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Edson R. Sunderland
University of Michigan

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THE REGULATION OF LEGAL PROCEDURE

EDSON R. SUNDERLAND*

Much has been said and written about the imperfections of legal procedure. It is a subject of great interest and concern to the bar and to the public. Since rules of practice prescribe the conditions under which rules of law may be made operative, in so far as they fail of their purpose the law itself becomes ineffective. Lord Campbell is reported to have said that "The due distribution of justice depends more upon the rules by which suits are conducted than on the perfection of the code by which rights are defined."

The legal profession, being charged with the duty of administering the law, has always laid emphasis upon the study of procedural theory, but its main interest has been directed to a study of the procedural product, rather than to a study of the process of production. This is entirely natural, since lawyers are always engaged in using the rules and can hardly escape observing how well or how ill they function. If a rule works badly they want it changed; otherwise they are content. Causes for failure are usually

* Professor of Law and Legal Research, University of Michigan.
1. 27 Law Jour. 104.
looked for only in the rule itself, not in the source from which it came or in the method by which it was prepared.

But it is obvious that such a basis for criticism is inadequate, and leads to negative results, and it would seem worth while to consider the various means and methods for encouraging and directing the reform of procedure, in order to ascertain if possible what conditions are most favorable for its successful development. Reforms are not brought about spontaneously. Some agency must propose, formulate and validate them. Back of the reform itself is the means and mechanism by which it must be brought about. The machinery of reform is a subject which has received too little attention.

I

Under the traditional method of the common law, the courts formulated rules of practice and applied them as they were needed in the course of litigation. As cases arose the remedial problems which they presented were worked out during their passage through the courts.

There were great advantages in this method of procedural development. It was eminently practical. The rules were the product of actual experience, and were slowly evolved as definite solutions of concrete problems by the leaders of the English bar. The men who made the rules were the men who used them. Every feature was the result of careful consideration and grew out of the actual needs of contemporary litigation.

It was, moreover, a method which produced a highly refined technique. There is an adequacy, an appropriateness and a technical perfection about common law procedure which shows the skillful work of well trained specialists. The system which it developed, preeminently judicial in its origin, embodied the best thought of the ablest lawyers of the age.

But there is a fatal weakness in any system of procedure which develops as an incident of litigation. This results from the rule of stare decisis. Within its proper field it performs an invaluable service in the administration of justice. Pollock has pointed out the inherent necessity of
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this rule in developing the principles of the law itself. Without it case-law would have no rational basis. "We have seen," he says, "that case-law has a scientific aim, namely, the prediction of events by means of past experience, and that the possibility of such prediction rests, an in other sciences, on a fundamental assumption of uniformity." To obtain a workable legal system there must be an assurance that the same decision will always be given on the same facts. "In English case-law this object is attained by what seem the most obvious and direct means, namely, an understanding that the court will follow the authority of decisions formerly given on similar facts." Only by this means can people feel any real confidence in the stability of their legal relations.

But the situation is entirely different in the field of procedure. While a general adherence to customary methods is doubtless convenient, departures may be freely made as often as it appears that change will improve the practice, because the court is able by the exercise of its discretionary power to fully protect the litigant from prejudice in each case of variation from precedent. For instance, any rule of pleading might be changed at any time without substantial injury to the pleader, if the court should allow an appropriate amendment to conform the pleading to the new rule on a showing of justifiable ignorance of the change. Since personal and property rights are not directly involved, the rules of procedure are matters of indifference to suitors except in so far as they enable them to secure decisions on the merits of their cases, no possible harm could result from such a course. The entire problem would be one of notice to the profession of the changes introduced, and want of notice can always be supplied later with no harm beyond temporary inconvenience.

The common law judges did not, however, distinguish between rules of law and rules of procedure. Convinced of the necessity of following precedent in one field they pursued the same course in the other, and the result was the utter stagnation of procedure. Rules became perpetually binding.

