

Cornell Law Review

Volume 32
Issue 2 November 1946

Article 6

86 or 1100

Arthur John Keeffe

Torrance Brooks

William J. Greer

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Recommended Citation

Arthur John Keeffe, Torrance Brooks, and William J. Greer, *86 or 1100*, 32 Cornell L. Rev. 253 (1946)
Available at: <http://scholarship.law.cornell.edu/clr/vol32/iss2/6>

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86 OR 1100*

ARTHUR JOHN KEEFFE, TORRANCE BROOKS AND WILLIAM J. GREER

*"The court of appeals shall have the power, from time to time, to prescribe by rules, for the courts of this state, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions and proceedings at law and in equity."*¹

This statute has been introduced in the New York State Legislature at each of the last two sessions, and will, no doubt, be introduced again at the next session. The proposal has been patterned after the Act passed by Congress in 1934² which gave the Supreme Court the power to promulgate the Federal Rules of Civil Procedure, which took effect in 1938³ and made sweeping reforms in the rules of procedure.⁴

*With the undisclosed aid of Messrs. Brooks and Greer, Professor Keeffe used most of the material in this article as the basis for an unreported address before the Federation of the Bar of the Sixth Judicial District meeting at Oneonta, N. Y., on September 7, 1946. The address was entitled "Should the Court of Appeals be Given Rule-Making Power?"

¹Proposed as § 52-a of the N. Y. JUDICIARY LAW, and introduced in the Senate on January 22, 1946 (No. 519, Int. 507)

"Court of appeals may make civil rules of procedure, for the courts of this state. 1. The court of appeals shall have the power, from time to time, to prescribe by rules, for the courts of this state, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions and proceedings at law and in equity. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

"2. Said rules shall be reported to the legislature within ten days of the beginning of the regular session thereof next succeeding the adoption of said rules. Except as amended or rescinded by the legislature at such session, said rules shall take effect after the close of such session and upon completion of publication in accordance with the provisions of section fifty-two hereof, or such later date as may be specified in said rules. Thereafter all laws in conflict therewith shall be of no further force or effect.

"3. Nothing in this act shall abridge the right of the legislature to amend or rescind such rules."

²48 STAT. 1064 (1934), 28 U. S. C. §§ 723(b), 723(c) (1940).

³28 U. S. C. § 723(c) following; 308 U. S. 645 (1939).

⁴Medina, *Current Developments in Pleading, Practice and Procedure in the New York Courts* (1945) 30 CORNELL L. Q. 449, in which the writer comments at page 464:

"Fortunately, there is now, and has been for some years, an increasing demand for placing the rules of procedure under the control and supervision of the Court of Appeals. This is where the power to make such rules should reside. The experience with the Federal Rules of Civil Procedure, adopted by the Supreme Court after the most careful and exhaustive study, and then at infrequent intervals amended in an orderly and systematic fashion, is a most valuable and reassuring guide.

"It is my hope that the Bar, as a whole, will place itself solidly behind this most desirable and substantial reform." See also Moscowwitz, *Trends in Federal Law and Procedure* (1946) 21 N. Y. U. L. Q. REV. 1, in which Judge Moscowwitz said at page 27:

"I believe that the federal courts by and large have made greater strides than most of the state courts in withdrawing from bonds of tradition and antiquated practices. The Federal Rules of Civil and Criminal Procedure are undoubtedly the most notable of these advances." See W. C. Chestnut, *Improvements in Judicial Procedure* (1943) 17 CONN.

Since the coming of the Federal Rules, the American Law Institute in 1942 presented to the profession its Model Code of Evidence which makes comparable advances in the law of evidence.⁵

Adoption of the present proposal, therefore, would permit a general revision of the adjective law of the State of New York that could utilize the best features of both the Federal Rules and the Model Code of Evidence. If this proposal is passed, it will vitally affect every member of the legal profession within New York State, and mark the beginning of a new era in procedural reform.

No one can look at the present scheme of legislative regulation, the cumbersome and out-moded Civil Practice Act, without coming to the conclusion that this reform is necessary.

Defend if you can the following five aspects of the adjective law of New York.

I.

Terence Kelly owned one of the finest saloons in the City of New York. One day he died. His saloon and his other property were claimed by his beloved mother and an alleged girl friend who said she was his common law wife. A contest developed between Kelly's family and this young lady. In order to establish her case in the probate court, the young lady put her mother on the witness stand, who testified that every night after his saloon was closed Kelly would come to their home and in the morning before he left she would prepare his breakfast. When Kelly's own mother then took the stand to tell the court that this was utterly false, how her son Terence had been a good boy, how every night after his saloon was closed he came home to her, and how, of course, she always prepared his breakfast, she was excused. The ruling of the Probate Court was that the mother of the alleged common law wife should be heard, but the mother of the son could not. In the eyes of the law, Kelly's mother is an interested witness and a liar. On appeal, the highest court in the state agreed that this was the correct application of Section 347 of the Civil Practice Act.⁶

B. J. 238; Charles E. Clark, *The Challenge of a New Federal Procedure* (1935) 20 CORNELL L. Q. 443; Note (1943) 18 TEMP. L. Q. 145. See also Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence* (1940) 26 A. B. A. J. 482.

⁵MODEL CODE OF EVIDENCE (1942) adopted and promulgated by the American Law Institute. It is the work of: Edmund Morgan, Wilbur Cherry, Lawrence Eldredge, William Hale, Augustus Hand, Learned Hand, Mason Ladd, Henry Lummus, John Maguire, Charles McCormick, J. Russell McElroy, Robert Patterson, Charles Wyzanski. John H. Wigmore was Chief Consultant.

