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Rule-making Authority

By William Hazlitt Smith

From the very nature, purpose and duty of courts, rules of practice and procedure are necessary. If each judge made his own rules for the courts he held, varied practices and requirements would arise to confuse and confound both litigants and lawyers. Therefore the judges, if left to themselves, would soon get together and make uniform rules to govern and regulate the business in their courts in all matters of practice and procedure. Accordingly the judges, unless prevented by statute, have authority to make rules. The legislature is, of course, the other authority, and the controlling authority, except as limited by the constitution, or except as it may expressly give such authority to the judges and courts. A code of procedure is essentially made up largely of rules, though in form and origin wholly a statute of a legislative body.

There is now in this country an active agitation against Codes of Procedure, and in the State of New York it is seriously proposed to abolish both the name and substance, and scatter the contents into various separate statutes, new and old, and into so-called Court Rules; statutory to begin with and afterwards subject to revision and amendment by the judges.

Rule-making authority, almost unlimited, is granted to the judges in England, and it may be well to examine the extent and manner of its exercise there. A book entitled "The Rule-making Authority in the English Supreme Court" by Samuel Rosenbaum, recently Fellow in the Law School of the University of Pennsylvania, has been published this year. This volume gives a careful and complete history of rule-making and reform in procedure in England, and I obtain from it and from the White Book, Annual Practice for 1916, the facts here stated.

Reform began in 1833 with an Act authorizing eight of the Common Law judges to make rules for the reform of pleading. This Act was broadened in 1850, 1852 and 1854. In 1850 and 1858 acts were passed authorizing the Chancery judges to make general rules covering practically the whole procedure of the court. Rules were also authorized and made under several Acts relating to Bills of Exchange, Dispatch of Business, Debtors, etc. Before 1875 the Common Law Courts were by statute given jurisdiction of some equitable rights and remedies, the Court of Chancery was given some legal powers, and the way was paved for abolishing the distinction between these courts.

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1Of the Ithaca, N. Y., Bar; A.B., Cornell, 1873.
2Published by the Boston Book Co.
as to jurisdiction and powers. This was accomplished by the Judicature Act in 1875, which made the Common Law and Chancery Courts divisions of the Supreme Court, with the forms of action alike in each. This Act of 1875 has since been amended and extended in various particulars, and numerous other Acts, a dozen or more, have been passed relating to special rights, remedies and subjects. All these Acts taken together make a statutory Code, quite complete, and cover a wide range, quite analogous to portions of the New York Code of Civil Procedure if it were divided into separate statutes.

The Act of 1875 expressly gave authority to the Judges to make rules. In 1876 a Rules Committee of six judges was constituted, the number being increased to eight in 1881. Later, in 1894, the President of the Incorporated Law Society (London solicitors) was added by statute, and the Chancellor was empowered to add two more to the Committee, one of them to be a practising barrister. In 1909 an Act was passed providing that the General Council of the Bar (barristers) should choose two to sit in the Committee, the Incorporated Law Society should choose one, and that the Chancellor should appoint one solicitor from a provincial Law Society. This Act is still in force. The Rules Committee is now composed of eight judges, two barristers and two solicitors. This Committee has express power to make and amend all rules regulating the sittings of the courts and of the judges thereof, the pleadings, practice and procedure of the courts, the duties of their officers, and the costs of proceedings therein. The Act of 1875, and all subsequent amendatory Acts, expressly reserve to Parliament the right to annul any rule within forty days after it is made, but without prejudice to proceedings already had thereunder. Proposed rules and amendatory rules have to be published in the London Gazette during the forty days, and copies of the proposed rules have to be accessible to any public body.

The Rules Committees have made numerous revisions, amendments and additions so that the Rules of the Supreme Court have grown from 456 (in 1875) to 1045 (as appears by White's Annual Practice, 1916).

It is not within the scope of this article to examine or comment on the contents or substance of the Rules above referred to. It is sufficient to say that the reforms accomplished in England by the Acts referred to, and by the Rules, are revolutionary compared with the old regime, and are considerably in advance of the present Code practice and procedure in our numerous states, and especially in the State of New York. In 1887 Lord Bowen, writing of the English reforms, said:
"A complete body of rules, which possesses the great merit of elasticity, and which (subject to the veto of Parliament) is altered from time to time by the judges to meet defects as they appear, governs the procedure of the Supreme Court and all its branches. In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes, upon oral evidence or affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading or proceeding, that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished pari passu with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move."

It should be stated that the Rules do not apply to the County Courts. The County Courts Act, 1888, provides for those Courts making their own rules, with the concurrence of the Rules Committee of the Supreme Court. Such rules have been made and now number over 1200. A separate annual County Courts Practice is published.

It remains to consider the rule-making authority of legislatures as exercised to date, through Codes of Procedure, especially in the State of New York. In legislation the tendency has been to be too specific with reference to the details of practice and procedure, and so the New York Code has grown in number of sections and has become too precise and allows practically no variation according to the circumstances. Practice under it is not elastic and is often discouraging to a party seeking relief. The legislature has been buncoed by interested parties into passing amendments and additions to serve some special purpose or to fit some special circumstance. More than one section of the Code furnishes ground for belief in the truth of this charge. These evils are not to be charged against the Code as a fundamental proposition. Lack of careful supervision of Code legislation in advance of passage is largely to blame. People ignorantly like to be told just what to do and what not to do, and the legislature accommodates them. Witness the agitation for years to amend the Anti-Trust Law, a model because of its brevity and the use of general terms.

But whatever be the rule-making authority, whether legislature or judges, or both, with the assistance of lawyers, the tendency will be toward the evils mentioned. The rules will be frequently amended, revised and added to by one authority or the other. The English
Rules demonstrate this. Their Supreme Court Rules and their County Court Rules and the various practice and procedure Acts taken together equal in number the sections of our Code.

Code rules may be elastic as well as Court rules. It is all in the making, and major operations of surgery will become necessary occasionally in either case. We need radical changes in this State and there are many features in the English Practice and Rules which we would do well to adopt, but whether by Code revision or Rules, or both, is not important. Both routes may be the best way out.

Personally, I am in favor of the general scheme of the proposed new Rules modeled largely after the English Rules, which will eliminate and transfer to Rules numerous sections of the Code. The plan of the Practice Act of sixty odd sections, the repeal of the whole Code, and transferring portions to numerous consolidated and new laws, instead of Code revision, may be wise or unwise. There is good ground for difference of opinion. Lawyers as a class are conservative with reference to changes in the practice and procedure to which they have become accustomed, but with reference to the proposed reform they are quite generally apathetic. Very few of them, I venture to say, have given any careful attention to the several volumes containing the proposed rules and statutory changes, sent them by the Commission. Many have not even looked in the books.

The judges, with the assistance of several good lawyers from active practice, may safely be trusted to formulate Rules. The same may be said of the legislature as to Code Rules, if it has the active assistance, advice and guidance of judges and lawyers in the work of reform. If all the lawyers would only read Mr. Rosenbaum's book the needed reforms in practice and procedure in this state would then have, with few exceptions, their active interest and support.