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## JUDICIAL REGULATION OF COURT PROCEDURE[1]

ANCIENTLY, regulations of pleading and practice were principally of judicial origin. Some were the result of judicial decisions in individual cases; others were court rules formally declared;[2] some few were enactments of parliament, the latter of which were attempts to mitigate some of the most technical

[1] In preparation of this paper the following were freely consulted, and material therefrom has been liberally used:

Procedure through Rules of Court. I Journal of American Judicature Society 17 (June 1917).

The Proposed Regulation of Missouri Procedure by Rules of Court, Manley O. Hudson. University of Missouri Bulletin, Law Series 13, p. 3 (Dec. 1916).

Regulation of Judicial Procedure by Rules of Court, Roscoe Pound. 10 Ill. Law. Rev. 163; 2 Amer. Bar Association Journal 46 (Oct. 1915).

Ontario Courts and Procedure, Herbert Harley. 12 Mich. Law Rev. 339-447 (March-April 1914).

English Courts and Procedure, William E. Higgins. Bulletin 11, Amer. Jud. Society 32.

A Criticism of the Colorado Act for Procedure by Rules of Court (Laws of Colorado 1913, p. 447), E. L. Regennitter. 18 Col. Bar Association Reports 131.

Procedure by Rules of Court. 83 Central Law Journal 394 (1916).

Reforming Procedure by Rules of Court, Roscoe Pound. 76 Central Law Journal 211 (1913).

Report of Committee on Reform of Judicial Procedure. 28 Va. State Bar Association Reports 71 (1915).

Report of Board of Statutory Consolidation, New York. Vol. I p. 170 et seq. (1915).

Committee Report, 37 Ohio State Bar Association Reports 18.

Rosenbaum, Rule-Making Authority in the English Supreme Court. Boston, 1917.

Studies in English Civil Procedure, Samuel Rosenbaum. 63 University of Pennsylvania Law Rev. 105, 151, 273, 380, 505.

[2] Jenks, Short History of English Law 188.

of the asperities of common law pleading. By the beginning of the nineteenth century the rules of common law procedure had become so rigid and formal that some relief, other than from the courts themselves was imperative. In England it took the form of the civil procedure act of 1833, which provided for the formulating of rules by the common law judges for the simplification of pleading and practice. The Hilary Rules of 1834 were accordingly promulgated. In this country various statutory modifications of the ancient rules were enacted. The early experiences of England under the Hilary Rules and the experience generally with patchwork procedural reform led to the adoption of the Field Code in New York in 1848. Whereas the English act of 1833, while commanding simplification, left with the judiciary the methods of accomplishing it, the New York experiment effectuated a practically complete transfer of procedural regulation from the courts to the legislature. The Field Code has been widely copied and is the basis of most of the systems of procedure in our country today. The American Bar Association is now advocating a system of uniform judicial procedure, the first step in which requires the enactment by the Congress of the United States of the provisions of the so-called Clayton Bill as introduced in the sixty-third Congress. That bill provides that the Supreme Court of the United States shall have "the power to prescribe, from time to time, and in any manner, the forms of writs and all process, the mode and manner of framing and filing proceedings and pleadings, of giving notice and serving writs and 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 and the kind and character of the entire pleading, practice and procedure to be used in all actions, motions and proceedings at law of whatever nature by the district courts of the United States and the courts of the District of Columbia; that in prescribing such rules, the Supreme Court shall have regard to the simplification of the system of pleading, practice and procedure in said courts, so as to promote the speedy determination of litigation on the merits," and that, when and as the rules of court shall be promulgated, all laws in conflict therewith shall become of no force or effect. It is planned to have similar

statutes enacted in the several states and to have rules adopted thereunder conforming to those promulgated by the Supreme Court of the United States. In short, it is proposed to revest the control of procedure in the courts, but to prescribe that it shall be exercised by rules formally promulgated rather than by regulations evolved through judicial decisions.