⁶Matter of Kelly, 238 N. Y. 71, 143 N. E. 795 (1924).

Put yourself in the place of the lawyer for the mother of Terence Kelly and see how difficult it would be for you to sit down and explain to her that Section 347 of the Civil Practice Act, passed by the legislature in 1877, is to blame for her not being allowed to testify. Can anyone criticize her for not understanding? She leaves your office blaming you, the legal profession, and the court for this unjustifiable result.⁷

II.

In divorce actions the courts, following the mandate of the statute,⁸ have enforced the prohibition against allowing either spouse to testify against the other, except to prove the marriage or disprove the allegations of adultery. The operation of the rule is illustrated in *Reierson v. Reierson*:

"The plaintiff had received information and become suspicious that the defendant was guilty of infidelity to the marital relation; and for the purpose of satisfying himself in this regard, and of obtaining proof of the fact if the same existed, upon the night of the 24th of October, 1897, he procured two men to accompany him to his house, and the three concealed themselves in a barn upon the premises, where they re-

⁷These so-called dead man statutes have been attacked by every writer in the field of evidence. Any argument for these statutes was exploded by a study of the Commonwealth Fund. See LAW OF EVIDENCE—INTERESTED SURVIVORS (Commonwealth Fund, 1927) 23. Their arguments against these statutes are:

(1) That interested survivors will be subjected to an irresistible temptation to perjury is contrary to experience and presupposes that most witnesses are not only so corrupted by their interests that they will perjure themselves for it, but also so adroit as to deceive courts and juries. Such a contention underestimates the power of cross-examination and disregards the fact that if human nature is so depraved, parties will have little difficulty in finding a disinterested witness ready and willing to furnish the requisite proof.

(2) To oppose the admission of such evidence because it would greatly imperil the estates of the dead, is to argue that it is more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof. It overlooks the fact that court and jury will inevitably scrutinize with great care the testimony of the survivor under such circumstances.

(3) The assertion that public sentiment would not tolerate a rule making the survivor entirely competent is a prediction which experience in Connecticut, Massachusetts, and Rhode Island has demonstrated to be false.

(4) The ordinary statute excluding the testimony has proved to be extremely cumbersome and difficult of application, with a resulting volume of litigation.

(5) Actual experience by the bench and bar with a rule admitting this testimony is the best proof of its desirability. The results of a questionnaire submitted to the bench and bar of Connecticut demonstrated that opposition to the statute allowing the testimony of interested survivors is in inverse ratio to experience with the statute. For the expression of similar views see: 2 WIGMORE, EVIDENCE (3d ed. 1940) § 578; Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal* (1941) 26 IOWA L. REV. 207; Taft, *Will Contests in New York* (1930) 30 YALE L. J. 593, 605.

⁸N. Y. CIV. PRAC. ACT § 349.

mained for some little time. At this time there was in the plaintiff's house, in company with the defendant, one Gully (who is charged as co-respondent in the action), a man named Wilson, and a servant girl. After remaining in the barn for a time, the plaintiff effected an entrance into the rear of the house with the assistance of Wilson, then in the house; and he and his two companions entered, and concealed themselves therein. A little time thereafter, the defendant went upstairs to her bedroom, and, as the evidence tended to disclose and the verdict of the jury has established, called for Gully to come upstairs. Gully responded to the invitation, and proceeded to the defendant's sleeping room, where she was undressed and in bed. After waiting a few minutes, the plaintiff and his two companions entered the sleeping room of the defendant, struck a match, and discovered Gully and the defendant in the act of adultery upon the bed."⁹

On appeal the court held that the trial court was "entirely justified in withdrawing from the consideration of the jury the averments of the commission of adultery upon the part of the plaintiff" because Section 831 of the Code of Civil Procedure (now Section 349 of the Civil Practice Act) prohibits such testimony. Fortunately the plaintiff had hired two witnesses to accompany him. If he had accidentally discovered the defendant in this same act when alone, he would have been without evidence, since to permit a husband to testify against his wife would destroy confidence and produce marital discord.¹⁰

This is our present law which no one can justify.¹¹ To paraphrase one

⁹32 App. Div. 62, 63, 52 N. Y. Supp. 509 (2d Dep't 1898).

¹⁰RICHARDSON, EVIDENCE (6th ed. 1944) § 510; *Admire v. Admire*, 180 Misc. 68, 42 N. Y. S. (2d) 755 (Sup. Ct. 1943).

¹¹5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (London, 1827) 327-345. Bentham effectively exposes the incongruities of the marital privilege:

"The law will not suffer the wife to be a witness for or against her husband: this is a proposition put by a reporter into the mouth of the first Earl of Hardwicke. 'The reason is . . . to preserve the peace of families: and therefore I shall never encourage such a consent.' Here, by good fortune, we have a distinct proposition, with an assignable author, and he of the first degree of professional respectability. . . .

"Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens), evidence sufficient for conviction is obtainable, without having recourse to the testimony of the wife; in the other instance, not without having recourse to the testimony of the wife. While the one suffers,—capitally, if such be the punishment,—to what use, with what consistency, is the other to be permitted to triumph in impunity?

"The film of prejudice once removed, a very loose system of morality, or rather (to speak plainly) a system of gross immorality, will be seen to be at the bottom of these exemptive rules. The very crime which it punishes in one man—punishes even with death—it affords its protection to in another. It converts, or seeks to convert, the house of every man, into a nursery of unpunishable crimes. The same age of barbarism and superstition, the same age of relaxed morality, which gave birth to the institution of *asylums*, gave birth (there seems reason to think) to this privilege, which gives

judge: a woman in bed with a strange man is in a very unfavorable situation to insist upon preserving inviolate the sacred concord of marriage, and harmony and confidence on the part of her husband.¹²

III.

