The Rule-Making Power of the Courts

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THE RULE-MAKING POWER OF THE COURTS

DURING these times of renewed interest in the defects in our judicial procedure, probably the most sweeping and far-reaching reform proposed is to give the rule-making power to our courts. The exact form of the proposal differs with the conditions in various jurisdictions, but the proposed acts generally provide that the highest appellate court of the jurisdiction shall 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 suits, actions, appeals and proceedings of whatever nature in any of the courts of the state, superseding any statutes in conflict therewith,—as, for example, the very recent enactment in the State of Washington. It will be seen at once that such a proposal breaks away from "code practice" under which the courts of most states in the Union have operated since about 1850. For that reason as well as because of the need which gives rise to it, it seems proper that the bench and bar of those states where regulation is by procedural code should familiarize themselves with the history of the proposal, existing enactments, any legal or constitutional questions involved, and its advantages or disadvantages.

1 A bill of the most recent and advanced type is House Bill No. 158, passed on January 4, 1926, shortly before adjournment, by both Houses of the 1925 extraordinary session of the Legislature of the State of Washington. The bill was approved by the Governor on January 12, 1926, and will take effect in April, 1926. The text of the bill, which is modeled after the proposed Federal rule-making act in law actions (for discussion of which see text of this article, supra), reads as follows:

"AN ACT to promote the speedy determination of litigation on the merits and authorizing the Supreme Court to make rules relating to pleading, procedure and practice in the courts of this state.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. The Supreme Court shall have the power to prescribe, from time to time, the forms of writs and all other 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; of drawing up, entering and enrolling orders and judgments; 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 suits, actions, appeals and proceedings of whatever nature by the Supreme Court, Superior Courts and Justices of the Peace of the State of Washington. In prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

Sec. 2. When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

Sec. 3. This act shall not be construed to deprive the Superior Courts of power to establish rules for their government supplementary to and not in conflict with the rules prescribed by the Supreme Court."
Speaking generally, the growth of procedural law may be divided into three periods: (1) The Common Law, (2) Statutory rule, (3) Court rule.

I.

THE COMMON LAW PERIOD

The earliest method of making rules of procedure was by rules of court, found for the most part in court decisions, though sometimes formally promulgated.²

During this era, which may be said to have commenced in the fourteenth century³ and to have come to an end in England with the Hilary Rules of 1834 and in the United States with the Field Code of 1848, the legislatures interfered occasionally for the purpose of "mitigating the asperities of common law pleading,"⁴ so that a certain amount of procedural law is found in the statutes.

In Tidd's Practice, the standard procedural treatise of the times, the tables show "nearly five hundred statutes referred to and more than that number of general rules of court, orders and notices."⁵ This work, which would make very hard reading for the present day lawyer, had by 1828 run into nine English editions, and it is especially noteworthy that the Third American Edition appeared in 1840 and the fourth in 1856. In other words, the practice and usage with regard to the rule-making power in England was believed applicable and useful in America up to the Code Procedure Period. And it is true, of course, that "we inherited the English system of regulating pro-

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² Lord Bacon's "ordinances" or orders as to chancery practice (1618) governed procedure in equity, with some modifications by successive chancellors, at the time when our courts of equity were set up and are the foundation of the old equity rules of the Supreme Court of the United States, and thus of the present practice in equity. They may be seen in Beames' Orders in Chancery, where the successive amendments and additions by later chancellors are also set forth. But, although modern equity practice is thus derived from Bacon's Orders in Chancery, there were such orders before him. He only exercised in a comprehensive way a power already exercised by his predecessors. Kerly, History of Equity, 164: see also, Roscoe Pound, 10 Ill. L. Rev. 171.

³ Edward Jenks, in his Short History of English Law, p. 188, says that these rules go back "for a long period in English legal history, and it is impossible without further research into the archives of the fourteenth century to state definitely when they began * * * * * While the known Chancery Orders go back to 1388, the oldest Common Law Rules date only from 1437 but the oldest of these latter refer clearly to still older Rules, which seem to have disappeared. The oldest published Rules of the King's Bench appear to be of 1604, but it is more than probable that these are not in fact the first made. The oldest Exchequer Rules known to the writer date from 1571." 13 L. S., Mo. Bulletin, p. 6.

⁴ Preface to Ninth English Edition (1828), p. xi, see also Table of Regulae Generales, printed in 1 Chitty, Pleading, 14th Amer. Ed., 126.
procedure by rules of court, and practice at law in the United States is founded upon the rules of the Superior Courts in England as adopted and modified by our courts prior to the taking over of the subject by the legislature."

In 1792, the following incident is recorded as taking place in the newly constituted Supreme Court of the United States:

"The Attorney General having moved for information, relative to the system of practice by which the Attornes and Counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, The Chief Justice, at a subsequent day, stated that The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary." (2 Dallas, 411.)