3 Id., p. 240.
merely because they were once announced, and the elasticity vanished from common law practice. This is a result to be expected in any jurisdiction where procedural rules are founded in case-law, and modern practice exhibits no striking superiority in this regard over that of the ancient common law. The tyranny of precedent makes it impossible for procedural reform to flourish in the conventional atmosphere of the court room. Some other means must be found.

II

The most obvious alternative to court processes for the production of rules of legal procedure, is recourse to the legislature. It is a direct and powerful method, a public system of self-help, where the people demand by force what the law in its orderly development has failed to furnish. It is extrinsic, detached and arbitrary, suggestive of revolution, rather than a gradual expansion of implicit possibilities through inherent evolutionary vitality. So careful a scholar as Pollock has declared that relief by direct legislation "is not a natural operation at all, but a catastrophic interference."4 And in another connection he refers to a specific amendment of procedural rules by legislation as "a serviceable instrument when rightly handled, but in unskillful hands it can be a remedy worse than the disease."5

The advantages of the legislative method are patent, for it avoids the great drawback to which procedural development through litigation is subject. The legislature is not bound in the slightest degree by any rule resembling stare decisis. There is no presumption against change in legislative halls; indeed, quite the contrary, for the recognized need of change is the sole occasion for the meeting of legislative bodies. There is accordingly no inevitable restriction upon ingenuity in reform to be found in this kind of procedural development. Legal conservatism finds its way into legislative assemblies through lawyer members, but these are in the distinct, often in the very small, minority, and their presence furnishes no more than needed caution in a body clothed with the enormous power of legislation.

5 The Genius of the Common Law, p. 72.
But while the chief disadvantage found in the common law system is absent from the legislative method, its great merit is also lacking. Rules of practice laid down in legislative acts do not grow spontaneously out of the exact requirements of actual practice, and they fail to show that delicate adaptability to circumstances which distinguishes judicial decisions. They are, in other words, less practical. They embody legislative theory, not judicial experience, and often destroy by their clumsy abstractness the very purposes which they were created to serve.

Legislation also shows a want of technical refinement. The subtle appreciation of the conditions of litigation, which can only come to those who spend their lives in the active administration of justice, is not usually found among the political representatives of the people who meet to make the laws. Notwithstanding that bills dealing with legal procedure may be drawn by lawyer members, the political atmosphere of a legislative assembly is not friendly to the close and painstaking study of an intricate mechanism which is necessary for successful regulation. Crude draftsmanship is characteristic of most of our legislation, but procedural laws suffer from the additional defect of crude adjustment and lack of coordination, thereby tending to disorganize the entire machinery of justice.

There are other tendencies in legislation which also produce undesirable results. Legislatures are timid about making important procedural changes because they lack both the technical information and the opportunity for thorough investigation. They are therefore inclined to busy themselves with perpetual changes in minor details instead of undertaking broad programs of constructive legislation. And the changes so made are as likely as not to be merely meddlesome, and to serve no useful purpose whatever. Such bills can readily pass unnoticed, when bills of real importance would provoke extended debate and successful opposition. This was the history of the New York Code of Civil Procedure, that "monstrum horrendum," as Mr. Coudert has called it, which became so bulky and complicated as to be almost unworkable. It was a conspicuous

*Certainty and Justice, p. 19.
instance of legislative tinkering with details, "Even a tinker of genius cannot get beyond tinkering, and tinkers are not men of genius as a rule." Furthermore, legislative programs are usually crowded, and bills with a strong popular appeal are given the right of way, so that any bill dealing with a subject as dry as legal procedure will receive a cold welcome at the capitol. Unless some organized effort can be enlisted in its favor, such as a strong bar association, can occasionally command, there is little hope of its emergence from committee pigeon holes. Even legislative commissions for revising statutes usually feel that they must avoid introducing any change sufficiently marked to arouse opposition on the floor of the assembly, lest the whole enterprise fail.

Such a striking legislative achievement as the New York Code of Civil Procedure of 1848 occurs but rarely in the history of legal institutions, and unusual combinations of favoring factors are necessary for its accomplishment. The New York Code rapidly swept over the newly organizing West, and is the basis for the practice in the great majority of the states beyond the Alleghenys. But the reform wave quickly lost its vigor. Procedure requires constant attention, and no method of regulation will suffice which cannot function steadily. As a start in the right direction the American Code practice was excellent, but as a final goal, and such it appears to have become, it is a monument to the futility of legislative control of legal procedure.

