

December 1927

Recent Statutes of Rule-Making Power of Courts

T. W. A.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Courts Commons](#)

Recommended Citation

T. W. A., *Recent Statutes of Rule-Making Power of Courts*, 34 W. Va. L. Rev. (1927).

Available at: <https://researchrepository.wvu.edu/wvlr/vol34/iss1/10>

This Editorial Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

requiring the court to hear any such case if both parties so demanded. The avowed idea of the present bill is to give the proposed change a trial without forcing it in all cases.

The chief objection raised by the opponents of this change is that it will overwork the courts. To this the proponents answer that any court conscientiously reading the voluminous records now presented is required to do more work than would be required if the cases were heard before it with opportunity then and there to rule upon the evidence. There is another answer to this objection. If the chancery deposition is outmoded it should be abolished, no matter what the immediate result. If the state must take care of it by the appointment of additional judges, or if it may be taken care of by references to a master in certain cases, as was suggested at the 1926 meeting, those are matters of detail. It is not believed that any serious congestion will follow even if open hearings are made compulsory. Such congestion has not followed in other states.

The Bar Association has gone on record. This is hardly half the battle. If the association is in earnest, doubtless legislation will follow. The trial should be given. There can be very little doubt that it will prove satisfactory in more ways than one. It will eliminate most of the delay; it will very substantially decrease the cost; it will give to the court the opportunity of observing the witnesses on the stand; it will remove a strong deterrent to potential litigants, who, if they are intelligent, frequently refuse to prosecute matters in chancery unless their importance compels such prosecution.

This is only a step in advance but it is a step. It is to be hoped that it will lead to our complete emancipation from a form of procedure discarded over half a century ago by the courts which originated it.

—J. H. BRENNAN.

RECENT STATUTES ON RULE-MAKING POWER OF COURTS.—In 1925 two statutes of general interest to the bar were passed, one in Delaware and one in Washington. The Delaware Statute reads in part as follows:

“The Chief Justice and Associate Judges of the State

of Delaware shall have power to prescribe and establish by general rules the process, writs, pleadings, verifications, motions and forms of action, and the practice and procedure in civil actions at law and in the rendition, whether at or during the first term or otherwise, entry, opening or vacating of judgments and orders therein. Said rules shall not abridge, enlarge or modify the substantive rights of any litigant. They shall take effect six months after their promulgation. Upon becoming effective, all laws in conflict with such rules shall be of no further force or effect. The said Judges shall have power, from time to time, to supplement, abridge, modify, or amend such rules.

"In all cases where by statute special forms of action, pleading or practice are prescribed for the enforcement of civil rights or titles, the process, writs, pleadings, verifications, motions and forms of action, and the practice procedure, judgments and orders so prescribed by said general rules, shall be followed in lieu of the forms of action, pleading and practice so prescribed by statute."

The Washington Statute is very similar in its effect.

"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.

"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.

"This act shall not be construed to deprive the Superior Courts of power to establish rules for the government supplementary to and not in conflict with the rules prescribed by the Supreme Court."

Both of the statutes embody the full authority of the courts to make their own rules of procedure, superseding

all legislative enactments in conflict therewith. In neither Washington nor Delaware however, has there been time to formulate a set of rules of procedure and the power is as yet unexercised to any great extent. In Delaware at a meeting of the bar association this year the unanimous conclusion was reached that a new set of rules should be adopted following the model set of rules of the American Judicature Society.

In Washington the bench and bar have been very cautious and the passage of the act has made very little difference in procedure.

Statutes conferring similar powers in Colorado in 1913 have been so cautiously regarded by the courts there that few changes have been effected.

Few states allow a court to override the acts of the legislature, but in all of them the power of the court to make rules exists to a greater or less extent. That power, except in the cases of a few specialized courts, such as the Chicago Municipal Court, and many governmental administrative courts, has not been exercised. Courts have preferred and even taken active steps to shift the responsibility to the legislature. Whether the reason for this has been that the legislature offers a convenient body to receive criticism if rules of procedure prove cumbersome or whether courts have preferred to trust to superior wisdom of legislators in procedural matters where they felt they needed a guide does not appear from the record. The fact remains that the rule-making power has not been exercised by courts generally even to the limited extent as it now exists.

In the last ten years however, there has been an increasing agitation among responsible lawyers and judges for the establishment of a complete rule-making power in state and federal courts. A committee of the American Bar Association, composed of Josiah Marvel, Roscoe Pound, Charles S. Cutting, Frank W. Grinnell, E. W. Hinton, Charles S. Cushing, Thomas W. Shelton and Edson R. Sunderland, is now enthusiastically endorsing this movement and is conducting active propaganda in its favor. This fall they have issued a pamphlet which is just off the press, containing the statutes, decisions and opinions of lawyers on the practice in the exercise of the rule-making power in

every state in the union. The pamphlet is thorough and well worth study.

