit and decides whether or not they indicate a defense worthy of trial. If the defense has merit the case is tried; otherwise judgment is rendered just as in cases of default.

Originally the use of the summary judgment was limited to actions upon express or implied contracts. However, the Illinois Practice Act,¹⁸ a typically modern code of civil procedure enlarges the scope of the summary judgment to include actions upon a judgment or a decree for the payment of money;¹⁹ actions to recover the possession of land, with or without rent or mesne profits;²⁰ and actions to recover the possession of chattels. Its use in this last type of action is also found in England,²¹ Ontario,²² Connecticut,²³ and New York.²⁴ The summary judgment has afforded the means for prompt disposition of a large number of cases in the jurisdictions in which it has been most freely used. In England, for example, in 1930 there were 5535 summary judgments as against 1226 judgments after trial in the King's Bench Division of the High Court of Justice.²⁵

It was formerly argued that summary judgments infringe the right of trial by jury guaranteed by the Constitution,²⁶ but that contention is no longer tenable.²⁷ The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a *bona fide* issue exists between the parties to the action.²⁷ If there are no issues of fact

17. For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929) 28 *Yale L. J.* 423.

18. Sec. 57.

19. Found also in New York Civil Practice Rules, rule 113; in New Jersey: Rules of the Supreme Court, 80-84; and in Conn.: Rules of Civil Practice, sec. 14A (1).

20. Very similar to the Ontario rule. See Holmestead, *Ontario Judicature Act* (1915) 369; *Consolidated Rules of Practice*, rule 33 (f).

21. *The Annual Practice* (1933) 14, Rules of the Sup. Ct., Order III, rule 6.

22. *Consolidated Rules of Practice*, rule 33 (g).

23. *Conn. Rules of Civil Practice*, sec. 14A (1).

24. *Rules of Civil Practice*, rule 113 as amended in 1932.

25. *Civil Judicial Statistics for England and Wales* (1930) 16, as cited in *Ill. Prac. Act* (1934) sec. 57 (annotation).

26. Act III, sec. 2.

27. *General Investment Co. v. Interborough Rapid Transit Co.* (1923) 235 N. Y. 133, 139 N. E. 216 (a leading case).

to be determined, one is not entitled in a civil case to trial by jury.²⁸

*Abolition of Demurrers*²⁹—While there must be some procedural devices to secure the observation of the rules of pleading, the tendency of modern pleading is to abolish demurrers and substitute the more flexible motion in their place.³⁰ When the Missouri code was adopted, it was thought that the demurrer would raise legal issues apart from issues of fact, and thereby often obviate the necessity of a trial on the facts. Practically, this result has been rarely achieved. Instead the demurrer is most frequently used by a party who, seeking to delay the trial, directs it only to the form and sufficiency of the pleadings.³¹

The substitution of the motion for the general demurrer would not do away with the substance of the demurrer, but would change the form of the objection, and add the requirement that it be made specific.

The demurrer has been expressly done away with in the new Federal Rules of Civil Procedure.³² The rules reserve to the party the right to question the sufficiency of the opponent's pleading in advance of his own pleading by means of the following motions: (1) lack of jurisdiction over the subject matter and over the person; (2) improper venue; (3) insufficiency of process or of service of process; and (4) failure to state a claim upon which relief can be granted.³³ In addition, motions for (1) summary judgment,³⁴ (2) judgment on the pleadings after their close,³⁵ and (3) more definite statement or for bill of particulars³⁶ are permitted. It is hoped that by means of this plan the desired results will be accomplished more directly and effectively. The abolition of demurrers and special separate or dilatory pleas was

28. *People's Wayne County Bank v. Wolverine Box Co.* (1930) 250 Mich. 273, 230 N. W. 170. To like effect see *Hanna v. Mitchell* (1922) 202 App. Div. 504, 196 N. Y. S. 43, aff'd (1923) 235 N. Y. 534, 139 N. E. 724. See also *Fidelity & Deposit Co. v. United States* (1902) 187 U. S. 315, 23 S. Ct. 120, 47 L. ed. 194.

29. For the demurrer in Missouri see R. S. Mo. (1929) secs. 770 et seq. Missouri is one of the few states which still retain the general demurrer.

30. Clark, *Code Pleading* (1928) 371. This is true in England, New York, New Jersey, Michigan, Illinois and under the Federal Equity Rules. See, e. g., Ill. Prac. Act (1934) sec. 45. For a full discussion of the whole question see Pike, *Objections to Pleadings* (1937) 47 Yale L. J. 50.