The Judiciary Act of 1789 and the Process Act of 1792 conferred on the federal courts large powers to control their own practice and to vary the rules which prevailed in the inferior courts. Furthermore, rules of procedure were promulgated by the Supreme Court of New York in 1799.

In the statutes of practically every state in the Union, prior to the adoption of the codes, will be found provisions adopting the proceedings of the common law, so far as applicable, and as Professor Hudson remarks, this "was really nothing more than court-made procedure," though, of course, the power of the legislature was recognized.

In spite of this spasmodic interference of the legislature, "at common law, the adjective law, like the substantive law, developed mainly through judicial decisions reached by a process of judicial reasoning in which the judges arrived at their conclusions chiefly by the aid of ancient custom and the employment of deductive logic, professing at least not to make but to discover the law." The result was that the courts erected a complex system of procedure which too often obscured the true end and purpose of procedure—"the determination and enforcement with reasonable speed of the substantive rights of the parties."
II.

THE STATUTORY PERIOD.

The disadvantages of the cumbersome system in England brought about the enactment of the Civil Procedure Act of 1833, which authorized eight of the common law judges to make rules for the reform of pleading, and under the authority of which the Hilary Rules of 1834 were issued. These rules were a compromise "between the conservatism of six centuries and the demands of modern criticism and modern convenience." Contemporary opinion of the Hilary Rules may be gleaned from the "Advertisement to the Third American Edition" of Tidd's Practice, where the author refers to the enactment of the Hilary Rules in the following language:

"In pursuance of the power given by the Administration of Justice Act (11 Geo. IV and 1 W IV, c. 70) general rules were made by all the Judges in Trinity term, 1831, and Hilary term, 1832. The object and intent of the rules of Hilary term appear to have been, to assimilate the practice of the different courts, and to render the proceedings therein more expeditious, and less expensive to the suitors.

"Under the Law Amendment Act, (3-4 W IV, c.42) general rules were made by all the judges of the superior courts of common law at Westminster in Hilary term, 1834,

These rules, which may be considered as the commencement of a new era in pleading in England, are of two kinds: 1st, general rules, relating to all pleadings, and secondly, rules relating to pleadings in the particular actions of assumpsit, covenant, debt, detinue, case and trespass."

However, though the Hilary Rules ushered in a new era in English procedural law, they are placed in the second period of procedural development because the stimulus behind them was a legislative act, and the interference of the legislature in determining how and when the rules were to be made and that they were to be revised was much more sweeping action than had hitherto been taken by Parliament in relation to rules of court. It will be noticed, however, that in England at this time there was really no sharp break in the general method of making rules—that is, the legislature did not attempt to lay down a set of rules for the courts to follow, but only compelled the courts to take action themselves "to assimilate the practice of the different courts," and "to render the proceedings more expeditious."

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13 3 and 4 William IV, c. 42.
14 Hepburn, History of Code Pleading, p. 77.
15 Pp. iii-lv.
To meet the situation created by the over-technical forms of the common law and the reluctance and even stubbornness of the courts in correcting abuses in common law procedure, the American legislatures acted in an entirely different way from Parliament. About 1840 David Dudley Field proposed a Code of Procedure to simplify the practice in New York state. As Professor Edmund M. Morgan says, "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."

Under the conditions then existing in that state, there were sixty or more different forms of action, by the adoption of the Field Code in 1848 they were reduced to one. The original code contained 391 sections and was comprised in 169 small, loosely printed pages of the Session Laws of that time. It was unquestionably a tour de force. As was said in 1885, after the adoption of the New York code, or one substantially the same, in most American states, and many foreign jurisdictions, "it will be seen that the State of New York has given laws to the world to an extent and degree unknown since the Roman Codes followed Roman Conquests."

Elihu Root refers to the Field Code as "that great enactment which gave form to the procedure of practically every American state following the course of the common law, and which ultimately impressed itself upon the slow-moving but considerate judgment of the English People." He goes on to say, "We are now in about the same condition as was England in 1873, when the British Parliament passed the new Judicature Act and yielded to the principle of simplicity in litigation the allegiance to which she has ever since maintained and strengthened."

But the enactment of the Code did not ultimately meet the high hopes of its founder. It marked a decided improvement from the artificial common law procedure and in its beginning had artificial simplicity, but its lack of flexibility and the other defects of legislative control of the details of legal procedure soon made it apparent that we were proceeding on the wrong theory. The conditions became

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2 MINN. L. REV., 82.

27 In 1910 there were 3384 sections of the New York code.

By 1885 twenty-four American states, India, the Consular Courts of Japan, Shanghai, Hong Kong, and Singapore had adopted the main features of the Field Code; and, as hereinafter stated, the code had exerted a powerful influence on England, Ireland and the colonies by providing the impetus for the passage of the English Judicature Acts commencing with 1873.