A few years ago the city council of the City of New York heard that more patients were dying in one of the City's hospitals than the city fathers thought proper. In order to investigate the charges of negligence and maladministration, the city fathers began an investigation and sought to subpoena the doctors and records of the hospital to inquire about the diagnosis and treatment of patients in that particular hospital. The investigation was blocked. The Court of Appeals¹³ said that it would be a violation of the

to each man a safe accomplice in his bosom. The mischievousness of the domestic asylum goes, however, far beyond that of the asylum commonly called. . . .

"A rule like this, protects, encourages, inculcates fraud. . . .

"It debases and degrades the matrimonial union; converting into a sink of corruption what ought to be a source of purity. It defiles the marriage-contract itself, by tacking to it in secret a license to commit crimes. . . .

"Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes! —Think? answers the legislator; yes, indeed, I think of it; and, in thinking of it, what I think of besides, is what you ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. . . .

"To the legislators of antiquity, the married state was an object of favour: they regarded it as a security for good behaviour: . . . Such was the policy of the higher antiquity. The policy of feudal barbarism, of the ages which gave birth to this immoral rule, is, to convert that sacred condition into a nursery of crime. . . .

"The reason now given, was not, I suspect, the original one. Drawn from the principle of utility, though from the principle of utility imperfectly applied, it savours of a late and polished age. The reason that presents itself as more likely to have been the original one, is the grimgrubber, nonsensical reason,—that of the identity of the two persons thus connected. Baron and feme are one person in law. On questions relative to the two matrimonial conditions, this quibble is the fountain of all reasoning.

"Among lawyers, among divines, among all candidates setting up for power in a rude age, working by fraud opposed to force, scrambling for whatever could be picked up of the veneration and submission of the herd of mankind,—there has been a sort of instinctive predilection for absurdity in its absurdest shape. Paradox, as far as it could be forced down, has always been preferred by them to simple truth. . . .

"All these paradoxes, all these dull witticisms, have this in common,—that, on taking them in pieces, you find wrapped up, in a covering of ingenuity, some foolish or knavish, and in either case pernicious, lie. It is by them that men are trained up in the degrading habit of taking absurdity for reason, nonsense for sense. It is by the swallowing of such potions, that the mind of man is rendered feeble and rickety in the morning of its days. To burn them all, without exception, in one common bonfire, would be a triumph to reason, and a blessing to mankind." See also 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2239; MODEL CODE OF EVIDENCE (1942) Rule 216.

¹²United States v. Bassett, 5 Utah 131, 136, 13 Pac. 237, 241 (1887).

¹³Matter of New York City Council v. Goldwater, 284 N. Y. 296, 31 N. E. (2d) 31 (1940); Note (1941) 26 CORNELL L. Q. 482.

medical privilege to permit the city to inquire from its own doctors in its own hospital how they were treating patients. The confidential relationship between doctors and patients would be violated.¹⁴ The court was required by the statutory mandate (Section 352 of the C. P. A.) to deny to a legislative committee, whose avowed purpose was to uncover abuses, the right to ascertain the facts, perhaps vitally necessary for the protection of the public of the City of New York.

IV. and V.

The present motion system in New York makes it possible for an attorney who does not desire a decision of the controversy on the merits to keep delaying the action by making motions until he is able to either exhaust the other party or secure a compromise settlement.¹⁵ If the action can be delayed long enough there is always hope that the other party will give up or lose his case through the loss of material evidence or key witnesses.

Besides being permitted to make numerous motions, each delaying the action during the time the motion is coming up for a hearing, the moving party is allowed the unlimited right of appeal on corrective motions.¹⁶ This makes it possible for this ridiculous situation to occur.

For example, A sues B for breach of contract and on Jan. 1 serves the summons. On Jan. 21, A serves the complaint. Feb. 10, B applies *ex parte* for an order to show cause for a 20 day extension of time to answer or move. March 2, B gets a further extension of 20 days. March 22, B moves to make the complaint more definite and certain and to separately state and number. April 22, B loses and appeals to the Appellate Division. June 1, B has finally prepared the appeal papers but wants the summer to brief. Dec. 1, B's motion is finally denied on appeal and he is directed to answer in 10 days. Dec. 10, B now moves to strike part of the complaint as

¹⁴That adherence to this privilege may create great injustices *see*: 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2380a (He denounces the privilege as an injury to justice one-hundred fold greater than any injury which might be caused by disclosure.)

¹⁵"The energies of attorneys and counsel and clients, their time and labor, are devoted to these statutory proceedings instead of being addressed to the trial of the case. Pending the disposition of the multitude of motions which it is possible to make, and which in number are often in inverse proportion to the merits of the case, the final disposition of the case is postponed. Serious and long-continued delay is the result in many cases. Witnesses die or leave the jurisdiction. Their memories become vague and the establishment of facts becomes more difficult. Suitors become tired and discouraged, or their means are exhausted. Conditions change, and the relief, when attained, is often deprived of much of its value." Taken from an address by Elihu Root, President of the New York State Bar Ass'n (1911) 34 N. Y. S. BAR ASS'N REP. 87, 92.

¹⁶N. Y. CIV. PRAC. ACT §§ 609, 610.

irrelevant under Rule 103. Jan. 10, the motion is heard and argued and denied. B then turns to see what else he can do to delay coming to the merits. Perhaps he can now move to the federal court, giving him as much as 60 days delay at once.