31. Atkinson, *Pleading the Statute of Limitations* (1927) 36 Yale L. J. 914, 929; Rothschild, *Civil Practice in New York* (1923) 23 Col. L. Rev. 732, 747.

32. Rule 7 (c).

33. Rule 12 (b).

34. Rule 38.

35. Rule 12 (c).

36. Rule 12 (e).

also recommended in the report of the Missouri Code Commission.³⁷

Instructions to Jury—The Code provides that in all law cases tried by the court, as well as those tried before a jury, written instructions shall be given.³⁸ In court trials the function of the instruction is merely to declare the applicable law and indicate the theory upon which the trial court gave judgment. In jury cases the function of the instruction is to advise the jury of the law applicable to the case and to define the issues. All issues of law are for the court alone,³⁹ and consequently if there are no issues of fact, the court should direct the verdict.⁴⁰ Similarly, only the ultimate facts to be found from the evidence as necessary to create or bar liability should be stated in the instruction.⁴¹ Each party is entitled to have his theory of the case, made by the pleadings and the evidence, presented to the jury in a direct way, upon the request of proper instructions.

Frequently, however, instructions are requested, and sometimes given, which are confusing, ambiguous, conflicting, and highly technical. Under the present practice, general exceptions or objections are permitted, and they are never required to be made specific. After a party loses his case, he searches for errors and arguments on which to base an appeal, and then for the first time points out his specific objections. This practice is a fruitful cause of appeals and of reversals and consequent delays.

A simpler and more effective plan is outlined in the new Federal Rules of Civil Procedure,⁴² which follow the recently adopted procedures in Texas⁴³ and Montana.⁴⁴ This plan contemplates that at the close of the evidence any party may file written requests for instructions. The court then informs counsel of its proposed action upon the requests, prior to the arguments to the jury; but the instructions are not given to the jury until after the arguments are completed. Each party is required to make his objections before the jury retires, stating distinctly the matter to which he objects and the grounds of his objection. A party failing to object in this manner may not on appeal assign as

37. See Missouri Code Commission Report (1914) 34.

38. R. S. Mo. (1929) sec. 967.

39. *Clower v. Fidelity-Phenix Fire Insurance Co. of New York* (1927) 220 Mo. App. 1112, 296 S. W. 257.

40. See cases cited in Houts, *Missouri Pleading and Practice* (1936) sec. 358.

41. *Smith v. Greer* (1924) 216 Mo. App. 155, 257 S. W. 829.

42. Rule 54. See also note 60, *infra*.

43. Texas Revised Statutes (1936) sec. 2185.

44. Montana Revised Codes (1935) sec. 9349 (5).

error the giving or the failure to give an instruction. The practical results of this plan are: (1) duplicates are discarded; (2) instructions which are not the law are discarded; (3) those remaining are critically analyzed—and by alteration, addition, and elimination, the final charge to the jury is simplified; (4) grounds for error are lessened; and (5) the number of appeals and motions granting new trials is reduced.

Review—Under the present code, appeals are said to be unnecessarily expensive and cumbersome. The Courts of Appeals and the Supreme Court are burdened with voluminous records which they cannot possibly read in the available time. The court record alone frequently averages over two hundred printed pages, and this does not include the printed briefs and arguments of counsel. Consequently, instead of aiding the appellate courts, these long records seriously hamper and delay the determination of the cases. It would seem fairly evident that this procedure should be changed so as to require appellants to present to the appellate court only such matters, and only so much of the record, as is necessary for a proper understanding and determination of the issues.

There was a strong desire when the code of civil procedure was adopted to cover by specific statute every possible contingency that might arise in a lawsuit. Such a course has continually required constant addition and amendments. Not infrequently, because of many inflexible statutory provisions, the courts have been prevented from applying the rule of justice because of the technical failure of counsel to comply with mere procedure.⁴⁵ Again, the great volume and detailed character of the code has made it possible for counsel to evade the real issues in a case by taking advantage of loopholes and technicalities.

In England, on the other hand, the procedure relating to appeals is extremely simple and direct. Long records are discouraged and matters of form are given little consideration. In their appellate procedure, and in fact in all procedure in England, questions of form and mere technicality are of little moment. Appeals are permitted and used more as a means of correcting errors which have caused injustice than as a means of delaying or defeating justice.⁴⁶

The Missouri Code Commission in its report to the legislature

45. E. g. Motion to dismiss suit, found in abstract of record proper but not appearing in bill of exceptions, cannot be considered. See *Hutson v. Allen* (1911) 236 Mo. 645, 139 S. W. 121; *Hodson v. Anerney* (Mo. 1917) 192 S. W. 423.