It is further to be observed that no elasticity exists in regard to a legislative mandate. No matter how crude, cumbersome, ineffective or unjust a statutory rule may be, the court is powerless to alter it. This is often lamented by the courts, who are forced against their wills to execute the harsh commands which legislatures have thoughtlessly passed and quickly forgotten. "If," said the United States Supreme Court in dealing with the service of process upon a city, "the common law (which is common sense in matters of justice) were permitted to prevail, there would be no difficulty * * *. But when a statute intervenes, and displaces the common law, we are brought to a question of

\[\text{7 Pollock, The Genius of the Common Law, p. 72.}\]
words and are bound to take the words of the statute as law."

And there is a third difficulty with the legislative regulation of legal procedure, which is perhaps the most serious of all. By its means we have divided the responsibility for the administration of justice between the legislature and the courts, and have thereby destroyed the possibility of locating the source of trouble. Division of authority always tends to obscure responsibility, and where the officers or agencies which share governmental power are so related that the efficiency of one is dependent upon that of another, the public becomes confused in its attempt to diagnose the situation and provide a remedy.

Under the legislative system, the legislature makes the rules which the courts administer. Is the fault in the rules themselves or in the way in which they are employed? No one knows. The courts and the profession believe they are doing fairly well with the rules that they are forced to use, and point to the legislature as the authorized source of procedural reform. The legislature does not know what is wrong with the rules and believes that the chief difficulty is the inefficiency and technicality of the profession. Faced with the dilemma of shifting and unascertainable responsibility, the public is helpless, and the administration of justice continues to be the one conspicuous failure in American popular government.

III

When we turn to the final alternative of a court-rule system of procedure, all the drawbacks of the other systems seem to disappear, and all the advantages seem to be preserved.

The principle of *stare decisis*, which made it impossible for a vigorous and progressive system of procedure to develop out of the processes of litigation, has no operative status. The timidity of the legislature and its want of technical knowledge, no longer stifle progress, while the generalized form of the rules enables the profession to forecast the proper steps to take with as much confidence as though the

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8 Amy v. City of Watertown, 130 U. S. 301 (1888).
practice were laid down in a legislative code. And finally, the responsibility for the effectiveness and success of the system is not only conspicuously localized in accordance with well demonstrated principles of governmental policy but is at the same time placed in the hands of those best qualified to carry it.

No modern observer would be inclined to dispute President Lowell's assertion that the ability of popular government to endure will depend upon its capacity to use experts. The administration of justice has always been a difficult and delicate function of the state, and as civilization develops the complexity of the problem increases. No one can possibly understand or appreciate the nature of the technique essential to the work of the courts who is not familiar with the conditions under which litigation proceeds. And if judicial procedure is to be kept in close adjustment with the constantly changing requirements of society, the regulation and development of that procedure must be under the supervision of those who carry on the work of the courts.

If David Dudley Field had been a more thorough student of the history of the common law, he would not have been so readily fascinated by the novel principle of legislative control of judicial procedure. It was a principle which seemed to offer unlimited possibilities of relief from burdens long endured. But those who hoped to bring the millennium through the magic of legislation, failed to appreciate the delicate adjustment of machinery necessary to an efficient administration of justice.

Never, in the eight hundred years since the Plantagenets laid the foundations of our system of judicial administration, did Parliament ever undertake to chain the courts to the chariot wheel of a legislative code of procedure. A few corrective statutes found their way into the law. Magna Charta prohibited the courts from selling justice, gave the common pleas a fixed location, and established the principle of trial by jury. A dozen statutes relating to amendments are found among the records of four centuries of parliamentary activity. Here and there new remedial rights were