All corrective motions should be made at once and there should not be an unlimited right of appeal.¹⁷ Contrast the New York motion practice with Federal Rule 12(b) which requires that the answer be served within 20 days, but allows one corrective motion which must contain all objections to the pleadings. There is no appeal on this motion.¹⁸ In case the motion is made, 10 additional days are given to answer. However, any matter which could be the subject of a motion may be pleaded in the answer. One critic has suggested that even this one omnibus motion in the federal procedure should be abolished and defendants forced to include motion objections in their answers.¹⁹

The Remedy

The above illustrations, which could be multiplied, point out instances where the courts under the Civil Practice Act are obliged to do injustice. Any correction now requires legislative action. Although many eminent lawyers are members of the judiciary committee of the legislature, their time and energies must necessarily be spent on matters other than securing the passage of bills designed to correct numerous minor defects in the operating procedure of the courts.

The legislator who is not a lawyer does not know, nor does he care, about these proposed changes. There is no reason why he should, for he has more

¹⁷"The attainment of justice is delayed until it often amounts to a denial of justice, the honest suitor is discouraged, the dishonest man who seeks to evade his just obligations is encouraged to litigate for the purpose of postponing them. Such a condition is not sporadic and occasional. It is continuously recurrent. It is the result of a natural tendency which appears whenever the conduct of affairs in any branch of the social life of man is entrusted to a particular class of men specially qualified for that special work by learning and skill beyond the great body of their fellows. The conduct of such affairs by such a class becomes an art. The art becomes a mystery. Rules and formulas originally designed as convenient aids to the attainment of ultimate ends become traditions and dogmas, and belief in their importance supercedes the object which they were originally meant to subserve. Special training develops intellectual acuteness and fine and subtle distinctions. The sense of proportion is lost and the broad, simple, direct methods which alone are really useful in helping plain people to attain the substantial objects of practical life become entangled in a network of form and technical refinements." This comment, relating to court practice under the Code of Civil Procedure, applies to motion practice under the Civil Practice Act. Root, *Reform of Procedure* (1911) 34 N. Y. S. BAR ASS'N REP. 87, 89.

¹⁸43 STAT. 936 (1925), 28 U. S. C. § 225 (1940).

¹⁹Clark, *Some Problems Concerning Motions Under Federal Rule 12(b)* (1943) 27 MINN. L. REV. 415, 3 F. R. D. 146.

important and more interesting functions in formulating broad matters of policy. He can not be expected to learn court procedure, to learn the mischief of the present procedure, and then to learn the proposed remedy in order to properly evaluate the proposal.²⁰

The proper place to argue the merits of a proposed change in court procedure is before the court itself. It is part of its business to know the existing procedure and its abuses. Another advantage of court rules is that the rules are interpreted by those who make them. Consequently, the responsibility for deciding a law suit on a technical point of procedure instead of deciding it on the merits then cannot be placed on the legislature. Rules of court have a tendency to make procedure subsidiary to substantive law.

The simplicity of the Federal Rules presents an encouraging contrast to the voluminous Civil Practice Act. The Federal Rules of Civil Procedure contain only 86 rules covering a field which requires over 1100 sections in the New York Civil Practice Act.²¹ This simplification of the rules of practice and procedure in the courts is especially helpful to the litigant of small means. Well-to-do litigants can afford to hire lawyers to haggle over procedural problems, but the man of small means must be able to get justice speedily and at the least possible cost, or justice will be denied him.

Judge Rodenbeck of Rochester, writing in the *Cornell Law Quarterly* in 1916 said:

"Where the procedure is regulated by statute the courts are powerless to deviate from the rules thus laid down and the procedure must necessarily become a matter of right. That system also enables the courts to avoid coming to the merits of a controversy and is productive of delays by multiplying adjudications upon matters of procedure. It is easier to decide questions of procedure than to pass upon the rights of the parties. It is for these reasons that we have had so much procedural law under the present system of statutory regulation of procedure. The system of statutory rules also encourages a resort to other means for deciding controversies between citizens. The growth of committees and boards of arbitration are an evidence of the insufficiency of the courts and a protest against the existing court procedure."²²

One of the most persuasive arguments for permitting courts to formulate rules of procedure is that technical complexities created by the legislature are driving clients away from the courthouse to seek adjudication by referees and administrative tribunals. Consider, for example, the voluminous litiga-

²⁰See Pound, *The Rule Making Power of the Courts* (1926) 12 A. B. A. J. 599, 602, 10 J. A. J. S. 113, 118.

²¹Mitchell, *Reform in Judicial Procedure* (1938) 24 A. B. A. J. 197.

²²Rodenbeck, *The New Practice in New York* (1916) 1 CORNELL L. Q. 63, 66.

tion carried on by the State Industrial Board (Workmen's Compensation Commission). Very early in the history of that Board the Court of Appeals upheld the admission of hearsay evidence before it.²³ Administrative law practice is modernized; court practice is left behind the times. The Court of Appeals is powerless to correct any of the oddities in the various exceptions to the hearsay rule which need revision,²⁴ making it more desirable to try actions before administrative tribunals.

Speaking at Denver in September of 1916 Roscoe Pound put it this way:

"We can vouch a generation of experience in England, the experience of the federal equity rules, the experience of the federal administration rules, the experience of the rules in bankruptcy and in copyright, and the experience of administrative tribunals throughout the land, to each of which a full control of its procedure through exercise of a rule-making power has regularly been conceded. Indeed, it is a curious anomaly that the legislatures and the bar have been quite willing to allow administrative boards and commissions, tribunals manned by laymen and provided with little or no substantive law, a free hand to shape their own procedure by giving them the rule-making power of the common law judge, while insisting that the courts, manned by trained judges, accustomed to refer their every action to legal principles, and provided with an elaborate apparatus of substantive law, be held down by detailed procedural legislation. One would think that if either were to be given some scope for doing things efficient in its own way, as dictated by experience, it would be the courts; that if either needed the procedural strait-jacket of a statute it would be the administrative commission."²⁵

The statute authorizing the Supreme Court to make rules was passed in 1934.²⁶ It was first advocated in 1906 in an address by Dean Roscoe Pound

²³Matter of Altschuller v. Bressler, 289 N. Y. 463, 46 N. E. (2d) 886 (1943) in which the Court of Appeals enlarged upon the dictum in Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507 (1916) to sustain the Industrial Board's finding based entirely on hearsay testimony and corroborated only by the absence of any direct evidence to the contrary; Matter of Theodore Gallagher v. Mundett Cork Co., 295 N. Y. 576, 64 N. E. (2d) 283 (1945). See N. Y. WORKMEN'S COMPENSATION LAW § 118.