For the benefit of those who have not followed the discussion of the rule-making power of courts, a short statement might be of interest.

The proposal, in its broadest terms, contemplates the substitution of court rules for legislative codes of practice and procedure. Procedural law is divided into two classes, (1) What the courts may do, (2) How they may do it. The first class includes jurisdiction and general procedure. The second, all rules of practice directing the *manner* of bringing parties into court and the *method* by which the court proceeds thereafter.

The first is to be a matter of legislative enactment.

The second is to be provided for in court rules.

This proposal would not eliminate codes of civil procedure, but would cut down their application to jurisdictional matters, rules of evidence and rules of substantive law.

The chief objections urged to regulation of procedure by rules of court are as follows: (1) It would require the enactment of a new code of procedure which in turn would require judicial construction and would plunge us into a condition of uncertainty which it would require years to remove. (2) That the procedure today is not in any serious need of reform and that this is an attempt to tinker with a system which works well enough as it is. These are the chief objections on the ground of policy. Other objections applying to specific states are that the rule-making power might be unconstitutional.

The argument of the protagonists for this proposal may be summed up as follows:

(1) Rules of procedure should be made by experts instead of by legislative bodies that know nothing about the subject.

(2) The power of the court to make rules which would override statutes in matters of procedure, would create great elasticity and tend toward accomplishing the following things,

(a) Uniformity of procedure over the United States through the interchange of ideas through the bench and bar.

(b) The elimination of delay in changing a procedure or rule which does not fit.

(c) An increasing sense of responsibility of courts which sense of responsibility has been destroyed by their lack of power to make their own rules.

(3) It is contended in answer to the argument that confusion would result from the change, that the proposal has been tried in England since 1875 with the result that the English procedure today is far superior to ours; that it has also been tried in Canada, Australia, Ireland and British India. It has also been the uniform rule of Congress wherever new courts have been established to allow these courts to also establish their own procedure. Examples are the Court of Claims, the United States Court of China, the Court of Customs and Appeals, the Supreme Court of the District of Columbia, the Interstate Commerce Commission, the Board of Tax Appeals and other similar bodies.

In West Virginia the statutes are as follows:

“Form of writs.—The Supreme Court of Appeals may, from time to time, prescribe the forms of writs and other process, and make general regulations for the practice in such court. (Acts 1872-3, c. 9.) Barnes’ W. Va. Code 1923, c. 114, 3.

“Courts have inherent power and authority to prescribe and enforce rules and regulations for the conduct of their business and in accordance with established procedure, not inconsistent with organic or statutory law, nor unreasonable, oppressive or obstructive of common right. *Teter v. George*, 86 W. Va. 454 (1920).”

Section 4, Chapter 51 of the proposed new Code of West Virginia provides as follows:

“Regulation of Pleading, Practice and Procedure in All Courts of Record Except County Courts.—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. (Code 1849, c. 161, 4; Code 1860, c. 161, 4; Code 1868, c. 114, 3; 1872-3, c. 9, 3; Code 1923, c. 114, 3.)”

This is a very cautious start toward the rule-making power. It leaves the legislature supreme in matters of procedure and leaves a very limited field for the Supreme Court. It creates a similar situation to that existing in a majority of states in most of which the courts have either declined or neglected to exercise such narrow powers.

There appears to have been up to the present time little interest in the bar in extending this power of the Courts. However, the question is becoming of increasing importance and interest and deserves discussion in this state. We quote therefore the following letter received from Judge Josiah Marvel, the guest of honor at the last Bar Association meeting:

"Thurman Arnold Esq., Dean,
Morgantown, W. Va.

Dear Sir:

"Some time during the year I will hope for your cooperation in forwarding the Rule Making Power of the Courts in your State. The plan that we are suggesting to the Presidents of the various Bar Associations in the various States is along the following lines:

"1. That they consider the subject and bring in a report in favor of the Rule Making Power of the Courts being granted by the Legislature at the next meeting of the State Bar Association.

"2. That they induce the President of every local Bar Association in the State to appoint a similar committee for a similar end.

"3. That they use every opportunity to induce the press to favor the proposal and if some news item looking to the appointment of a committee or otherwise is given to the press at the same time, it can be induced to include the arguments in favor of the Committee as a part of the news story.

"I look forward with confidence to your helpfulness in carrying the subject forward in your State.

Very truly yours,

Josiah Marvel."

—T. W. A.

WEST VIRGINIA BAR ASSOCIATION—THE PRESIDENT'S ADDRESS.—There are certain portions in the address of Nelson C. Hubbard, past president of the West Virginia Bar Association, at the last meeting which deserve more than customary burial in the bound volume of the Bar Associa-