The sole object of any procedure system should be the attainment of a just and speedy decision upon the merits, according to the principles of substantive law, at the lowest practicable cost, of all disputes between litigants. The attainment of this end is possible only under a plan which recognizes the impossibility of foreseeing the effects of the application of any procedural rule in all contingencies, and the impossibility of devising a code which will cover every procedural contingency. Consequently, a satisfactory system must be flexible and must provide an easy method for wise amendment. Other things being equal, the object is more likely to be attained if the rules are made by those best qualified by learning and experience to appreciate the practical problems of the administration of justice. Fairness demands that, so far as practicable, authority to cure procedural defects and popular responsibility therefor should be with the same body. And obviously any suggested change should be workable, should promise improvement over the existing system and should be practicable of adoption. The present proposal, therefore, involves a comparison of the present system and the suggested plan as to flexibility, ease of amendment, and qualifications of the respective rule-making bodies, and the consideration of popular responsibility for faults in the administration of justice, and of the practicability of the proposed system.

Legislative control of the details of procedure is based upon the obviously erroneous theory that the courts can be furnished a set of rigid orders, devised in advance by a farseeing legislature, to fit every possible circumstance, so that in any case the court has but to select the particular rule designed therefor, which will automatically apply. This results in an absolutely rigid system. The courts can, of course, do much to soften the rigor by process of interpretation, if they be so inclined, but they cannot properly disregard or suspend positive statutory enactments, even to avoid an outrageous result.

Rules of court, however, may be waived, or their operation suspended, to prevent a manifest injustice.[3] As to flexibility, the advantage, therefore, is clearly with the proposal.

The same is true with reference to amendment. Legislative amendment is difficult because legislative sessions are infrequent, are overcrowded with business, and are of limited duration. Furthermore, it is nobody's duty to bring to the attention of the legislature in the proper way, procedural matters needing amendment. The attorney who has found the code inadequate or ambiguous, or positively misleading in some particular, forgets it as soon as the case involving it is disposed of; and no one takes the time to anticipate troublesome questions of pleading or practice. Legislative amendment is usually unscientific, because the bills are not carefully drawn, or if carefully drawn, are carelessly amended in committee or upon the floor; because frequently a rule is enacted or altered without sufficient consideration of its effect upon other portions of the code, and because bills are sometimes passed as personal favors to meet individual cases. Under a system of procedural regulation by rule of court, on the other hand, the rule-making body is in almost continuous session, is always available and may issue its regulations at any time. Suggestions for amendments may be made by attorneys and trial judges, as and when difficulties in pleading and practice arise. Many such matters can be anticipated. The court will have accessible the whole body of procedural law, and can easily consider the effect thereon of any proposed change. Being under no restriction as to time, and having in mind the necessity of interpreting the rules, it may and should insist upon careful drafting and accurate phrasing. It will be under no temptation to make regulations as personal favors to give advantages to favored counsel or litigants, but will be much more amenable to suggestion by the bar than is the legislature.

It would seem too clear for argument, that judges are in a much better position than legislators to know and appreciate the practical problems of administration of justice. The rules of pleading and practice are the tools of their trade. They

[3] United States v. Breiling, (1887) 20 How. (U. S.) 252, at 254, 15 L. Ed. 900; Gillette-Herzog Mfg. Co. v. Ashton. (1893) 55 Minn. 75, 56 N. W. 576; Picket v. Wallace et al., (1880) 54 Cal. 147.

must use them every day. And as the skilled workman knows the defects in his tools, and the difficulties and the imperfections in the product caused thereby, so the judges, much more clearly than any legislative body, know the inconsistencies and shortcomings of many procedural regulations and the effects thereof in the delay and denial of justice. And with this knowledge they are obviously better qualified to devise the remedies in the way of new or altered rules.

People generally are impatient of the workman who complains of his tools. And during the past decade or more the public has paid little attention to the plea that delays and miscarriages of justice are due to legislative stupidities, and has placed the responsibility upon the courts, with the result that, constitutional provisions and statutes in several jurisdictions were enacted providing for the recall of judges. The courts and the lawyers know that much of the criticism heaped upon the courts belongs rightfully to the legislature; but the public does not know it, and can with difficulty, ever be made to believe it. If the courts are to bear the responsibility for the defects in the machinery or the administration of justice, theirs should be the authority to design and repair that machinery.