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9 Public Opinion and Popular Government.
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created and old procedural abuses were cut off. But there is no instance, in all English history, of parliament undertaking to assume to itself the political responsibility for the administration of justice, nor to offer its crude, fragmentary and stereotyped notations of procedure as a substitute for the expert opinions of lawyers. Not even during the storm and stress of the nineteenth century, when the flood of popular resentment threatened to engulf the profession, did Parliament lose its poise. The first great reform wave brought the Civil Procedure Act, of 1833, in which a considerable number of procedural anomalies and restrictions were removed, but at the same time the preamble of the act recited that, since improvement in the methods of administering justice could not be conveniently accomplished otherwise than by the Rules and Orders of the judges, therefore the judges should make such alterations in the rules of pleading and practice as they should deem expedient. Out of this legislation grew the famous rules of Hilary Term, 1834. They did not satisfy the public. But instead of violently seizing the power of regulating legal procedure, Parliament again undertook to assist rather than oust the courts. The Common Law Procedure Act of 1852 was a fairly complete procedural code, in 239 sections, but it contained the remarkable provision that the judges were nevertheless to retain complete power to make any rules regarding pleading and practice that they might deem expedient, anything in the present act to the contrary notwithstanding.

For 800 years the Anglo-Saxon conception of a court had been that of a dynamic agency clothed with the power to supply the people with every necessary means for enjoying the protection of the laws of the land. England chose to confirm and sustain that power and in every one of the procedural acts which were passed in the course of her long struggle for reform, she expressly recognized and reserved the authority in the judges to make general rules and orders, even to the extent of changing the form of proceedings established by Parliament. In the Judicature Act of 1873

11 3 & 4 William IV, c. 42.
12 15 & 16 Vict., c. 76.
the theory of professional responsibility found its final recognition in a statute which frankly abandoned even the form of a legislative mandate and substituted a schedule of Rules of Court.

America, on the other hand, chose to repudiate the doctrine of professional control. No more striking contrast in political theory could be conceived than is afforded by the procedural acts of the last century in England and the almost contemporary legislation in the United States beginning with the Field Code in 1848. The New York legislature believed that the courts could be entirely regulated by the clumsy and alien hand of the popular assembly, and yet suffer no loss either in technical skill or in capacity to respond to the public demand for service. It was a political and economic blunder of the first magnitude, and set a precedent which changed the American judicial establishment from a living stream into a stagnant pool. Deprived of all initiative in devising new means and methods, and safely concealed under the political shadow of the legislature, our courts have become lifeless and bureaucratic, substituting regularity for efficiency as an operating ideal.

Seventy-five years have passed since England and the United States stood at the parting of the ways and made their momentous decisions. Those years have been full of progress in England; they have been years of inaction here.

Practically all the improvements in civil procedure which have made England the envy of the world were invented or adopted during that period by professional experts charged with the high responsibility of enabling Englishmen to enjoy prompt and adequate justice. The summons for directions was invented to enable the court to exercise an effective control over the progress of the case from its earliest stage; the originating summons was devised as a means for getting judicial decisions on specific questions without drawing the entire subject-matter into litigation; discovery before trial has been tremendously expanded; summary and declaratory judgments have been made more available; the technical problems of joinder of parties and of causes of action, and of the use of counterclaims, have practically
disappeared, and in their place has come the simple question of convenience; model forms of pleading have been adopted to take the place of detailed rules; chamber practice in equity has been revolutionized by the so-called “linked-judge” system whereby each case is assigned to a pair of judges, one of whom is always in the court while the other is in chambers; a commercial court has been organized and operated to serve the needs of the large commercial interests; venue in every case is fixed by the court on the ground of convenience; the powers of the court of appeal have been enlarged and the procedure so simplified that no appeals fail for procedural errors and practically no new trials are ordered; a body of permanent masters, serving in effect as assistant judges, has been organized to take over an important part of the work of the courts. Not a year has gone by in which some improvement in the rules has not been introduced. They are under constant inspection, and whenever weaknesses are discovered or changes in business or social conditions make old methods of legal procedure inappropriate, new rules or amendments are provided to meet the need. The court-rule system is a vital organ of the state, functioning steadily, quietly and effectively through its inherent creative power. By its means the legal profession enjoys high credit for its skillful performance of an important public service.