46. Jenks, *Short History of English Law* (2d ed. 1922) ch. XIX, p. 346.

in 1914 considered the English procedure more desirable than the Missouri system. They therefore proposed nine new sections to the Revised Statutes which covered the entire system of perfecting appeals.⁴⁷ In brief, the system contemplated a review by the appellate court upon a statement in narrative form. This statement, which was to be approved by the trial court, was to include only substantive facts proven at the trial, and was to cover only the issues to be presented to the appellate court. In the event either party should be dissatisfied with the statement approved by the trial court, he would be permitted to take up a complete transcript, subject however to the penalty of paying the entire cost of the transcript if it were found unnecessary. It was believed by the Commission that this procedure would not only reduce costs and simplify appeals, but would relieve the appellate court of the burden of examination of unnecessary voluminous records. The legislature, however, has never acted on the recommendations of the Code Commission.

The matter of the "record proper" will serve as an illustration of a needed change in the system of appeals. Under the present code, the distinction between the "record proper" and the "bill of exceptions" or stenographic report of the actual proceedings and evidence presented at the trial is highly technical and must be strictly observed. The courts have consistently refused to consider the bill of exceptions where the abstract of the record proper did not show a filing of the bill of exceptions.⁴⁸ Similarly, matters technically belonging in the record proper which are found in the bill of exceptions (or vice versa) will not be considered by the court of review, even though the misfiled document or evidence is in fact in the record before the court.⁴⁹

This condition could be remedied by providing that all distinctions between the record proper and the bill of exceptions be abolished for the purpose of determining what is properly before the reviewing court. All matters in the trial court record actually before the court on appeal would be considered by the court for all purposes. This was accomplished in Illinois by the Civil Practice Act,⁵⁰ with the result that substance was made to prevail over form.

47. See Missouri Code Commission Report (1914) 54-55, proposing a substitute for R. S. Mo. (1909) sec. 2048.

48. *Hutson v. Allen* (1911) 236 Mo. 645, 139 S. W. 121; *Hodson v. Anerney* (Mo. 1917) 192 S. W. 423.

49. *Atlas Cereal Co. v. Griffin Grocery Co.* (Mo. 1924) 259 S. W. 130.

50. See Ill. Prac. Act (1934) sec. 74 (2).

POSSIBILITY OF LEGISLATIVE CHANGE

It is of course always easier to define a problem than to provide a satisfactory solution. It has been suggested that the legislature could accomplish the desired results. A prime deterrent to this is found in the fact that such legislation lacks political value. So many matters are brought before the legislators that they find time to consider only the more pressing ones. The result is said to be that they do not give the necessary and proper consideration to the construction and enactment of laws dealing with matters of civil procedure. This condition is not necessarily a reflection on Missouri legislators, for the same condition exists to some degree in all the states of the Union, and even in the Congress of the United States.

Another obstacle to securing legislative changes is the apathy and lack of interest on the part of the general public. Occasionally a citizen may face the problems in an actual case, but he soon forgets. Rarely do we find laymen who realize that the need for a simplified system of court procedure is an economic and social problem, as well as a matter of professional interest.

But even assuming sufficient agitation should result in a general agreement as to principles, the fact is that whenever there have been attempts to embody these principles into concrete laws, it has been found to be practically impossible to frame them in a way that they will not meet opposition from some faction. Similarly, experience has shown that small details of procedure which sometimes are very irritating in their effects upon litigants do not interest the legislature so that it is almost impossible to correct them by enactment.

Although there has been a constant and growing demand for changes, thus far it has been practically impossible to secure legislative action. The Judicial Council of Missouri in its Annual Report for 1937, after discussing its recommendations to the legislature, says in part: "All of these measures * * * passed the House and were sent to the Judiciary Committee of the Senate, from which they never emerged. They met the fate that such remedial proposals — almost without exception — have met for many years."⁵¹ The fault, however, does not lie entirely with legislators and laymen. Many of the proverbially conservative courts and lawyers are inclined to continue to do things "in the old way." If any material changes are to be made via the legislature, it will be necessary to devise some scheme for overcoming this inertia of the legislators, the bar, and the general public.

51. (1938) 9 Mo. Bar J. 24.