29 ALBANY L. JOUR., 261.

so bad that in 1912 leaders of the New York Bar had this to say of
the system in New York State, "The present code system in this state
of regulating details of practice by statute has been tried and has so la-
mentably failed and has been condemned in such unmeasured terms that
it may be passed without further comment."\textsuperscript{21} The code system
assumed that the legislature could lay down details in advance, as it
were \textit{a priori}, that these details would require little, if any, modifica-
tion, and that the judges would have no task beyond that of mechan-
ically applying them.\textsuperscript{22}

The weaknesses of the statutory system as developed in the United
States may be summarized as follows:

1. A statutory code is too rigid. The courts cannot defeat the
statute; it must be applied though it works an injustice, and it cannot
be suspended or modified to meet situations unforeseen at the time
of its enactment. It is "cast iron", it cannot be bent to the instant use.

2. Under the code system the courts cannot clarify rules of pro-
cedure without an actual controversy. This creates unnecessary delay
and uncertainty, and many times results in undue emphasis on statu-
tory procedure, \textit{i.e.}, too many cases turn on points of practice.\textsuperscript{23}

3. The Legislature is not the proper body to pass on the details of
legal procedure.

   a. It is not responsible in the eyes of the public for the defects.
   This leads to lack of interest in changes proposed.

   b. It is engrossed with political matters, not the dry details of
   legal procedure, which is as special a subject as chemistry, or physics
   or higher mathematics.

   c. Though many of the members are lawyers, they are often
elected for qualities not connected with legal ability and do not go to

\textsuperscript{21} Report of the Board of Statutory Consolidation of the State of New
York, etc. (1919), 27.

\textsuperscript{22} Roscoe Pound says of this attitude of mind: "This assumption was made
also with respect to substantive law by the codifiers of the eighteenth century.
They conceived that a body of enacted rules might be made so complete and
so perfect that the judge would have but to select the one made in advance for
the case in hand, interpret it, and apply it. A like assumption was made by
the English advocates of codification in the nineteenth century. Although they
saw that the doctrine of natural law, upon which the eighteenth century codi-
fiers proceeded, was untenable, they had the same idea of the possibility of a
perfect code, self-sufficient and adequate to every case." Roscoe Pound, 10 Ill.

\textsuperscript{23} 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 num-
ber of points on practice and on substantive law decided by the courts. West
Pub. Co.'s \textit{Docket}, II, pp. 1759, 1758. In a total of 5,927 cases, a total of 22,986
points were decided, of which 12,959, or 53.33\%, were points on practice. 2
\textit{Minn. L. Rev.} 86.
the legislatures as lawyers. In many states, too, the lawyers are a small minority.24

d. The legislators are compelled to act at relatively crowded sessions. They are required to pass on hundreds of bills, to very few of which can they give the examination necessary, and if preliminary study is advisable there is no chart to guide them. On procedural matters alone the bills introduced in the last California legislature comprise a volume nearly one inch thick.

e. Most legislatures meet biennially, and no relief is possible in the interim. Experience has shown that several sessions of the legislature frequently elapse before a needed reform is generally recognized. This means more delay, if not failure.

f. The system of legislative amendment is uncertain, spasmodic, and even dangerous, resulting either in piecemeal, inconsistent legislation on procedure, or enactment of pet procedural bills not designed with a broad view of the situation. Also bills which have a downright destructive tendency may be enacted because not properly scrutinized.

III.
THE COURT-RULE PERIOD

A. IN ENGLAND AND THE BRITISH EMPIRE.

As has been said, the Field Code unquestionably had influence on legal reform in England.25 This influence, however, consisted largely in the abolition of forms of action, the adjustment of law and equity, and in general simplification and directness in pleading, for it should be noted that the method of making procedure established by the Hilary Rules26 remained unchanged in the later Judicature Acts; in other words, what was adopted from the Field Code was the results

24 Of 176 members of the Missouri General Assembly of 1915, only 57 were lawyers. In the State of Washington, out of 139 members of the 1925 Legislature, only 29 were lawyers.

25 See 11 V. A. L. Rev. 517, p. 530, "History, Systems and Functions of Pleading," Charles E. Clark; Pleading in Civil Actions, Simeon E. Baldwin, pp. 318, 317, Hepburn, The Development of Code Pleading, 175; Pomeroy, Code Remedies, Pref. to 1st Ed. (1876), p. xvii; Pref. to 2nd Ed. (1883), p. iii; Life of David Dudley Field, Henry M. Field, p. ix of preface. For contrary view, see H. A. Sims, 51 Yale L. Jour., p. 215. Lord Bramwell, speaking at a meeting of the Liberty and Property Defence League, in London, on the 10th of November, 1890, said that, "Mr. Field was the author of codes in his own State of New York which had been adopted en bloc in several colonies, and which were represented in English law by the recent Judicature Act." "David Dudley Field," Irving Browne, 3 Green Bag, No. 2 (1891). See also Distinguished American Lawyers, "David Dudley Field," H. W Scott, p. 364 (1891).

26 "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. 2 Minn. L. Rev. 92.
of the legislative rule-making and not the principle of making rules by legislature.