Seventy-five years under a legislative system of procedure has accustomed the legal profession in America to a dogged perseverance in a hopeless cause. The conduct of the intricate specialty for which they were trained was taken out of their hands, and the political representatives of the people prescribed the rules of practice upon which the success or failure of the administration of justice largely depended.

Instead of placing the code in the hands of the courts as a mechanism to be used, improved, and developed by the profession, as Parliament had always done with its procedural statutes, the American legislature placed the seal of finality upon its legislation and thereby destroyed its power of growth. Under such conditions it is not surprising that
we have been imitative rather than original, and our most notable improvements in practice have been borrowed from England.

IV

It might be supposed that the persistent use of legislation throughout the United States in the regulation of the procedure of our ordinary courts, indicates that our legislative bodies, at least, have not been impressed with the theoretical weaknesses, political, economic and historical, which can be so powerfully urged against it.

A survey of contemporary political development, however, will demonstrate exactly the contrary. Every new court which Congress has created since the advent of the Field Code has been given express power and authority to make and amend its own rules for the regulation of practice and procedure. This was true of the old Court of Claims, established in 1855, and its authority to control its own procedure was continued when it was given full judicial powers in 1863.\textsuperscript{14} The United States Court for China was established with full rule-making power in 1906.\textsuperscript{15} The Court of Customs Appeals was organized with similar authority in 1909.\textsuperscript{16} The Commerce Court, during its short career, exercised the same power.\textsuperscript{17} Finally, in 1920, Congress enacted a new code for the District of Columbia, and therein conferred upon the Supreme Court of the District authority to "establish written rules regulating pleading, practice and procedure, and by said rules make such modifications in the forms of pleading and methods of practice and procedure prescribed by existing law as may be deemed necessary or desirable to render more simple, effective, inexpensive and expeditious the remedy in all suits and proceedings," provided that its equity rules shall not be inconsistent with the equity rules issued by the Supreme Court of the United States.\textsuperscript{18}

But the problems of legal procedure are not confined to

\textsuperscript{14} 36 Stat. L. 1139.
\textsuperscript{15} 34 Stat. L. 816, §5.
\textsuperscript{17} 36 Stat. L. C. 231, §206.
\textsuperscript{18} Act of April 19, 1920.
those tribunals which exercise powers which we term strictly judicial. Modern political ingenuity has developed a vast group of quasi-judicial bodies exercising powers which, for constitutional reasons, are termed administrative, but which deal with exactly the same kind of controversies and are confronted with exactly the same procedural problems as those tribunals which we call courts.

For forty years the Interstate Commerce Commission has possessed and exercised the power to make general rules and orders regulating its own procedure. The Board of General Appraisers, the Board of Tax Appeals, the Federal Trade Commission, and the Federal Power Commission, all operate under full rule-making authority.

The states have followed exactly the same course as the federal government. Every railroad or public utility commission in the United States has been given general authority to adopt rules of practice and procedure governing hearings, investigations and proceedings before it. And the workmen's compensation laws, which in effect transferred to boards or commissions the jurisdiction over industrial accidents formerly exercised by the courts, have invariably given to those commissions the power to make rules for the regulation of their own practice and procedure. When the courts, rather than commissions, are given power to administer relief under the compensation laws, as in Kansas and Minnesota, those courts are themselves clothed with power to make rules of procedure.

It thus appears that the almost universal American practice, in establishing new tribunals, whether judicial or quasi-judicial, has been to place the full responsibility for effective procedure upon those in charge of their operation. This has not been due to the conviction that the procedure of the new courts and commissions is more difficult than that

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19 Act of 1887, §17.
20 36 Stat. at L. C. 6, §12.
21 Revenue Act of June 2, 1924, §900.
22 Act of Sept. 26, 1914, §5.
24 Report for 1923 of Committee on Uniformity of the National Association of Railway and Utilities Commissions, p. 243.
25 §35.
26 §22.
of the ordinary courts. On the contrary, the limited jurisdiction of most of them makes their technique more simple, and yet the legislatures have uniformly declined to undertake to do for them what they have so long done for the regular courts. The reason seems not hard to find. Wishing to make the new tribunals function strongly, the legislatures which created them were unwilling to tie their hands by a rigid set of rules. They wanted results. They were unfamiliar with the conditions under which these new courts and administrative bodies would operate, and understood well enough that efficient methods are the joint product of technical training and practical experience. Both qualifications could be found only among those who were to be actively engaged in the administration of the new tribunals. There were no ancient traditions to dull the judgment and banish common sense. Therefore the development and operation of the new judicial agencies were placed in the hands of experts.