²⁴MODEL CODE OF EVIDENCE (1942) 223:

"The fact is, then, that the law governing hearsay today is a conglomeration of inconsistencies developed as a result of conflicting theories. Refinements and qualifications within the exceptions only add to its irrationality. The courts by multiplying exceptions reveal their conviction that relevant hearsay evidence normally has real probative value, and is capable of valuation by a jury as well as by other triers of fact."

⁵WIGMORE, EVIDENCE (3d ed. 1940) § 1576 (He comments favorably at page 441 on the Massachusetts statute prohibiting the exclusion of a deceased's declaration because it is hearsay.) See MASS. GEN. LAWS 1920, c. 233, § 65.

²⁵Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599, 602, 10 J. A. J. S. 113, 118. See Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 ILL. L. REV. 163.

²⁶See note 2, *supra*.

before the American Bar Association.²⁷ A special committee of the American Bar Association was formed to secure the enactment of the necessary enabling act to authorize rule-making powers for the court.²⁸ This committee continued its efforts from 1911 to 1933 when it was felt that it would be impossible to do anything further at that time.²⁹ However, a year later, the new Attorney General, Homer S. Cummings, championed the cause and was able to secure passage of the necessary legislation as part of his program for reorganizing the Judicial Department.³⁰ Many eminent judges and scholars were identified with this movement which secured the rule-making power for the Supreme Court.³¹ They included such names as Roscoe Pound, Ex-president Taft,³² Elihu Root, Judge Alton Parker, Mr. Justice McReynolds, Henry Wade Rogers, Moorfield Storey, Frank B. Kellogg, Samuel Williston, Joseph Beale, Louis Brandeis, and Charles E. Clark. The proposal was approved by Presidents Wilson and Franklin D. Roosevelt and endorsed by Attorneys General McReynolds, Gregory, Palmer, Stone, and Sargent. Presidents Taft and Coolidge considered it of sufficient importance to include their approvals in messages to Congress. It was endorsed by forty-six State Bar Associations, including the New York State Bar Association,³³ the Conference of Commissioners of Uniform State Laws, the executive committee of the Association of Law Schools, the United States Chamber of Commerce, the National Association of Credit Men, the Commercial Law League, the National Civic Federation and the Southern Commercial Congress. It was approved by present or former deans of many important law schools, including Harvard, Yale, Cornell, and Virginia.

The Supreme Court appointed an advisory committee to aid it in the formation of the rules.³⁴ This committee, composed of leading members of the bar,³⁵ formulated the rules and submitted them to the Court. With

²⁷*Supreme Court Adopts Rules for Civil Procedure in Federal District Courts* (1938) 24 A. B. A. J. 97, 99.

²⁸(1912) 37 A. B. A. REP. 35, 434-436. See Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States* (1934) 32 MICH. L. REV. 1116.

²⁹*Supreme Court Adopts Rules for Civil Procedure in Federal District Courts* (1938) 24 A. B. A. J. 97, 104.

³⁰*Ibid.*

³¹Cummings, *Immediate Problems for the Bar* (1934) 20 A. B. A. J. 212 (A list of names of those identified with the movement is set forth in this article.)

³²See Taft, *The Delays of the Law* (1908) 18 YALE L. J. 28, 32; Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts* (1922) 47 A. B. A. REP. 250, 260-269.

³³(1913) 38 N. Y. S. BAR ASS'N REP. 100.

³⁴Orders of the Court dated June 3, 1935 (295 U. S. 774) and February 17, 1936 (297 U. S. 731). See also Continuation of the Advisory Committee, January 5, 1942 (314 U. S. 720).

³⁵The Supreme Court of the United States appointed an advisory committee of fifteen

minor changes, these were accepted by the Court and have now become the Federal Rules of Civil Procedure.

To write about the advantages of the federal procedure over the present state procedure under the Civil Practice Act would be useless. In certain instances the New York procedure has some merit, but on the whole, the existing state procedure has few defenders, especially among those who are well acquainted with the procedure in the federal courts.³⁶

The history of the rule-making power in New York State from the colonial period to the present is set forth in the case of *Hanna v. Mitchell*.³⁷ The Colony of New York in 1691 passed a statute quite similar to the one being considered today.³⁸ It gave to the Supreme Court of the Colony the power to make, order, and establish such rules and orders for the more orderly practice and proceeding in their courts. This power was exercised by the Supreme Court for 86 years before there was a legislature of the State of New York.³⁹ Some of the rules of procedure promulgated by the Supreme Court of New York as early as 1799 are still found in the present code of this state.⁴⁰ During the early history of this country the right to promulgate rules of procedure was generally recognized as inherent in the courts.⁴¹ The Supreme Court of the United States expressly recognized in this early period that it had such power and did prescribe rules of procedure to be used in federal courts.⁴²

men, five of whom were law school experts on procedural systems, and ten of whom were practicing lawyers with wide experience.

