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Regulating Procedure by Rules of Court in West Virginia

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REGULATING PROCEDURE BY RULES OF COURT IN WEST VIRGINIA*

The present broad rule-making power vested in the Supreme Court of Appeals of West Virginia had its inception in a very simple statute which antedates the founding of the state itself. In the *Virginia Code of 1849* is found the following:

> "The supreme court of appeals may, from time to time, prescribe the forms of writs, and make general regulations for the practice of all the courts."[1]

This identical statute was later incorporated in West Virginia's first codification of laws (*Code of* 1868) and remained on the statute books until 1931. Thus it may be seen that the power of the West Virginia Supreme Court of Appeals to make rules governing its own practice was originally, as now, grounded in specific statutory authority.[2] Furthermore, there has never been any time in the history of the state when this power was not exercised, beginning with the Rules for Practice in the Supreme Court promulgated in 1 *West Virginia Reports* xiii.

The Supreme Court, although it could make its own rules of practice was, originally, without any control over the rules prescribed by and which prevailed in other courts of record, which, generally speaking, means the several circuit (nisi prius) courts.

That this rule-making power of the circuit court was grounded strictly in common law, and was a matter over which it had only a limited control, was recognized by the Supreme Court of Appeals of West Virginia in the case of *Teter v. George.*[3]

Although earlier cases, both in Virginia and West Virginia contain authority to this effect the above citation is the clearest and most succinct statement of the rule and has been followed in

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* Part I of "A Survey of the Administration of Justice", based upon the recommendations of the Section of Judicial Administration made in 1938 to the American Bar Association and adopted as a special program of the Association, being made by the Junior Bar Conference as a cooperating organization.

[1] VA. CODE (1849) c. 161, § 4.

[2] This statute would seem only to be declarative of the common law. See Teter v. George, 86 W. Va. 454, 103 S. E. 275 (1920).

[3] 86 W. Va. 454, 103 S. E. 275 (1920): "Courts have inherent power and authority to prescribe and enforce rules and regulations for the conduct of their business in accordance with established procedure, not inconsistent with organic or statutory law, nor unreasonable, oppressive or obstructive of common right." (Syl. 2.)

later cases. In another case, after citing *Teter v. George,* the Supreme Court of Appeals stated:

> "When such rules are adopted and promulgated they are the law controlling proceedings in that court. They become binding upon the litigants, as well as upon the court in the conduct of its proceedings." (Citing outside authority.)[4]

Later cases, citing these basic West Virginia decisions with approval, have consistently upheld the rule-making activities of the circuit court only excepting where the court rule in question is "unreasonable" or "inconsistent with organic or statutory law".[5]

It was realized that with each circuit court having sole jurisdiction over its own rule making, as noted in the above cases, there was slight possibility that uniformity of pleading, practice and procedure in the several lower courts of record could ever be attained. Accordingly when the general revision and recodification of the laws of West Virginia was submitted and approved in 1931 the statute was so broadened as to give the Supreme Court of Appeals the power to make uniform rules of pleadings, practice and procedure, not only in that court, but in all other courts of record.[6]

However, in spite of this amendment in 1931, no uniform rules for use in the inferior courts of record were ever promulgated by the Supreme Court. In fact, the line of cases following *Teter v. George* was continued even until 1935.[7]

The effect of the 1931 statute was, therefore, merely to provide a new source for rules of pleading, practice and procedure to be used in the circuit court without purporting to confer any control over the rule making in these lower courts, which continued exactly as before. Furthermore the limitations of the statutes relating to

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[4] Star Piano Co. v. Burgner, 89 W. Va. 475, 479, 109 S. E. 491 (1921).

[5] See Kemble v. Wiltison, 92 W. Va. 32, 114 S. E. 369 (1922); Citizens National Bank v. Dixon, 94 W. Va. 21, 117 S. E. 685 (1923); Hall v. O'Brien, 97 W. Va. 77, 124 S. E. 507 (1924); Wagner v. Edgington Coal Co., 100 W. Va. 117, 120, 130 S. E. 941 (1925); Altmeyer v. Fassig, 114 W. Va. 268, 171 S. E. 529 (1923).

[6] "The supreme court of appeals may, from time to time, make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this State, civil and criminal, except county courts. Such rules and regulations shall not be inconsistent with the Constitution and statutes of this State, and shall be uniform for all courts of the same grade or class." W. VA. REV. CODE (1931) c. 51, art. 1, § 4.