Theoretically, then, the proposed revesting of the control of procedure in the courts has everything to commend it. What of its practicability? It has been said that it could not work worse than the present system. And in fact, legislative control has produced some well-nigh intolerable results. The original codes have generally been inadequate, have been variously interpreted and have been voluminously and carelessly amended. The Field Code contained fewer than four hundred sections; the present code of New York, without the 1917 amendments, contains more than thirty-four hundred sections. With its annotations it covers some five thousand pages. The experience has doubtless been worse in New York than elsewhere; but it has been bad enough everywhere. A great portion of the time and energy of the trial and appellate courts is consumed in determining mere questions of practice. Mr. Frank C. Smith prepared for the American Bar Association a table covering the general digest for the first three months of 1910, showing the number of points on prac-

tice and on substantive law decided by the courts.[4] In a total of 5927 cases, a total of 22,986 points were decided, of which 12,259 or 53.32% were points on practice. In Minnesota, of 332 points, decided in 115 cases, 183 or 55.1% were points on practice.[5] These figures show the vast amount of time, labor and money expended on matters not going to the merits. They do not purport to show the percentage of cases lost in the trial courts, or reversed in appellate courts on points of practice. It must not be taken that in all of these cases justice was denied or even delayed by procedural faults. In many of them, such was doubtless the fact. But even if it were not so in a single case, the waste of work and money involved in making the points, preparing the records and briefs, and making and writing the decisions, is sufficient to bring condemnation upon the system. Such a mass of procedural litigation must tend to develop the procedural specialist, whose aim is to win upon technicalities and to prevent adjudication upon the merits. And the development of such specialists in turn tends to increase the amount of procedural litigation. Thus the evil grows upon itself.

Past experience with judicial regulation of procedure has not been uniformly satisfactory. Indeed, the failure of the courts to show a proper appreciation of the true function of rules of pleading and practice was the chief cause for legislative interference. It must be remembered, however, that most of these rules were developed by judicial decision, as were the principles of substantive law, and the doctrine of stare decisis was applied to them. Consequently, they became practically as formal and rigid as legislative enactments. Regulation by rule of court will, of course, not be subject to this objection. And such data as are available with reference to the practical operation of regulation of this sort, while far from demonstrating its perfection, do indicate the possibility of its producing much more satisfactory results than the present system.

Procedure has been regulated by rules of court in England

[4] West Publishing Co.'s Docket, II. p. 1752, 1753.

[5] At the 1917 meeting of the Minnesota State Bar Association, Hon. William A. Cant, Judge of St. Louis County District Court, voiced his protest against the use of so great amount of time and energy of court and counsel upon points not going to the merits.

since before 1875,[6] in Ireland since 1877, and in Scotland since the sixteenth century.[7] Our federal courts have controlled equity practice by rule since 1822,[8] admiralty practice since 1842,[9] bankruptcy since 1898,[10] and copyright since 1909.[11] New Hampshire courts have exercised such rights of regulation since before 1859.[12] The courts of Michigan have had the constitutional power to do so since 1850;[13] those of Delaware, statutory authority since 1852.[14] The various commissions and courts created to handle such matters as workmen's compensation, railroad and warehouse affairs, etc., are generally given power to prescribe their own rules of procedure. The municipal courts of Chicago and Cleveland have enjoyed a somewhat restricted privilege of the same sort. Until 1909, however, no particular stress seems to have been laid upon the right and duty of American courts to work out their own procedural salvation. In that year the Committee of the American Bar Association to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation pointed out the desirability of such a program. In 1912 New Jersey,[15] in 1913 Colorado,[16] in 1915 Alabama,[17] Michigan,[18] and Vermont,[19] and in 1916 Virginia[20] enacted practice codes upon this principle. The Colorado,

[6] Common Law Procedure Acts were enacted in 1852 and 1854, and Judicature Acts in 1873, 1875, 1877, 1879, 1881, 1884, 1890, 1891, 1899, 1902, 1909, 1910. See Proposed Regulation of Missouri Procedure, Manley O. Hudson, University of Missouri Bulletin, Law Series 13, p. 18.

[7] Ibid., pp. 19, 20; Rosenbaum, Rule Making in the Courts of the Empire, 15 Jour. Comp. Legislation (N. S.) 128, 132, Rosenbaum. Rule-Making Authority, 228.

[8] 1 U. S. Statutes at Large 276. See rules in 7 Wheat. (U. S.) pp. v-xxiv.