After many preliminary reform movements, considerable criticism from Benthamites and "social science" interests, and the reports of Judicature Commissions in 1867 and following years, the Parliament passed the English Judicature Acts of 1873 and 1875, in which was created a council of judges to promulgate rules of procedure. In 1876 a definite rule committee was authorized and in 1894 the rule committee was enlarged by the addition of active practitioners, and it now consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges of the supreme court, two barristers and two solicitors.

The terms of the Judicature Act of 1875 are very broad, providing that:

"Rules of court may be made for regulating the pleading, practice and procedure of the supreme court, and in general for regulating any matters relating to the practice and procedure therein."

Parliament may veto these rules, and the practice is to put them before both houses of Parliament within forty days after they are made. Furthermore, no rules are promulgated until notice has been given and opportunity is afforded for discussion of the proposed changes by members of the bar.27

The rule-making power has been extended in the British Empire to Ireland, Scotland, Ontario, and, to a certain extent, the courts control their own procedure in Manitoba, Nova Scotia, New Brunswick, South Africa, and in Australia, except in New South Wales and Tasmania. In British Columbia the legislative assembly in 1911 broadly and briefly provided in its "Court Rules of Practice Act" that, "notwithstanding anything in any act contained, the Lieutenant-Governor in Council may make rules governing all matters of practice and procedure in all or any of the courts of the province."28

It is not the function of this article to discuss the results of the rule-making power in England further than to say that after some early unsatisfactory experiences, due somewhat to the personnel drawing the rules,29 a flexible, practical system of procedure has been worked out through the medium of which issues are tried on their merits with greater dispatch and more accuracy than obtained under the

29 See 8 Law Quarterly Rev. 289, ff.
THE RULE-MAKING POWER

Code System. Some adverse criticism may be directed against the number of rules thus promulgated, but, on the whole, the English bar and courts are well satisfied with the method.

B. FEDERAL COURTS.

The exercise of the rule-making power is no new thing in the federal courts. As above stated, the Judiciary Act of 1789 and the Process Act of 1792 authorize the Supreme Court of the United States to make rules. The oldest practice of this character was the formulation of equity rules, in 1822. The Supreme Court, however, allowed many of these equity rules to become obsolete, until 1911, when on its own initiative a committee was appointed for the purpose of bringing the rules up-to-date, and in 1912 a complete new set of equity rules was promulgated. Other federal rules regulate the practice in Admiralty, since 1842, in Bankruptcy, since 1898, in Copyright cases, since 1909, in the Federal Court of Claims, in the Interstate Commerce Commission, and in the Federal Trade Commission, established in 1914.

For more than a decade, a bill sponsored by the American Bar Association and by Chief Justice Taft since his appointment, has been before Congress to confer on the Supreme Court the power to make rules in all actions and proceedings at law in the federal district courts. This bill has been approved by practically every state bar association in the nation, was recommended recently by President Coolidge in his


21 In 1924 the latest edition of the English Annual Practice had 2,423 finely printed pages, containing 1,045 rules, many statutes, and notes and cases construing the rules.


23 In Wayland v. Southard, 10 Wheat. (U. S.) 1, 22, 42-43, 45-48, 50 (1825), the court (per Marshall, C. J.) held that the federal Constitution had left it to Congress to prescribe the practice and procedure for the federal courts, under the general provision in Sec. 8 of Art. 1, that Congress should "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." And the court held, in considering the Judiciary Act and the Process Act, that the delegation by Congress to the courts of the power to make procedural rules is proper.

24 See 7 Wheat. v-xxiv.

25 See 160 U. S. 693.

26 See 173 U. S. 653.

27 See 214 U. S. 533.


29 See Fuller, Interstate Commerce, p. 429.

30 See Demarest, American Jurisprudence, p. 91.
message to Congress, and will probably be enacted into law within a short time.\textsuperscript{41}

C. In Various State Jurisdictions.

In analyzing the power of the courts to make rules as it exists in the various states, the jurisdictions fall into approximately three classes or groups.

1. Where complete rule-making power exists by virtue of constitution or statutory enactment.

In \textit{Michigan}, by the constitution of 1850, the Supreme Court was given unlimited power to make rules.\textsuperscript{42} The provision was preserved in the constitution of 1908.\textsuperscript{43} "The Supreme Court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same." This power has been exercised only to a limited extent by the Supreme Court of Michigan and then only under pressure from the bar association, and the legislature has constantly encroached upon the Supreme Court's power without complaint.\textsuperscript{44} The constitutional provision is embodied in Michigan's elaborate "Judicature Act of 1915,"\textsuperscript{45} where the court's power is ostensibly restricted to "cases not provided for by any statute." The court is, however, directed to effect certain broad reforms by rule.\textsuperscript{46} The Supreme Court of Michigan, in interpreting the constitutional provision, has apparently failed to pass directly on a case where there is a conflict between a statute and a rule.\textsuperscript{47}

\textit{Colorado}, by statute, has a thorough-going rule-making provision which is as follows:

"The supreme court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute."\textsuperscript{48}

In practice this power has been very sparingly exercised, and when exercised the rule has referred to some minor detail of direction. This

\textsuperscript{41} For title of bill and discussion see 1923 Rept. of Amer. Bar Assn., 242, 345; A. B. A. \textit{Journal}, Oct., 1924, p. 695; 23 Mich. L. Rev. 154 (Dec., 1924). This proposed Federal Act is the prototype of the rule-making act just passed in the State of Washington; see footnote 1.