POSSIBILITY OF CHANGES BY COURT RULES⁵²

It is clear that judicial procedure in the English courts was from the very beginning largely controlled by the courts in the form of rules. Not until comparatively recent times did the British Parliament concern itself to any great extent with the matter of judicial procedure. This power of the court to make rules concerning procedure included the power of the Court of King's Bench, an appellate tribunal, to make rules for the *nisi prius* courts.⁵³

In 1820 the first constitution of Missouri vested all judicial powers in a Supreme Court and other courts.⁵⁴ It divided all the powers of government among three departments, and forbade the exercise by any department of powers delegated to either of the other departments.⁵⁵ It would seem that if the power to make rules as at common law was vested in the courts, the doctrine of separation of powers would prevent the power to make rules from being taken away or impaired by the legislative department. The constitutional validity of the rule-making power given to the federal courts has been upheld in a number of cases.⁵⁶

The classic arguments in favor of the adoption of court rules are:⁵⁷ (1) Sessions of the legislature are held biennially and then only for a period of about two to three months, and the legislature does not have time to consider matters of civil procedure.⁵⁸ (2) Under the Constitution, the Supreme Court has a general superintending control over all other courts and is therefore competent to determine the procedure that will facilitate determination of justice. (3) The exact workings of a detailed rule of

52. For a survey of courts which have adopted rules of procedure, see 11 J. Am. Jud. Soc. 15. See also Morgan, *Judicial Regulation of Court Procedure* (1918) 2 Minn. L. Rev. 81; Hudson, *Proposed Regulation of Missouri Procedure by Rules of Court* (1916) 13 Mo. Law Bull. 3.

53. Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599, 601.

54. Art. V, sec. 1.

55. Art. II.

56. *Bank of U. S. v. Halstead* (1825) 10 Wheaton 50, 6 L. ed. 200; *Beers v. Haughton* (1835) 9 Peters 329, 9 L. ed. 326, are typical.

57. Whittier, *Regulating Procedure by Rules of Court* (1927) 11 J. Am. Jud. Soc. 15. See also Hudson, *Proposed Regulation of Missouri Procedure by Rules of Court* (1916) 13 Mo. Law Bull. 3; Morgan, *Judicial Regulation of Court Procedure* (1918) 2 Minn. L. Rev. 81; Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 Ill. L. Rev. 163, 2 A. B. A. J. 46.

58. It has been suggested that this difficulty could be alleviated by the appointment of a legislative commission to study and propose needed changes to the legislature. Such a plan was attempted in 1914. The Code Commission in its report recommended a large number of statutory changes, but the General Assembly failed to enact them.

practice cannot be anticipated, and as change and adaptation to the exigencies of judicial administration are inevitable, this change and adaptation should be left to the judges who, knowing how the rules are actually operating, are best qualified to determine what experience requires. (4) The Supreme Court is a continuous body and can amend rules and make new rules whenever the occasion may require. (5) Since the courts and the profession are held responsible for unnecessary delay and expense of litigation, they should be allowed to make the rules which govern practice and procedure in the courts. (6) When procedure is governed by rules of court rather than by statute, the tendency is to make procedure subordinate to substantive law. (7) Above all, there ought to be a possibility of speedy adjustment of the details of procedure to the exigencies of administration, and only rules of court can bring this about.

A study of the English rule-making power and of the rule-making power of the United States Supreme Court fails to disclose any disadvantages in the regulation of procedure by rules of court. The only real criticism which has been heard is that rules of court will merely substitute one elaborate, detailed, rigid code for another. This objection is predicated on the fallacious assumption that procedure must be an elaborate, detailed system of more or less arbitrary precepts. All experience shows that while statutory procedure runs to details and is of necessity rigid, procedure prescribed by rules of court tends continually to become simple and easily adaptable, by judicial amendment, to new situations and needs of practice.⁵⁹

Congress has passed enactments authorizing the United States Supreme Court to adopt rules of court procedure which will supersede statutes. The new rules of civil procedure for United States district courts have recently been promulgated by the United States Supreme Court under authority of a law passed by Congress in 1934.⁶⁰ The same result was accomplished in equity cases more than thirty years ago although the power given the Supreme Court was not so broad.

The Missouri Institute for the Administration of Justice, a committee sponsored by the Missouri Bar Association, has considered the question at some length.⁶¹ Many of its prominent

59. Compare the new rules for the federal district courts with the Missouri statutory procedure.

60. (1934) 48 Stat. 1064, 28 U. S. C. A. sec. 723 (b). These new rules become effective three months after the close of the present session of Congress, but if that date is prior to September 1, the rules take effect on the latter date.