[9] See rules in 1 How. (U. S.) pp. xli-lxx. The Act of 1842, Chap. 188, confirmed the court's power. 5 U. S. Statutes at Large 516.

[10] National Bankruptcy Act, 1898, Sec. 30. 30 U. S. Statutes at Large 552. See rules in 172 U. S. 653.

[11] 35 U. S. Statutes at Large 1075 Chap. 320 Sec. 25. See rules in 214 U. S. 533.

[12] Jeremiah Smith, in 10 Ill. Law Rev. 364. See also Owen v. Weston, (1885) 63 N. H. 599, 604.

[13] Mich. Constitution, 1850. Art. VI. Sec. 5.

[14] Del. Revised Code 1852 Chap. 106.

[15] N. J. Acts 1912 Chap. 231 Sec. 32. See also N. J. Acts 1915 Chap. 93.

[16] Col. Laws 1913 Chap. 121.

[17] Ala. Laws 1915 p. 607.

[18] Mich. Public Acts 1915 No. 314 Sec. 14, Mich. Judicature Act 1915 p. 5.

[19] Vt. Laws 1915 No. 90 Sec. 10.

[20] Va. Acts 1916 p. 939.

Vermont, Virginia and Alabama enactments place in the courts the control of procedure almost without restriction, as does the English act. The New Jersey plan provides a short legislative code covering in outline the general principles of practice and leaving details to be cared for by rules of courts.

It is apparent that it is too early to make accurate deductions from the American experience. Prior to 1909, the possibilities of procedural progress by court rules was not realized. The courts of Michigan had taken no advantage of their authority to regulate procedure by rule. The Supreme Court of the United States in its dealings with equity practice rivalled the average legislature. The old equity rules were almost as badly drawn and as fruitful of litigation as the ordinary procedural statute; and no substantial amendment after 1842 was made, notwithstanding the fact that even their phraseology had become obsolescent. Furthermore, judicial regulation made no gain by the promulgation of the 1914 rules of the supreme court of Colorado. They were inartistically drawn, inaccurately phrased, and in some respects unwisely enacted. [21] In fact they seemed to offer absolutely no improvement over the usual legislative act. On the other hand, the federal supreme court in 1913, of its own motion, made a thorough and satisfactory revision of the equity rules. The Colorado court was quick to appreciate the criticisms of the bar and to respond by amending and revising its rules. [22] But it is the working of the English system that proves the superiority of court regulation over legislative regulation. The rules are, on the whole, accurately worded and carefully drawn. They are readily but not hastily amended, as experience in applying them shows the need of amendment.[23] They are administered with due regard to the fact that their purpose is the attainment of adjudication upon the merits. Thus, reliance upon technicalities is discouraged, and the law of procedure is relegated to its proper place. The result is that American lawyers, who see the system in operation, are astonished at the rapidity and accuracy with which the merits of a case are presented for decision. This end, of course, could not be

[21] See 18 Col. Bar Ass'n Reports 131 et seq.
[22] See 1 Journal of American Judicature Society 17.
[23] See Rosenbaum, Studies in English Procedure, 63 Univ. of Pa. Law Rev. 111.

attained without a proper attitude of both bench and bar. If the court did not appreciate the tremendous responsibility and opportunity given it in the right to control procedure and did not take the proper steps for a wise and scientific exercise of that right; if the bar did not unselfishly and intelligently lend its aid to the court, the English system would function as badly as our own.

It is believed that the American bench and bar have come to realize the folly of making a fetich of procedure, the stupidity of sacrificing merits to technicalities, and the importance of a proper making and interpreting of rules of pleading and practice. Of course, where courts are so constituted intellectually as to reverse a conviction because the indictment concludes "against the peace and dignity of state," instead of "against the peace and dignity of the state," [24] or to reverse a judgment on the merits because the complaint uses the word "promise" instead of the word "agree," [25] counsel will continue to raise such senseless objections; and relief will be had not in the adoption of the new system of procedure, but in the appointment or election of new judges. It is noteworthy that when decisions of this kind are now announced, they are accompanied by profuse apologies, and attempts to place the blame upon the legislature or upon the doctrine of stare decisis.

The attitude of the majority of the courts is well illustrated by the language of the Minnesota supreme court in dealing with the matter of inconsistent defenses in the McAlpine case:[26]

"We are not so much concerned with the development of an artistic and symmetrical system of pleading as we are with having a practical procedure which will result in a speedy determination of disputes upon the facts.