\textsuperscript{42} For definition of the term "procedure" as used in such statutes, see \textit{Krnag v. Missouri}, 107 U. S. 221-231 (1883).

\textsuperscript{43} Art. 6, Sec. 5, Constitution of 1850.

\textsuperscript{44} Art. 7, Sec. 5.

\textsuperscript{45} 22 Mich. L. Rev. 301 (Feb., 1924).


\textsuperscript{49} L. 1913, p. 447, § 1, Comp. Laws Colo. 1931, p. 184, § 444.
is probably because there is no effective rule committee or judicial council, though it may be because the Code of Civil Procedure of Colorado has worked satisfactorily.

In Connecticut the judges of the superior court for many years have had the power to make the orders and rules necessary to carry into effect the provisions of the practice act, including suitable forms of procedure thereunder, and may make other rules for the disposition of business in the court.49 The supreme court of Connecticut, in Dunnett v. Thornton,50 held that the rule-making power is limited to those matters consistent with the practice act. However, in 190551 the judges of the superior court were given the power to make rules for the commencement of process and procedure in certain special actions, including replevin, summary process, habeas corpus and other special writs, forcible entry and detainer, etc., and suitable forms of procedure in such cases, and the same act provided that when these rules should take effect they should supersede all statutes and rules inconsistent therewith. According to Mr. James E. Wheeler, secretary of the State Bar Association of Connecticut, the judges of the superior court have recently prepared and published a revision of rules under the practice act. The lawyers in Connecticut are very well pleased with the results obtained by the exercise of these powers. Connecticut's practice act is comparatively short, the theory being52 that the courts should make all but fundamental rules.

In 1925 the Delaware legislature passed an act similar to the federal proposal. This act gives the court rules precedence over statutory rules of procedure. It is one of the most recent enactments of this character.53

In 1916, the Supreme Court of Appeals of Virginia which, under the constitution of that state,54 has "appellate jurisdiction only," received from the legislature a very broad rule-making power entitling it to "prescribe the forms of writs and make general regulations for the practice of all courts of record, civil and criminal, and may prepare a system of rules of practice and a system of pleading and the forms of process to be used in all the courts of record in this state, and put the same into effect."55 The enactment of this statute is regarded as having removed all "question of the power of the Supreme Court of

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50 73 Conn. 1, 6, 46 Atl. 158, 160 (1900).
51 Art. IV, § 88.
52 Del. Laws 1925, amending Ch. 128 of Revised Code.
53 See Dunnett v. Thornton, supra, for very able analysis.
54 Code of Va. 1919, § 5960; see also 19 Va. Law Reg. 328
Appeals to substitute rules for statutes in the regulation and direction of trial courts." Unfortunately, however, the court has not yet exercised the great powers thus conferred upon it.

By the constitution of Maryland, the judges of the Court of Appeals are given the power to make rules for appeals and also the duty to devise and promulgate by rules and orders the forms and modes of framing and appealing bills, answers and other proceedings and pleadings in equity, and to revise and regulate generally the practice in the courts of equity in the state, so as to prevent delays and promote brevity in procedure. The constitution also provides that all such rules and regulations shall, "when made, have the force of law until rescinded, changed or modified by the said judges or the general assembly." Such rules repeal existing statutes in conflict therewith.

Section 33 of the Maryland constitution also provides that the Supreme Bench of Baltimore City may make all needful rules and regulations for the conduct of the business in each of its courts. The language of this provision is not limited. The power has been exercised in law, equity and criminal cases, and it is the opinion of the profession generally that the relative speed of procedure in Baltimore City is due to the making of these rules by the court. Under this system we are advised that law cases are tried from three to four months after they are entered in the court, equity cases proceed almost as rapidly, while criminal cases are now tried within two to four weeks from the time of the commission of the crime.

By a Maryland statute "The judges of the several courts of law and equity may make such rules and orders from time to time for the well governing and regulating of their respective courts and the officers and suitors thereof, and under such fines and forfeitures as they shall think fit, not exceeding twenty dollars for any one offense; all of which fines go to the state." This section, though unlimited in language, evidently applies to rules of decorum rather than broad rules of practice.