V

But a court-rule system of judicial procedure is not self executing. The chief business of appellate courts is the hearing and decision of cases, and most of them are so overworked that they cannot be expected to devote much attention to the investigation of general problems connected with the practice. They will pass upon proposals specifically brought to their attention but they will not supply the initiative necessary to make a court-rule system function steadily and vigorously.

This has been the history of court rule regulation of practice by the Supreme Court of the United States. That court was given power in 1792 to make rules of practice for the federal courts in equity but it drifted along for thirty years before drafting the first set of rules. It then rested for twenty years before making any further substantial changes. Thereafter nothing was done for seventy years when the equity rules of 1913 were promulgated.

The same thing happened in Michigan, where the Supreme

27 1 U. S. St. at L. p. 276.
28 Equity Rules, 7 Wheat. XVII.
29 Rules published in 1 Howard.
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Court has possessed full rule-making power under the constitution since 1850. The legislature, in 1851, added the weight of its mandate in support of the constitutional grant of power, by enacting that:

"The judges of the Supreme Court shall have the power, and it shall be their duty, within three months after this law shall take effect, by general rules to establish, and from time to time thereafter to modify and amend, the practice in said court and in the circuit courts, at law and in equity, . . . and they shall, once at least in every two years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice: 1. The abolishing of distinctions between law and equity proceedings, as far as practicable. 2. . . ."

The foregoing statute has remained continuously in force since 1851. It has been practically a dead letter. No rules at all were promulgated until 1858, and the injunction to unify law and equity proceedings was absolutely ignored by the adoption of separate sets of rules for legal and equitable proceedings. The direction to revise every two years was absolutely forgotten, and no revision was attempted for 38 years, when a particularly active committee of the state bar association prepared a revised set of rules which were promptly adopted by the court. Nothing further was done, aside from a few minute changes of a mechanical sort, for 20 years, when another bar association committee voluntarily took up the matter, prepared a revision which for the first time undertook to obey the legislative command regarding law and equity, and presented the revision to the judges of the supreme court, who promptly adopted it. Finally, in 1927, the legislature created a commission to study the practice and to present proposals for improvement to the supreme court, and this commission has made the first comprehensive investigation ever attempted and has prepared the first thorough revision in the history of the state.

In Alabama the legislature gave the supreme court "full plenary power . . . to adopt such . . . rules to regulate the

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30 Act 93, P. A. 1852.
practice and proceedings in all the courts of the state . . . as they may deem proper . . ., provided that the Supreme Court shall not . . . change . . . any act of the Legislature." Fifteen years have gone by and the court has not yet undertaken to use the power granted.

In Virginia, through the efforts of the State Bar Association, the legislature passed an act providing that "the Supreme Court of Appeals . . . shall prepare a system of rules of practice to be used in all the courts of record of this state, and put the same into effect." Two years later, the court having in the meanwhile done nothing, the provision was amended by changing "shall" to "may." Ten more years have passed and Virginia seems to be still waiting for a system of rules of procedure from its supreme court.

This is not an encouraging catalogue of efforts to produce an efficient control of procedure through rules of court. It suggests a fundamental weakness somewhere in the system, a weakness apparently due to lack of driving force or motive power. To delegate authority to a competent professional agency is useless if there is no means for compelling that agency to function.

We are therefore led to the final step in the process,—a mechanism by which the judicial rule-making authority may have its attention constantly directed to the possibility and need of improvement and through which tangible results may be obtained in the form of actually promulgated rules.