"...When the rule of consistency, technically applied, prevents the interposition of a fair defense, it must yield to the insistent demand of the law that a party be given a hearing on all his causes of action and all his defenses. This is the paramount consideration. Substantive rights must not be sacrificed to preserve a rule no more important and no better accredited than the consistency rule."

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[24] State v. Campbell, (1907) 210 Mo. 202, 109 S. W. 706.
[25] McGinnity v. Laguerenne, (1848) 10 Ill. 101.
[26] McAlpine v. Fidelity & Casualty Co. of New York, (1916) 134 Minn. 192, 200, 158 N. W. 967. See also 1 MINNESOTA LAW REVIEW 94.

With the courts taking this position, with the bar realizing its justice and good policy, with the public calling for simplification and expedition of court procedure, and with both bench and bar recognizing the need and their responsibility, there would seem to be no reason why the proposed plan should not work here as well as in England.

But even though it is theoretically sound and practicable, is its adoption feasible? It has been objected that the present system while cumbersome and inartistic is fairly well understood, and that to substitute a new one will cause a tremendous increase in procedural litigation; that in the first fifteen years under the English Judicature Act some four thousand decisions dealt with the interpretation of rules.[27] It is answered that the present system is not sufficiently understood to avoid constant litigation, and that there is no necessity for sudden and complete change in procedure. The court might well prescribe that the procedure shall remain as formerly except where specifically changed. Then changes might be made gradually, beginning with those matters most urgently calling for alteration.

It is also objected that the adoption of such a plan calls for a constitutional amendment, and that in most jurisdictions it would be quite impossible to secure its adoption, because of the difficulties in the way of all constitutional amendments, and particularly because of the unfamiliarity of the public with the merits of the plan. In considering this objection, attention must be given to the particular method of accomplishing the desired result.

The method suggested by the American Judicature Society involves the reorganization of our entire judicial system, and places control of procedure in a judicial council composed of representatives of the different branches of a single state court.[28] This would clearly require an amendment to the constitution and the adoption of a project for which extensive propaganda would be necessary.

Another suggestion makes the rule-making body a committee of bench and bar. This committee would, of course, be separate from both the legislature and the courts; and

[27] Hepburn, History of Code Pleading, Sec. 224.
[28] 1 Journal of Amer. Judicature Society 17.

powers either judicial or legislative would have to be delegated to it. This might well be subject to constitutional objection.

The suggestion of the American Bar Association is to vest the rule-making power for all the courts of a jurisdiction in the court of last resort of that jurisdiction. This proposal has been opposed for the practical reasons, that courts of last resort are usually overworked, that some of their members have never been either trial judges or trial lawyers, that none of them are likely to be very familiar with the offices and duties of masters, referees, clerks,[29] and for the further reason that the legislature has no right to delegate to the judiciary the legislative function of prescribing rules of procedure. The practical objections are overcome by pointing out that the appellate courts can do as the federal supreme court did in preparing the revision of the equity rules. They can get whatever assistance they need from committees of trial judges and attorneys. Indeed the various bar associations would be glad to cooperate with the courts, and there would be no difficulty whatever in getting aid from any of the officers of any court in the jurisdiction.

As to the constitutional objection, it is true that most of our state constitutions provide for a separation of powers between the legislative, executive and judicial departments, and forbid the exercise of the powers of any department. But in the application of this provision the following well-settled propositions must be borne in mind: (1) While such a separation of powers seems theoretically sound, yet in the practical operation of government, it is absolutely impossible. As Mr. Justice Story said:

"Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our state constitutions, the same mixture will be found provided for, and indeed, required in the same solemn instruments of government.....Indeed, there is not a single constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim and at the same time some admixture of powers constituting an exception to it." [30]

[29] Ibid.
[30] Story, Constitution of the United States, 5th ed., I, Sec. 527.