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56 2 VA. LAW REG. (N. S.) 294.
57 10 VA. LAW REG. (N. S.) 707-8 (Feb., 1925).
58 Art. 4, § 18.
59 See Gablemen v. Plaenker 36 Md. 64 (1872).
60 Meloy v. Squires, 49 Md. 378 (1875).
61 Annotated Code of Maryland, 1924, Art. 26, § 1, p. 927.
62 Assuming, however, that it applies to rules of practice, in Laurel Canning Co. v. B. & O. R. Co., 115 Md. 633, 81 Atl. 196 (1911), the Maryland court holds that rules of court are not to be in conflict with statute. Therefore, as to law courts of inferior jurisdiction (except in Baltimore) the statute would seem to govern.
In 1912 practically complete rule-making power was given to the Supreme Court of New Jersey.\textsuperscript{3} The New Jersey legislature enacted a short Practice Act of thirty-four sections covering the more general principles of procedure and these were supplemented with legislative rules which were to be "considered as general rules for the government of the court and the conduct of causes," but which were made subject to being "relaxed or dispensed with by the court in any cases where it shall be manifest to the court that a strict adherence to them will work surprise or injustice." Any of these rules may be changed by the Supreme Court at any time and the same court is given power to replace statutory or traditional regulations and procedure with its rules. The New Jersey rules, with the exception of a few amendments, comprise a bound volume of approximately one hundred pages and cover a large percentage of the matters which are ordinarily regulated by codes of procedure. This power was not exercised until the bar assisted the court in formulating the rules.\textsuperscript{44}

Washington will belong to this group having complete rule-making power by statute, when the act just passed by the extra session of the legislature takes effect.\textsuperscript{45}

2. Where the power given is not limited to rules "consistent with law or statute" but the courts hold such power must be exercised in conformity with law or statute.

In Arkansas there is no constitutional provision on the rule-making power, but the Supreme Court is given the power to make rules for the "convenient disposition of business, preservation of order, argument of causes, rehearings, etc."\textsuperscript{66} And by another act the circuit courts of Arkansas are empowered to make "all proper rules which may be necessary for the disposition of business."\textsuperscript{67} This latter power is unlimited in language, but the Supreme Court of Arkansas holds that the rules must be in conformity with law.\textsuperscript{68}

In Missouri\textsuperscript{69} the constitution and the statutes make but scant reference to rule-making power.\textsuperscript{70} However, the Supreme Court of

\textsuperscript{1} See footnote 1. See also Editor's Note at the end of this article.
\textsuperscript{6} C. & M. Digest Stats. of Ark. 1921, § 2171.
\textsuperscript{6} Id., § 2231.
\textsuperscript{6} Aaron v. Anderson, 18 Ark. 268 (1856).
\textsuperscript{10} Const. Art. VI, § 27, referring to St. Louis County; Laws of Mo. 1921, p. 220, §§ 7, 10, referring to Jackson County.
Missouri has many times recognized the power of all courts to make rules for their own special government, but, beginning with the case of State v. Withrow the court has at all times subjected its own rules and those of the inferior courts to the test of conformity with the statutes, though the rule-making power, where mentioned in the constitution and statutes, is not expressly limited to "consistent with law."

In Arizona the Supreme Court has the power to "make and adopt rules of practice for said court, and also for the superior courts." This power is not limited by the statute, but in an early case the Supreme Court of the Territory of Arizona held that the Supreme Court might make rules not inconsistent with the laws of the territory for its own government. By another provision the Superior Courts may make rules consistent with law. No Arizona case seems to have touched on section 331 of the Revised Statutes, though the Superior Court provision has been interpreted.

In North Carolina the statute provides that the Supreme Court shall prescribe and establish from time to time rules of practice for that court and also for the Superior Courts. There is no limitation in the statute to "not inconsistent with law." The Supreme Court has held that the Supreme Court rules are not subject to legislative control, but the legislature may make the rules for the courts inferior to the Supreme Court.

3. Where there is an express limitation either in the constitution or in the statutes granting to the courts power to make rules "not inconsistent with statute" or "law."

In Alabama there is no constitutional provision with regard to rule-making power, but the Supreme Court was given the power "to establish rules of procedure in such court and all other courts of record in the State, not contrary to the provisions of this code."

Rules of practice promulgated by the Supreme Court consist of

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71 133 Mo. 500, 34 S. W. 245 (1896).
74 Woffenden v. Charoulean, 2 Ariz. 89 11 Pac. 61 (1886). This case, however, was based upon § 637, Ch. 48, Comp. Laws of the Territory of Arizona, which expressly provided that the rules should not be inconsistent with the laws of the territory.
77 Consolidated Stats. N. C. 1919, § 1421.
78 Calvert v. Carstarphen, 133 N. C. 25, 45 S. E. 353 (1903). This case prases the English system.
sixty-seven large pages of the Alabama Code. These rules relate largely to appellate procedure and are considerably more complete than the rules of most of the other state appellate courts. The Court of Appeals of Alabama has, in conformity to the statutes, held that acts of the legislature control the rules of court.

There is no constitutional provision in California, but the code provides that "every court of record may make rules, not inconsistent with the laws of this state, for its own government and the government of its officers." This provision has been in effect for many years, and the language is so similar to the Washington constitutional provision that it is possible that the constitutional provision in this state was copied from it. The Supreme Court of California has consistently held that such provisions give way to statutes.