61. See articles in *Mo. Bar J.*, Dec., 1937.

members favor the adoption of rules of procedure. The Institute, in the belief that favorable legislative action is infeasible, proposes to submit a constitutional amendment to the people of Missouri by means of the initiative.⁶² This amendment if passed would have the same effect in Missouri as the acts of Congress have had in the federal courts. It would permit the Missouri Supreme Court to appoint a permanent rules committee to make all the rules for civil and criminal procedure and practice in the courts of Missouri. Safeguards are provided to make certain that neither the people nor the state will be deprived of any substantive rights.⁶³

There is, of course, no novelty in the idea of promulgation of court rules by the highest court in the jurisdiction. Indeed there is much current argument in favor of the proposition that courts inherently have the power to prescribe their rules of procedure. It has been suggested by some judges and legal writers that the power to make rules governing practice and procedure in the courts is judicial, not legislative.⁶⁴ But even assuming that

62. Proposed Amendment to the Constitution of Missouri. Article VI. "New section to be known as section 3a: The Supreme Court shall have the power to prescribe by general rules, for the Circuit Court and the Appellate Courts of this State, the rules of practice and procedure with respect to any and all proceedings in civil and criminal causes. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant in a civil cause, or of the State or any defendant in a criminal cause. Said rules shall not affect the mode of giving evidence by the oral examination of witnesses, or the rules of evidence, or the law relating to jurymen or juries, or the right of trial by jury as now existing. All forms and methods of practice and procedure which are now in force under or by virtue of any statute, court rule or decision shall continue in full force and effect until and subject to being changed as herein provided.

"The right of appeal shall continue in all cases in which appeals are now or may hereafter be authorized by law, but the rules made as herein authorized may prescribe the time for and the manner of taking appeals, may specify the kind of record to be required on appeal and the time and method of its preparation, and may fix the conditions on which bail in criminal causes may be allowed after conviction for a felony and pending appeal. The Supreme Court may fix the dates when any rule or rules shall take effect, and after they become effective all statutes in conflict therewith shall be of no further force and effect, provided that no rule shall become effective prior to six months after its promulgation, and provided further that any rule may be annulled by resolution adopted by the General Assembly, and approved by the Governor."

63. What has been said in this note about the power of the courts to make rules governing procedure is to be understood as confined to procedure alone.

64. *Hanna v. Mitchell* (1922) 212 App. Div. 504, 196 N. Y. S. 43; *Houston v. Williams* (1859) 13 Cal. 24; *Ackerman v. Ackerman* (1908) 123 App. Div. 750, 108 N. Y. S. 534; *Cooper v. Board of Commissioners of Franklin County* (1922) 184 N. C. 615, 113 S. E. 569. See also Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599; Wigmore,

the legislature has the power to regulate court procedure, it was long ago settled by the Supreme Court of the United States that this power could validly be delegated to the courts themselves.⁶⁵

It is submitted that the legislature is better equipped to declare substantive rights than to prescribe procedural details. Since court procedure is but the machinery through which substantive rights are determined, the power to set up effective machinery should rest alone with the courts. Unnecessary delay, confusion, and expense too frequently result from the present system of procedural law. Under the existing conditions in Missouri the only feasible plan for changing this system is to permit the matter of procedure to be left to the courts to be regulated by rules instead of by statutes. Since it is unlikely that the General Assembly or the Supreme Court of Missouri will ever take the initiative in this matter, it is manifest that the change will have to be accomplished directly by the voters through the use of the popular initiative.

ADOLPH K. SCHWARTZ.

All Legislative Rules For Judiciary Procedure Are Void Constitutionally (1928) 23 Ill. L. Rev. 276. For an excellent discussion of the various phases of this problem, see Williams, *The Source of Authority for Rules of Court Affecting Procedure* (1937) 22 WASHINGTON U. LAW QUARTERLY 459; Hyde, *From Common Law Rules to Rules of Court* (1937) 22 WASHINGTON U. LAW QUARTERLY 187. For a discussion of the English experiences with court rules see Hyde, *Observations on English Experience in Regulation of Practice and Procedure by Court Rules* (1938) 9 Mo. Bar J. 44.

65. *Wayman v. Southard* (1825) 10 Wheat. 1, 6 L. ed. 185.