³⁶The following is a statement made by Hon. William D. Mitchell:

"I have practiced law in many sections of the country, and have become familiar with the systems of practice and procedure in many states, and I am sure it cannot be denied that, while the New York Civil Practice Act and Rules have many good points, they constitute the most complicated, rigid and difficult procedural system of any state of the union." See Flynn, *Regulating Procedure by Rules of Court* (1941) 26 CORNELL L. Q. 653, 663.

³⁷202 App. Div. 504, 196 N. Y. Supp. 43 (1st Dep't 1922) where the court states that "the power to make rules was inherent in the courts of Kings Bench, Common Pleas, and Exchequer of England, and would have been conferred on the Supreme Court without the express grant of such power contained in the act." For an approval of this statement by the Court of Appeals see *General Investment Co. v. Interborough Rapid Transit*, 235 N. Y. 133, 143, 139 N. E. 216, 220 (1923). See MacDonald, *A Survey of the Administration of Justice in New York* (1941) 26 CORNELL L. Q. 648; Flynn, *Regulating Procedure By Court Rules* (1941) 26 CORNELL L. Q. 653.

³⁸*Hanna v. Mitchell*, 202 App. Div. 504, 507, 196 N. Y. Supp. 43, 47 (1st Dep't 1922).

³⁹*Id.* at 513, 196 N. Y. Supp. at 51.

⁴⁰Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 ILL. L. REV. 163, 172.

⁴¹*People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934). See note 37 *supra*. See also Pound, *supra* note 40, at 170; Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally* (1928) 23 ILL. L. REV. 276.

⁴²"Rule," 2 Dall. 411, 413, 1 L. ed. 436 (U. S. 1792).

Field's Code adopted in New York in 1848⁴³ was the first endeavor by any legislature to prescribe in detail the procedure to be used in the courts. This original code contained only 391 sections and had many good qualities. Twenty-eight years later the Throop Code of Civil Procedure was adopted.⁴⁴ This was a collection in one code of all of the law governing New York procedure. The passage of this code, which attempted to regulate all of the details of practice, was opposed by David Dudley Field who did not believe in such detailed regulation of court procedure.⁴⁵ By revision and amendment this code grew to 3,383 sections containing a conglomeration of both substantive and adjective law.⁴⁶

In 1904 the state legislature set up the Board of Statutory Consolidation with Judge Rodenbeck as chairman.⁴⁷ The Board was given the task of consolidating and revising all of the law then in force. Believing that something more than consolidation and revision of the Code of Civil Procedure was needed, the Board concentrated on the revision of the substantive law.⁴⁸ The New York State Bar Association, acting in response to speeches by Judge Rodenbeck⁴⁹ and Elihu Root,⁵⁰ at their annual meeting in 1911 resolved to submit to the legislature a provision calling for the consolidation, revision, and simplification of the civil practice into a short practice act of fundamental rules to be supplemented by rules of court.⁵¹ Although the legislature passed the provision, it was vetoed by the governor.⁵² Later, in 1913, a similar provision was passed and the task was given to the Board of Statutory Consolidation.⁵³

⁴³N. Y. Laws 1848, c. 379.

⁴⁴N. Y. Laws 1876, c. 448-449 entitled "The Code of Remedial Justice," amended by and designated as "The Code of Civil Procedure" by N. Y. Laws 1877, c. 416; supplemented by N. Y. Laws 1880, c. 178.

⁴⁵Rodenbeck, *The Reform of the Procedure in the Courts* (1911) 34 N. Y. S. BAR ASS'N REP. 354, 359.

"David Dudley Field was one of the most strenuous opponents of the Code of Civil Procedure, and could find no language strong enough to express his condemnation of the act. On one occasion he said it was an 'attempt to force upon the people of this state a meretricious and abortive scheme which will keep you in perpetual trouble which will never have an end.'"

⁴⁶Note (1920) 29 YALE L. J. 904, 906.

⁴⁷N. Y. Laws 1904, c. 664.

⁴⁸Rodenbeck, *The Reform of the Procedure in the Courts of the State of New York* (1911) 34 N. Y. S. BAR ASS'N REP. 354, 355.

⁴⁹*Ibid.*

⁵⁰Root, *Reform of Procedure* (1911) 34 N. Y. S. BAR ASS'N REP. 87.

⁵¹(1911) 34 N. Y. S. BAR ASS'N REP. 468.

⁵²*Report of the Special Committee on the Revision of the Civil Practice* (1912) 35 N. Y. S. BAR ASS'N REP. 437.

⁵³N. Y. Laws 1913, c. 713. See also N. Y. Laws 1912, c. 393.

Two years later the Board submitted its recommendations.⁵⁴ In place of the Code of Civil Procedure it recommended a short practice act of 71 sections containing only the essential elements and a body of 401 rules, an Evidence Law, a Cost Fees, Disbursements and Interest Law, and a Civil Rights Law. This was expected to provide a simple, uniform, and flexible system of procedure, freeing the judiciary from fixed statutory rules and technical statutory construction.⁵⁵

While this report was before the state legislature, the Constitutional Convention of 1915 adopted as a part of the revised state constitution a provision making it a duty of the legislature to act upon the report of the Board of Statutory Consolidation.⁵⁶ It also provided:

"After the adoption of the Civil Practice Rules by the legislature . . . the power to alter and amend such rules and to make, alter, and amend civil practice rules shall vest and remain in the Courts of the State."⁵⁷

Because of other considerations this Constitution was not adopted by the people of the state at the general election in November 1915 when submitted for their ratification.