The Idaho constitutional provisions are interesting to Washington lawyers, as the constitution was adopted at approximately the same time as the Washington constitution. Article V, section 13 of the Idaho Constitution gives the legislature the power to provide the system of appeals and regulate proceedings of the inferior courts. Article V, section 25 provides that the defects in the law are to be reported by the districts courts to the supreme court yearly, and by the supreme court to the governor. This is similar to the provision which comes just after the superior court rule-making provision in the Washington constitution, and the next provision of the Idaho constitution, section 26, provides that the laws relating to the courts shall be general and uniform, and of uniform operation throughout the state; and also that the judicial powers, practices and proceedings of courts of the same grade shall be uniform. In other words, it would seem that uniformity was apparently the main thing desired by the enactment of such a provision as we have in the Washington constitution. The Idaho statutes provide that every court of record may make rules for its own government, but such rules shall not be inconsistent with statutes.

In Illinois the Supreme Court and Appellate Courts are given

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81 § 85 of the Alabama Constitution (1901), for which see Code of Ala. 1923, Vol. 1, p. 293, which provides in substance that "the legislature shall revise, digest and promulgate the public statutes of this state of a general nature, both civil and criminal, every twelve years."
84 People v. McClelland, 31 Cal. 101 (1866).
87 Smith & Hurd, Illinois Revised Statutes, 1923, Ch. 37, §§ 17 and 34.
the power to make rules for themselves not inconsistent with the statutes. The same power is given to the chancery and circuit courts. The Bar Association is attempting to secure enactment of a thoroughgoing rule-making power act.

There is no constitutional provision in Indiana with regard to the rule-making power, but by acts of the legislature the Supreme Court is given power to frame rules, as are Circuit Courts,—these rules to cover proceedings "not specially provided for by law" or "not repugnant to law". According to the decision in Epstein v. State, this is a power which the Supreme Court as a constitutional court has anyway, and the legislature is powerless to take it away; but a careful reading of this decision indicates that the Supreme Court is referring to those rule-making powers which are exclusively judicial and which cannot be transferred to the legislature because of the provision for separation of powers. The Supreme Court elsewhere recognizes that the rule-making power generally, at least of the circuit courts, is limited to conformity with statutory provisions.

In Massachusetts there is no constitutional provision, but by statute all courts are given the power to make rules consistent with law. The recent report of the Massachusetts Judicial Council contains the recommendation that the following provision be enacted.

"Procedure, process, and practice in equity causes shall while in the Superior Court be regulated by rules made from time to time by that court."

There is no constitutional provision in New Hampshire, but by statute the Supreme Court may make rules provided they are not inconsistent with the laws. It is true that the Supreme Court of New Hampshire, under the Bill of Rights of that state entitling every person to a speedy and certain remedy, has held a litigant entitled to the "best inventions procedure" and has revised procedure in the trial courts without any statutory authority. But other regulations of
the practice in chancery seem to have been authorized by statute in 1842.\textsuperscript{88}

Statutes in Ohio\textsuperscript{89} give to the supreme court, the circuit court, and superior courts, respectively, the power to make rules for themselves, not inconsistent with statute.\textsuperscript{90} The Ohio Judicial Council is attempting to secure legislation to give the Ohio courts thorough-going rule-making power.\textsuperscript{91} Until 1851 the State of Ohio followed the common law procedure. By Article XIV of the Constitution of 1851, provision was made for a Code Commission to "revise, reform, simplify and abridge the practice, pleadings and forms of proceedings of the courts of record of this state." By virtue of that provision, says the report of the Ohio Judicial Council, the people took away from the courts the rule-making powers they formerly possessed, and the enactment of the Civil Code followed shortly thereafter.\textsuperscript{92}

Washington belonged to this group until the passage by the legislature of House Bill No. 158 in January, 1926.\textsuperscript{93}

The following states should also be included in this group: Florida,\textsuperscript{94} Georgia,\textsuperscript{95} Iowa,\textsuperscript{96} Kansas,\textsuperscript{97} Kentucky,\textsuperscript{98} Louisiana,\textsuperscript{99} Maine,\textsuperscript{100} Minnesota,\textsuperscript{101} Mississippi,\textsuperscript{102} Montana,\textsuperscript{103} Nebraska,\textsuperscript{104} Nevada,\textsuperscript{105} New Mexico,\textsuperscript{106} New York,\textsuperscript{107} North Dakota,\textsuperscript{108} Oklahoma,\textsuperscript{109} Oregon,\textsuperscript{110} and other states.