(2) This provision does not prevent the legislature from delegating to the courts all powers which the legislature might rightfully exercise itself, but only those powers which are strictly and exclusively legislative. [31] (3) The assignment of powers not specifically distributed by the constitution is a legislative function, and when powers of an ambiguous character are assigned to the judiciary, any doubt will be resolved in favor of the validity of the statute. [32] (4) In determining whether a particular power belongs exclusively to a particular department, regard must be had to its history and especially to the exercise of it at and prior to the adoption of the constitution. [33]

From the foregoing it would seem to follow that if the history of judicial procedure shows the power to regulate it to have been exercised by the courts exclusively, or by the courts and the legislature in common, there can be no constitutional objection to vesting such power in the judiciary by legislative enactment.

As already stated, the regulation of procedure was in England, from the earliest times, regarded as chiefly a judicial function. At the time of our separation from the Mother Country, parliament had rarely interfered, although its power to do so was undoubted. The theory of all later English legislation, beginning with the civil procedure act of 1833, is that the courts should largely control their own procedure. [34]

That the theory of our early federal legislation was the same appears from the large measure of control of procedure placed in the courts by the Judiciary Act of 1789 and the Process Act of 1792. That the Supreme Court and the bar accepted the same principle is evidenced by the fact that the attorney general in 1792 moved the court for information relative to the system of practice to be used therein and the court responded that it considered "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

[31] Wayman v. Southard, (1825) 10 Wheat. 1, 42, 6 L. Ed. 253.
[32] State ex rel. Patterson v. Bates, (1905) 96 Minn. 110, 116, 104 N. W. 709, 113 Am. St. Rep. 612.
[33] State v. Harmon, (1877) 31 Ohio St. 250, 258.
[34] See enactments referred to in note 6, supra.

may render necessary." [35] In 1825, Chief Justice Marshall said:

"The 17th section of the Judiciary Act, and the 7th 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 returning 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." [36]

In the same year, Mr. Justice Thompson declared: "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 never has occurred to anyone that it was a delegation of legislative power." [37]

Ten years later Mr. Justice Story referred to the cases in which these statements were made and said:

"It was there held that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of the suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that 'a general superintendence over this subject seems to be properly within the judicial province and has always been so considered.' " [38]

The court's action in regulating equity practice, and the subsequent legislation and court rules regarding admiralty, bankruptcy and copyright practice are in harmony with the earlier history. It is, therefore, apparent that both in England and in our federal governmental system, the regulation of procedure has not been regarded as an exclusively legislative function.

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[35] 2 Dall. (U. S.) 411, 1 L. Ed. 436.

[36] Wayman v. Southard, (1825) 10 Wheat. (U. S.) 1, 43, 6 L. Ed. 253.

[37] U. S. Bank v. Halstead, (1825) 10 Wheat. (U. S.) 51, 61, 6 L. Ed. 264.

[38] Beers v. Haughton, (1835) 9 Pet. (U. S.) 329, 359, 9 L. Ed. 145.

And such has been its history in Minnesota also. In the Northwest Ordinance of 1787 and the act of August 17, 1789, to provide for the government of the Northwest Territory,[39] there was no original separation of powers, for the governor and judges had legislative powers until the organization of a general assembly. In 1800 Indiana Territory was carved out of the Northwest Territory,[40] and in 1805 Michigan Territory was carved out of Indiana Territory.[41] In December, 1820, the governor and judges of Michigan Territory adopted an act concerning the supreme and county courts of the territory, section 12 of which gave the courts power to make "all such rules respecting the trial and conduct of business both in term and vacation, as the discretion of said court shall dictate," and in order that the rules might be uniform the county courts were directed to make their rules conform as near as might be to the rules of the supreme court.[42] In 1825 the general assembly enacted a more elaborate bill, section 18 of which made it the duty of the supreme court to prescribe rules and orders for the proper conducting of business in said court and in the circuit courts and for the regulating of the practice of said courts, "so as shall be fit and necessary for the advancement of justice, and especially for preventing delay in proceedings." A direction to the county courts similar to that contained in the former act was made for the sake of securing uniformity.[43]

This law was in force when, in 1836, Wisconsin Territory was established by an act which, among other things, continued the laws of Michigan Territory in force until changed by the proper authorities.[44] The policy of regulating the practice of the supreme and circuit courts by rules adopted by the supreme court was continued in the legislation of the state of Michigan.[45] And in 1850 a similar provision was written into the constitution of Michigan.[46]

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[39] 1 U. S. Statutes at Large 50.
[40] 2 U. S. Statutes at Large 58.
[41] 2 U. S. Statutes at Large 309.
[42] Mich. Territory Laws, I, 714, 718.
[43] Mich. Territory Laws, II, 264, 268.
[44] 5 U. S. Statutes at Large 10.
[45] Mich. Rev. Statutes 1838, Part III Title 1 Chap. 1 Sec. 5; Mich. Rev. Statutes 1846 Chap. 88 Sec. 13.
[46] See note 13, supra.