The legislature sent the short practice act to a Joint Legislative Committee for action.⁵⁸ The committee members, who were opposed to a short practice act and court rules,⁵⁹ proceeded to correct the more glaring defects in the Code of Civil Procedure by a consolidation, revision, and simplification of its provisions. This revised code, later known as the Civil Practice Act,⁶⁰ consisted of 1,560 sections and was supplemented by 216 rules.⁶¹

⁵⁴REPORT OF THE BOARD OF STATUTORY CONSOLIDATION ON THE SIMPLIFICATION OF THE CIVIL PRACTICE OF NEW YORK (1915) Vol. 1.

⁵⁵Rodenbeck, *The New Practice in New York* (1916) 1 CORNELL L. Q. 63, 68.

⁵⁶Note (1920) 29 YALE L. J. 904, 905.

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹*Report of the Committee to Examine the Practice Act prepared by the Board of Statutory Consolidation and the Joint Legislative Committee* (1920) 43 N. Y. S. BAR ASS'N REP. 149. At page 151 this report quotes from the *Report of the Joint Legislative Committee to the Legislature* under the date of April 17, 1919:

"The Committee can see no special merit in a short practice act as such, which merely declared the policy of the state, nor has the committee been particularly impressed by the bitter denunciation of the Code on account of its size. . . .

"Statutory technicalities tend to defeat justice by increasing the delays of litigation and in numerous cases the cost of litigation to the honest litigant. On the other hand, uncertainty resulting from too few statutory requirements and too elastic a system of practice work just as great hardship in the individual case."

⁶⁰N. Y. Laws 1920, c. 925.

⁶¹In 1921 the Rules of Civil Procedure were adopted by a convention called for the purpose upon the authority of N. Y. Laws 1920, c. 902.

The New York State Bar Association, knowing that the Joint Legislative Committee had the power to put through their own code,⁶² in a last minute attempt to save the short practice act, introduced a bill⁶³ in the legislature on April 7, 1920 providing that both plans be submitted to a convention made up of delegates from the Appellate Division, the Bar Association, and members of both the Joint Legislative Committee and the Board of Statutory Consolidation. The Joint Legislative Committee was able to shelve this recommendation and obtain approval of their practice act.⁶⁴

When the bills containing the Committee's new practice act were presented to Governor Smith, he requested the advice of the New York State Bar Association. Judge Rodenbeck urged the Bar Association to advise the Governor to veto the new practice act. He said:

"It does not seem to me that we ought at this time, after so many years of study on this subject, to sacrifice principle to expediency . . . I say that we cannot afford to throw away the principle of regulating details of practice by court rules. . . ."⁶⁵

Faced with the problem of whether to insist upon the attainment of an ideal, or accept what the legislature offered, the Bar Association accepted the opportunity to improve conditions immediately and passed the resolution advising the Governor to approve the new practice act.⁶⁶ The Governor approved the bills and the Civil Practice Act became law.

The Practice Act has been criticized from the beginning.⁶⁷ It has admirable features, but it is altogether too long, with too much detail, too many traps for the unwary, and with too much emphasis on forms and modes of procedure. It is lacking in recognition of the fact that in the administration of justice enforcement of rules of practice is not the end in view.⁶⁸ That it is not adequate is evidenced by the habitual legislative tinkering which is required to keep it in service. In 1934 the Judicial Council was set up to make continuous studies of the judicial process, including court organization, jurisdiction, administration, procedure, and evidence.⁶⁹ On the basis

⁶²(1920) 43 N. Y. S. BAR ASS'N REP. 144-163, 301-203.

⁶³No. 1857, April 7, 1920.

⁶⁴(1921) 44 N. Y. S. BAR ASS'N REP. 530.

⁶⁵(1921) 44 N. Y. S. BAR ASS'N REP. 532, 544.

⁶⁶*Id.* at 546.

⁶⁷Rothschild, *The Simplification of Civil Practice in New York* (a series of articles) (1923) 23 COL. L. REV. 618, (1923) 23 COL. L. REV. 732, (1924) 24 COL. L. REV. 732, (1924) 24 COL. L. REV. 815. Rothschild felt that the Civil Practice Act was not a revision of our practice, but an amendment of the Code of Civil Procedure, introducing specific changes on specific subjects and allocating statutory law on various topics into what was considered more closely related subject matter.

⁶⁸See Mitchell, *Reform in Judicial Procedure* (1938) 24 A. B. A. J. 197.

⁶⁹N. Y. JUDICIARY LAW §§ 40-48.

of its studies it was to make recommendations to the legislature. At the end of the first ten years, the Judicial Council reported that it had recommended changes to 263 sections of the Civil Practice Act.⁷⁰ It also reported that 342 changes to the Civil Practice Act had been effected.⁷¹

The New York Civil Practice Act as it exists today, supplemented by Rules of Civil Procedure, offers the best example of the defect of having procedural codes enacted by legislatures.⁷²

Today twenty-three states of the union have adopted a statute giving their highest court rule-making power.⁷³ Many others are considering the matter. The English courts have been operating under court rules since 1873 with great benefit to the litigant, secured by the expedition in settlement of controversies and the elimination of appeals on practice and pleading.⁷⁴

There is no substantial question as to the constitutionality of the proposed act.⁷⁵ The passage of the enabling act in this state might be opposed by

⁷⁰JUDICIAL COUNCIL, INDEX TO FIRST TEN ANNUAL REPORTS (1945) 27.

⁷¹*Id.* at 23.

⁷²See Mitchell, *Reform in Judicial Procedure* (1938) 24 A. B. A. J. 197.

⁷³Alabama, Arizona, Colorado, Connecticut, Delaware, Idaho, Indiana, Iowa, Maine, Maryland, Nebraska, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, West Virginia, Washington, and Wisconsin. See Eleventh Annual Report of the Judicial Council, *Proposal Under Consideration by the Judicial Council to Empower the Court of Appeals to Make Rules of Civil Procedure* (1945) 321, 329.