VI

If we turn to the history of the court rule system in England we shall find that the problem of keeping the rule-makers informed and at work was encountered very soon after the establishment of the system, and definite steps were taken with a view to a practical solution. The judicature Act of 1875, placed the power to make rules in the entire

34 2 Code 1919, §5960.
high court, but it quickly became apparent that this would not work, and the next year the authority was transferred to a Rule Committee of six judges. Five years later the rule committee was increased to eight members, including the Lord Chancellor and four judges appointed by him. In 1909, by the Rule Committee Act, the committee was re-organized to consist of two barristers appointed by the General Council of the Bar, two solicitors (one of them appointed by the Incorporated Law Society and the other by the Lord Chancellor), and seven judges in addition to the Lord Chancellor, three of them designated by the act and four appointed by the Lord Chancellor.

By the creation of the Rule Committee, responsibility, previously scattered was localized. Through the addition of active members of the practicing bar, a broader outlook was obtained, and better contacts were established with the commercial community and with the public generally. These measures obviously promote efficiency, and have been adopted in other parts of the British Empire.

The English example has also impressed Americans interested in regulation of procedure by rules of court. In 1913 the Colorado legislature passed an act providing that "the Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same." This legislation was initiated and secured by the state bar association, but it very soon become apparent that the court itself would not supply the motive force necessary for the successful regulation of the practice by rules. Accordingly, in 1916, the state bar association, through a special committee, requested the supreme court to itself appoint a Standing Rules committee consisting of several judges of that court, several district and county court judges, and several practicing lawyers, whose duty it should be to consider and recommend to the supreme court such rules and amendments as they might deem proper.
This recommendation was based directly upon English experience with the rules committee. For a long time nothing was done by the supreme court toward the creation of such a committee, although the state bar association persisted in its efforts and repeatedly urged its appointment. The proposed personnel was subsequently altered by dropping the members of the supreme court, and suggesting a committee of seven, consisting of two district court judges, one county court judge and four practicing lawyers. Finally after ten years of effort, such a committee was appointed, and, according to the last report of the Colorado Bar Association, is functioning with some success. It is doubtful, however, whether a committee appointed by the court itself will contribute much force and initiative to the regulation of the practice. It will tend to move no faster than the court desires, and since it is the mere creature of the court it will be subject to all the inhibitions which operate upon court action.

A similar demand for centralized initiative and more adequate public contacts was made in New Jersey. In that state the common law system was completely swept away in 1912, and was replaced by a skeleton act providing for a comprehensive, court rule system under the direction of the supreme court. But the weakness incident to the lack of driving power was quickly apparent, and in 1915 the State Bar Association, which had secured the passage of the act of 1912, was proposing the legislative creation of a "Council for Judicial Procedure," consisting of four judges, the attorney general and three practicing lawyers, who should supervise the operation of the rules of practice and report to the governor and legislature at regular intervals what changes, if any, it deemed advisable. The next year the Bar Association committee was able to report that it had secured the passage of a bill creating such a council. What has been accomplished by this measure does not appear from the proceedings of the New Jersey Bar Association.

42 Id. (1926) p. 175.
44 Laws 1912, ch. 231.
46 Id., 1915-16, p. 171.
The greatest general obstacle to efficiency in the administration of justice is the lack of any public opinion on the subject. Public opinion is the indispensable dynamic element in popular government, and its vigorous development is the only guaranty of a successful state. Delegation of legislative power over rules of procedure to the courts will tend, in the absence of a corrective, to submerge the subject below the surface of public consciousness, for the reason that we have taken the courts out of the field of political criticism. In a government based on laws the judicial action of the courts must command instant respect and obedience. Their unreversed and unrepealed decisions must be accepted as the final embodiment of the law of the land. To preserve this respect for the law we have removed the courts themselves from the arena of political discussion and debate, and have granted them the "prerogative of inerrancy or infallibility."

Accordingly, the rule-making power in the hands of the judges would be under a double disability in respect to public opinion, for the natural difficulty of interesting people in so technical a subject would be added to the tradition of deference for the judiciary which protects it from attack. It is useless to expect an efficient and vigorous administration in the absence of the only stimulus which has the power to quicken public service.