In 1836 the legislative assembly of Wisconsin Territory passed an act concerning the supreme and district courts which, in terms almost identical with those of the Michigan enactment of 1820, conferred upon the courts the power to make rules, and directed the district courts to conform their rules to those of the supreme court.[47] When Wisconsin was admitted to the Union in 1848, this act was in force. The above-mentioned provision was continued in Section 2 of Chapter 87 of the Revised Statutes of 1849; and Section 4 of Chapter 82 gave the supreme court power to make rules for the circuit courts also. Because in 1856 a code of procedure was adopted in Wisconsin, this latter section appears in Chapter 115 of the Revised Statutes of 1858 with the qualifying clause requiring the rules to be "not inconsistent with the constitution and the laws."

The act of March 3, 1849, which established the territory of Minnesota provided that the laws in force in the territory of Wisconsin at the date of the admission of the state of Wisconsin should continue valid and operative in Minnesota.[48] This clearly made the Wisconsin act of 1836 part of the laws of Minnesota Territory. In 1851, Minnesota Territory adopted a code of civil procedure. At the same time it gave the supreme court power to prescribe rules for the conduct of its business. In 1852, Section 6 of Chapter 69 of the Revised Statutes was amended so as to provide that the supreme court might "by order from time to time, make and prescribe such general rules of practice both at law and in equity, and regulations for the said supreme court and the government of the several district courts, not inconsistent with the provisions of this act, as it may deem proper." This provision continued in force after Minnesota was admitted to the Union, until the revision of 1866.

It will, consequently, be seen that in Minnesota and in the jurisdictions from which she inherited her laws, as well as in England and the federal government, the power to regulate procedure has been regarded not as an exclusively legislative power, nor yet as an exclusively judicial power, but certainly as a power properly within the judicial province when not

[47] Wis. Laws 1836 p. 35.
[48] 9 U. S. Statutes at Large 403, 408.

otherwise directed by the legislature. The United States Supreme Court has said that it is for the state to determine whether or not the legislative, executive and judicial powers shall be kept altogether distinct and separate. [49] And the Minnesota supreme court is with the overwhelming weight of authority when it says:

"But it is not always easy to discover the line which marks the distinction between executive, judicial, and legislative functions, and when duties of an ambiguous character are imposed upon a judicial officer, any doubt will be resolved in favor of the validity of the statute, and the powers held to be judicial." [50]

It is, therefore, submitted that there is in Minnesota no valid constitutional objection against the adoption of the proposal of the American Bar Association. Even the minor objection that the supreme court has no power to prescribe rules for the government of inferior courts is covered by the foregoing history and authorities.

As may be gathered from what has already been said, the proposal favors the Colorado plan of entrusting the entire subjects of pleading and practice to the courts, rather than the New Jersey plan of having the legislature prescribe the general principles and outline, leaving only the details to the courts. If judicial control is to have a fair trial, there should be as little legislative interference as possible.

The movement for the control of court procedure by rules of court is growing. It is only a question of time when Congress will pass a bill embodying the principle. Six states have already done so. Similar legislation has been recommended in New York by an official board of revision. [51] Many state bar associations have, after full discussion, gone on record in favor of it. But it would be a mistake to adopt it in any jurisdiction until the bench and bar thereof realize the great responsibility thereby imposed upon them and are willing to make the necessary sacrifices of time and labor to formulate rules which shall be accurately phrased and scientifically drafted so as to remedy old abuses and prevent new ones.

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[49] Dreyer v. Illinois, (1902) 187 U. S. 71, 84, 47 L. Ed. 79.
[50] State ex rel. Patterson v. Bates, (1905) 96 Minn. 110, 116, 104 N. W. 709, 113 Am. St. Rep. 612.
[51] Report of Board of Statutory Consolidation, N. Y., I, pp. 170 et seq.