[7] "The law is settled in this jurisdiction that courts have inherent power to establish such a rule as the one herein (so essential to the administration of justice), that the rule has the effect of law, and that a judgment rendered in violation thereof 'is properly set aside upon motion of the party injuriously affected thereby.'" Smith v. Wallace, 116 W. Va. 546, 547, 182 S. E. 538 (1935).

pleading, practice and procedure necessarily would hamper the Supreme Court in any attempt at sweeping reforms in the field of judicial administration. The net result, therefore, of the 1931 statute was exactly nothing.

Yet the quest for a unified and flexible system for the control of pleading, practice and procedure continued, culminating in a sweeping amendment by the West Virginia Legislature of 1935. In looking at the new statute, one finds that: first, the Supreme Court of Appeals may, as heretofore under the 1931 law, make rules for itself, and for all other courts of record (county courts are no longer excepted); second, and most important, "all statutes relating to pleading, practice and procedure shall have force and effect only as rules of court", and are subject to change by the Supreme Court as any other rule promulgated by it; third, while other courts of record may still make their own local rules, they may not conflict with those of the Supreme Court of Appeals and "shall be effective only after approval by that court"; fourth, the Judicial Council is designated as an advisory committee on court rules.[8]

[8] The complete text of the statute is as follows:

"The supreme court of appeals may, from time to time, make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this state. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section. Such rules and regulations shall be uniform for all courts of the same grade or class; but any court of the state other than the supreme court of appeals may adopt rules of court governing its local practice, but such rules of local practice shall not be inconsistent with any general rule of court then in existence or thereafter promulgated, and shall be effective only after approval by the supreme court of appeals.

"The judicial council of West Virginia is hereby designated as advisory committee to make observation and report to the supreme court of appeals, from time to time, such recommendations as may, in its judgment, be proper; and all rules promulgated by the supreme court of appeals under the authority of this section shall, before taking effect, be referred to the chairman of the judicial council, the president of the West Virginia bar association and to the judge of every court affected thereby. In the event a hearing is requested, within twenty days after such reference, by any five of the persons so designated, the supreme court of appeals shall thereupon designate a day when a hearing on the matter of the adoption of such rules shall be held. In the event no hearing is requested or, if requested, after such hearing, the supreme court of appeals shall be free to adopt or reject the proposed rules. General rules and regulations governing pleading, practice and procedure, and local rules, shall from time to time be published as an appendix to the official reports of the supreme court of appeals and bound therewith." W. Va. Acts 1935, c. 37 [W. VA. CODE (Michie, 1937) § 5183].

Obviously it is intended that all the West Virginia law of pleading, practice and procedure be dependent upon this one statute. Just what the ultimate result will be is difficult to guess, but the general feeling is that this centralization of control over all rules, transcending even pre-existing statutes, is the opening wedge in a "progressive" campaign for general procedural reform (*e.g.*, the new federal rules). Also it remains to be seen how strongly the court will construe this statute. Undoubtedly there will be differences of opinion as to what legislation is encompassed in the "statutes relating to pleading, practice and procedure", which are now only in effect as rules of court. Furthermore, what is the status of the local rule which has not been submitted to the Supreme Court of Appeals as required in the statute? Will there be an interpretation which nullifies all existing local rules until Supreme Court approval? (Actually only one set of local rules has been so submitted since the effective date of this statute, ,and that not yet fully approved.) One would so conclude, following the letter of the statute.

As a matter of fact there have been no startling innovations under the new law. Circuit courts have gone along making their own rules, just as before; and probably the statute has given impetus to the adopting of such local rules. The only new development is found in 116 *West Virginia Reports* lix (1935), the first trial court rules promulgated by the Supreme Court of Appeals. Even these were not entirely new, being generally used by custom, if nothing else, in most circuits. The Supreme Court of Appeals is not made a dictatorial authority in the exercise of this rule-making power. Note that all new rules promulgated by the court must be submitted to the chairman of the Judicial Council, the president of the West Virginia Bar Association, and to the judge of every court affected. There is also provision for a hearing if objection is made. The Judicial Council may also submit proposals to the Supreme Court of Appeals, but in a purely advisory capacity and cannot bind the court thereby.

As the situation now stands in West Virginia the supervision of all court procedure has been definitely given into the hands of the courts. Whereas inflexibility engendered by strict statutory limitations often has seriously hampered courts with the unfortunate result not only to litigants but also to the judiciary and bar in general of unfavorable public reaction, the machinery is now present to undertake major alterations. The future history of this

legislation rests largely with the attitude of the bar, and in view of the general approval of the new federal rules the omens are good.

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