\textsuperscript{88} See 10 Ill. L. Rev. 364; 38 N. H. 605.
\textsuperscript{89} P & A. Annotated Ohio General Code, §§1473, 1523, 1575.
\textsuperscript{90} Van Ingen v. Berger 89 Oh. St. 255, 92 N. E. 433 (1910), holds that a rule in conflict with a statute must give way.
\textsuperscript{92} Id., p. 21.
\textsuperscript{93} See footnote 1, supra; see also Editor's Note at conclusion of this article.
\textsuperscript{95} 4 Park's Annot. Code Ga. 1914, §§ 4641, 4861, 4862, 6117, 6503, 6506.
\textsuperscript{96} Code of Iowa 1924, §§ 12803, 12809, 14009.
\textsuperscript{97} Rev. Stat. Kan. 1923, Ch. 60-3825.
\textsuperscript{98} Carroll's Kentucky Stats. 1922, §§ 949, 980, 982, 1009, 1020.
\textsuperscript{101} Gen. Stats. Minn. 1923, §§ 133, 182, 228, 8702, 9293; Laws of Minn. 1925, Ch. 397. Minn. Const., Art. VII, § 14, provides that "legal pleadings and proceedings in the courts of this state shall be under the direction of the legislature"; Lockaway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398 (1911). See also 2 Minn. L. Rev. 81, 94.
\textsuperscript{102} Hemingway's Annot. Miss. Code 1917, § 3190.
\textsuperscript{103} Rev. Code Mont. 1931, § 8845.
\textsuperscript{105} Rev. Laws 1919, Vol. 3, § 4833.
\textsuperscript{106} New Mexico Stats. Annot. 1915, § 4958.
\textsuperscript{107} Judiciary Law, § 93 as amended by Laws of 1921, Ch. 303, § 1, Parson's Practice Manual, 1923, prefix pp. xi-xii.
\textsuperscript{108} Comp. Laws N. D. 1913, § 7342.
\textsuperscript{109} Comp. Okla. Stats. 1921, §§ 809, 9175-6.
CONCLUSIONS FROM THE RULE-MAKING PROVISIONS OF THE VARIOUS STATE JURISDICTIONS

From an examination of the rule-making provisions in our various states, several conclusions appear, which are not so apparent without a general view of such legislation.

1. There is a growing tendency toward the enlargement of the rule-making power. The new acts in Delaware and Washington, the resurrection of the power in Michigan, the movements to use it in Colorado, the action of the Illinois, Montana, Oregon, and other bar associations, to say nothing of the general praise accorded the English procedural system, are sufficient indication of the trend of procedural advance in the United States.

2. Of these acts in existence there are two kinds, first the thoroughgoing rule-making power provision, represented by Michigan, Colorado, Virginia, Maryland, Delaware, and Washington, and, secondly, the short practice act with broad rule-making power to the Supreme Court, such as New Jersey and Connecticut. Along with the latter two might be grouped such states as Vermont and New Hampshire where the codes are comparatively short, consisting of general or jurisdictional provisions, the theory being that the courts should have broad powers in rule-making though restricted to rules "consistent with law." These provisions ordinarily grant the power to make rules "to carry into effect the practice act" or "code." Such states represent an intermediate step between the English rule-making power and the code.

3. The substance of the power given, whether limited by statute

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1 Olson's Oregon Laws 1920, §§ 916, 934, 3046.
7 Comp. Laws Utah 1917, §§ 1709, 1791.
10 Wis. Stats. 1923, pp. 223, 1790 3021, 3025; at p. 3021 is an interesting discussion of the history of Wisconsin court rules.
11 Comp. Stats. Wyo. 1920, § 1110.
12 See footnote 1.
or not, consists ordinarily of two types, first, the power to make all "rules of practice" or to prescribe the forms of action, and the pleadings and process therein, and, second, the power to prescribe rules for the government of the court, often including "and the officers and management thereof." The first type is the broad rule-making power similar to the English provisions and except in those states in group I, supra, is ordinarily limited to "not inconsistent with law or statute." The second type is what may be called "rules of decorum" or "local rules" relating rather to the internal management of the court than to the lawsuits themselves; in several states (see group II) this power is unlimited, and the failure to place in the acts the limitation "not inconsistent with statute," indicates the restricted nature of the grant. This second type may be viewed either as referring to those matters not regulated by statute or to those matters which the legislature cannot legislate upon without violating the provision against separation of powers.

4. There is a lack of uniformity as to the court which shall make the rules. Many statutes give the rule-making power for all the courts to the supreme or highest appellate court; some give it to the nisi prius courts direct; others limit the grant to appellate rules, though in every state some inherent power to make rules is recognized as residing in every court.

5. The rule-making power where it has been exercised to the extent permitted by constitution or statute, is exercised by formal promulgation, such rules having the force of statute until formally changed. This is a characteristic of the third or court-rule period, differentiating it from the common law period, in which many of the rules were originated by court decision, though in certain cases rules were formally promulgated.

(To be concluded.)

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Editor's Note—The second half of this article, containing a discussion of the constitutionality of the rule-making power and of the rule-making power in the State of Washington, will appear in the next issue of the REVIEW.

130 State v. Withrow, supra, 133 Mo. 500, 34 S. W. 245 (1896).

134 Epstein v. State, supra, 190 Ind. 693, 128 N. E. 353 (1920).