⁷⁴Taft, *The Delays of the Law* (1908) 18 YALE L. J. 28, 32; Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts* (1922): 47 A. B. A. REF. 250, 260-269; Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599; Paul, *The Rule Making Power of the Court* (1925) 1 WASH. L. REV. 163, 169.

⁷⁵The relevant sections of the New York Constitution involved are Article III, Sec. 1, which provides: "The legislative power of this state shall be vested in the Senate and Assembly," and Article VI, Section 20, which provides:

"The testimony in equity cases shall be taken in like manner as in cases at law; and, except as herein otherwise provided, the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that it has heretofore exercised."

At most Section 20 grants to the legislature the power to pass laws to the extent "heretofore exercised" regulating practice and procedure. It does not purport to take away the right of the courts, as part of their judicial work, to pass rules governing practice and procedure particularly where the legislature abstains from so doing. Nor is there anything expressed in the Constitution which prevents or prohibits the legislature from delegating to the Court of Appeals complete rule making authority, especially where such rules are still subject to legislative action. *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43 (1st Dep't 1922), *aff'd*, 235 N. Y. 534, 139 N. E. 724 (1923); *General Investment Co. v. Interborough Rapid Transit Co.*, 235 N. Y. 133, 139 N. E. 216 (1923).

In *Beers v. Haughton*, 9 Pet. 329 (U. S. 1835) at 360, the court, through Mr. Justice Story said, referring to earlier cases:

"It was there held that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the processes and modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it from its com-

legislators who desire to retain this control for themselves. To overcome this possible objection, the bill requires that the rules must be laid before the legislature during a full session with an opportunity on the part of the legislature to veto or modify them before they become effective. It may be that the strongest opposition to this proposed reform will come from lawyers who understand the present system, are accustomed to working under it, and feel that it would be a great burden to learn another entirely different procedure. In part this objection is overcome by the fact that with the Federal Rules as an example and starting point, it might be assumed that the court rules which would be adopted for use in the state courts would be so nearly identical to the rules in force in the federal courts that the lawyer practicing in this state would only be required to be familiar with one procedure rather than two, as is now the case with lawyers whose work carries them into the federal courts.

The actual drafting of the rules themselves will be a tremendous undertaking. However, the Court of Appeals would not be expected to do the actual drafting. As was done by the Supreme Court,⁷⁶ an advisory committee would have to be appointed, composed of members of the bench and bar, including judges of the lower courts. Perhaps this committee would work through, or in conjunction with, the Judicial Council. That agency has so many other problems to deal with that it might be well not to burden it with the original drafting of the rules. However, some permanent advisory committee should be retained after the rules become effective so that adequate reports on the operation of the rules will be available to the court and further changes can be studied and recommended for adoption to keep the rules adequate to their purpose.⁷⁷ The task of the Court of Appeals is

mencement to its termination, and until the judgment should be satisfied, 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." See *Bank of U. S. v. Halstead*, 10 Wheat. 51 (U. S. 1825); *Woodbury v. Andrew Jergens Co.*, 61 F. (2d) 736 (C. C. A. 2d, 1932), *cert. denied*, 289 U. S. 740, 53 Sup. Ct. 659 (1933); *Byers v. Smith*, 4 Cal. (2d) 209, 47 P. (2d) 705 (1934); *In re Constitutionality of Statute empowering Supreme Court to promulgate Rules Regulating Pleading, Practice and Procedure in Judicial Proceedings*, 204 Wisc. 501, 236 N. W. 717 (1931); *State of New Mexico v. Roy*, 40 N. M. 397, 60 P. (2d) 646 (1936); *State ex rel Foster-Wyman Lumber Co. v. Superior Court of Kings County*, 148 Wash. 1, 267 Pac. 770 (1928).

⁷⁶See note 34 *supra*.

⁷⁷Sunderland, *The Regulation of Practice and Procedure by Rules of Court* (1942) 15 OHIO BAR ASS'N REP. 91, 97; Eleventh Annual Report of the Judicial Council, *Proposal under Consideration by the Judicial Council to Empower the Court of Appeals to Make Rules of Civil Procedure* (1945) 321, 334.

merely to consider the draft when prepared, and if there are differences of opinion to act as judge.

As stated at the outset, the Federal Rules of Civil Procedure and the Model Code of Evidence by the American Law Institute provide models from which rules may be drawn. The best features of each should be adapted to New York procedure, and the best features of our own practice should be retained.

Before his death Chief Judge Lehman expressed the opinion that rule-making power should be vested in the New York courts although he reserved his judgment as to which New York courts should exercise the power.⁷⁸

This proposed statute has been endorsed by the Association of the Bar of the City of New York and the New York County Lawyers Association. It is also supported by the Citizens Committee on the Courts which is composed of lawyers and laymen of both political parties.

⁷⁸See Report of Committee on Courts of Superior Jurisdiction on Proposed Statute Delegating to the Court of Appeals the Rule-Making Power, Association of the Bar of the City of New York. This committee voted in favor of the proposed statute. With respect to the attitude of the late Chief Judge, the report states: "A representative of this committee, with a representative of the New York County Lawyers Association, conferred recently with Chief Judge Lehman of the Court of Appeals with reference to the proposed bill. At the conference Judge Lehman gave these representatives permission to quote his remarks, which were, in substance, that he was enthusiastically in favor of vesting the rule-making power in the Courts rather than in the Legislature. Judge Lehman had not given consideration at that time to the question of whether the rule-making power should be vested in the highest Court of the State, as has been done in other States and as is done under the Federal statute, or in the Appellate Divisions, and hence made no comment one way or the other with respect to that feature of the bill."