Rule-making is not a strictly judicial function, but is rather legislative and administrative, and to lay this duty exclusively upon the courts is inconsistent with the position to which we have assigned them in our scheme of government. It is wrong in principle to require the judges to carry the burden of these non-judicial activities, for they either lay themselves open to criticism in that field which may react unfavorably upon their judicial prestige and position, or the public is denied the right to freely criticize those who are really performing political functions. The vital difference between the judiciary and the other departments of government is that the latter should be responsive to popular opinion while the judiciary should be independent of it.47

A true public opinion in regard to the administration of

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justice can be developed only by making that subject a familiar topic of political discussion, and this can be done successfully only by placing the immediate responsibility for such administration in political and non-judicial hands.

This point has been stressed in England against the Lord Chancellor as administrative head of the department of justice. In the course of a series of thoughtful articles in the Solicitors’ Journal, in 1921, the writer, after pointing out the important judicial position of the Lord Chancellor, says: “While his essential functions thus defined are in this way raised, and rightly raised, above public criticism, other functions which he exercises and which do not deserve this sanctuary are automatically raised with them, and in this way the services of the Judicature, because they are centered in the Lord Chancellor, become screened from public criticism, and, in the larger sense, are still waters. The pretense is made that public interference with questions of establishment in the ordering of the Judicature is an interference with the powers and duties of the judges. * * * The Lord Chancellor is unable to abate the reserve imposed upon him as representative of the Sovereign and the Judiciary; * * * and yet, if the services of the Judicature are to meet public expectations, it is required of him that he should hold himself liable to attack when they fall below the standard set. The immunity from attack which he now enjoys is at the root of the inadequacy of the services.48

Responsible for improving the administration of justice must not be hidden under the judicial ermine, and yet it must be placed in expert hands. It follows that a commission or council made up largely of members of the legal profession, having an official status, and representing the public and the profession as a political agency, holds out the greatest promise for an efficient and adequate regulation of legal procedure. The movement for “judicial councils,” which is making rapid progress in the United States, suggests a convenient and effective means for the exercise of the rule-making power. The Massachusetts Judicial Council has been the most conspicuous and successful organization of the kind which has yet been established. Its function

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48 66 Solicitors’ Jour. (Nov., 1921) 70.
has been chiefly to recommend legislation, not rules, but it is very obvious that if the Supreme Judicial Court of Massachusetts had full rule-making power, the value of the remarkable services of this Judicial Council would be immeasurably increased. The superior court of Connecticut for many years has had the power to make rules necessary to carry into effect a brief practice act, and a judicial council has recently been established in that state to aid the court by initiating inquiries as to the causes for the complaints against the administration of justice, and by proposing remedies. The council has authority to require reports from the officers of the various courts relating to judicial proceedings, by means of which it will be able to obtain reliable information as to what is really being done. Data of this kind is an indispensable prerequisite to the formulation of adequate measures for relief, and it is well understood that the almost universal lack of judicial statistics in the United States has been one of the greatest obstacles to effective improvement.

So, in Virginia, a judicial council, consisting both of lawyers and judges, has just been created, the judicial members not belonging to the court which has the rule-making power. In Michigan a bill is now in the legislature to create a judicial council composed largely of practicing lawyers, as a means for making effective the rule-making power conferred by the constitution.

The state of Washington conferred full rule-making power on its supreme court in 1926, and at the same time created a judicial council, consisting of four judges, two members of the legislature and three members of the bar, to make the grant of power effective.

The judicial council seems to be the American solution for the problem of regulating procedure by rules of court. By its means the courts, which promulgate the rules, will receive the assistance which they need in studying the situa-

41 P. A. 1927, ch. 190.
52 L. 1925, ch. 118.
53 Id. ch. 45.
tion and in formulating remedies, and the legal profession, which has a greater stake in the efficient administration of justice than any other element of society, will be enabled to contribute its knowledge and skill to the task of improving legal procedure.