

1936

## Courts and the Rule-making Powers

Carl C. Wheaton

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Carl C. Wheaton, *Courts and the Rule-making Powers*, 1 MO. L. REV. (1936)  
Available at: <http://scholarship.law.missouri.edu/mlr/vol1/iss3/4>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

# Courts and the Rule-making Powers

CARL C. WHEATON\*

October 16, 1933! That was truly a day to hearten the citizenry of Missouri, a day on which the lawyers of this state, especially the members of its Supreme Court, could justifiably hold high their heads. For it was on that date that our highest tribunal announced its decision in *In re Richards*.<sup>1</sup> In that opinion the court said, in part:

“It is a fundamental principle of constitutional law that each department of government, whether Federal or State, ‘has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the Constitution.’

“It is not always easy to determine what objects are naturally within the range or orbit of a particular department of government, but it will scarcely be denied that a primary object essentially within the orbit of the judicial department is that courts properly function in the administration of justice, for which purpose they were created, and in the light of judicial history they cannot long continue to do this without power to admit and disbar attorneys who from time immemorial have in a peculiar sense been regarded as their officers.”

That ruling required courage, and demonstrated that in this state sits a Supreme Court of ability and fearlessness. It suggests further that the lawyers of this state should themselves see to it that the Missouri bar should be one of learning and honesty, and this desirable state of things is, year by year, being more nearly approached. The young men who are, from time to time, being admitted to legal practice in Missouri are, for the most part, persons of talent and good character. The bar is being purged of older practitioners who are wanting in integrity. In fact, a new day dawns for the legal profession of this state.

All that is splendid, but, if legally and practically proper, it should portend another advance which would complement the progress just considered. I refer to a complete overhauling of our criminal and civil procedure by the Supreme Court. The day arrived long ago when the procedural law of this state needed to be drastically reformed. To mention the following as a few of the present rules is to prove this assertion.

---

\*Professor of Law, St. Louis University.

1. 333 Mo. 907, 63 S. W. (2d) 672.

Who does not stand aghast at the idea that one accused of certain crimes cannot be released on bond before conviction, but that he can be thus set free after conviction? What logic or common sense is there to that? An accused may, without notice to the prosecution, plead an alibi or insanity, often supported by perjured evidence. Judges can merely be umpires, when they should be permitted to participate actively in legal proceedings, thus giving the juries the aid of their training so that just results may be reached. One's case must be alleged by setting forth *facts*, not law, and the facts must be ultimate, not evidentiary. It is impossible to estimate approximately the loss of time and money caused by this provision, for neither courts nor members of bars are sure of the distinctions between facts, ultimate and evidentiary, or between facts and law. The present statutes permit joinder of parties and causes only within comparatively narrow limits. This requires the bringing of what should be unnecessary lawsuits. The result is damage untold to clients. These are but samples of antiquated and improper procedural rules which lead inevitably away from general justice, the only decent standard for any law. There is a multitude of other rules of adjective law which are in the same category as those mentioned, but are not those cited sufficient to suggest that the time has come for a thorough-going reformation of methods of trial procedure?

How can this best be effected? My thesis is that our Supreme Court, with the help of the ablest procedural lawyers of this state, are the proper persons to undertake this task, so important to our citizens, and that they have the authority to do this either with, or without, legislative consent. Let us examine the correctness of this proposition, considering the matter first from the legal and then from the practical standpoint.

There is no doubt that courts may make special rules for procedure in cases coming before them, if there are no statutory laws regulating procedure, or if they are not inconsistent with existing legislative enactments relating to adjective law. Thus, it has been said that the power of a court to frame rules for the proper conduct of its business is an inherent one.<sup>1a</sup> Judges have declared that the power of a court to regulate practice before them exists without the aid of statutes.<sup>2</sup> However, it must be admitted that it has been stated many times that rules of court are subservient to a statutory mandate on matters covered by such rules.<sup>3</sup>

---

1a. *Smith v. State ex rel. Hamill*, 137 Ind. 198, 140 Ind. 340, 36 N. E. 708 (1894); *Fox v. Conway Fire Ins. Co.*, 53 Me. 107 (1865); *State ex rel. Kansas City Power & Light Co. v. Trimble*, 291 Mo. 532, 237 S. W. 1021 (1922); *Campbell v. Union Savings & Investment Co.*, 63 Utah 366, 226 Pac. 190 (1924).

2. *Epstein v. State*, 190 Ind. 693, 128 N. E. 353 (1920); *Harres v. Commonwealth*, 35 Pa. 416 (1860); *Russell v. Archer*, 76 Pa. 473 (1874); *In re Evans*, 42 Utah 282, 130 Pac. 217 (1913).

3. *Woodbury et al. v. Jergens*, 61 F. (2d) 736 (C. C. A. 2nd, 1932); *McMahon v. Hamilton*, 202 Cal. 319, 260 Pac. 793 (1927); *Butterfield v. Butterfield*, 1 Cal. (2d) 227,

At this point, two questions present themselves. Can the legislature of a state abandon to the courts of such a commonwealth the rule-making power? If such a legislature refuses to turn over to the courts the entire rule-making business, have these courts the power to assume that function without such legislative consent?

The answer to the first question is determined by the answer to another inquiry, namely, Is there an *unconstitutional* delegation of legislative authority when a legislature gives to the courts of its state the business of making all of the rules relating to trial procedure? The correct reply to that interrogation is clearly in the negative. Ever since there have been records of English law, courts have passed some rules of procedure. Legislative bodies have always permitted this. It is certainly not an exclusively legislative function. The result, at least in part, is that the right of courts to make procedural rules has been recognized. It is, therefore, possible for legislatures to surrender to courts the business of governing procedure in them.<sup>4</sup>

But let us presume that the legislature is not responsive to the suggestion that the courts, rather than it, should frame procedural rules. And right here let it be said that that may well be the attitude which the Missouri lawmakers will take. What can be done? An effort might be made to arouse the state's voters to their plight and to get them to demand of their repre-

---

34 Pac. (2d) 145 (1934); *Ackerman v. Union & New Haven Trust Co.*, 91 Conn. 500, 100 Atl. 22 (1917); *State ex rel. Fisher v. Rowe*, Judge, 110 Fla. 141, 148 So. 588 (1933); *People v. Davis*, 357 Ill. 396, 192 N. E. 210 (1934); *Advance Veneer & Lumber Co. v. Hornaday*, 49 Ind. App. 83, 96 N. E. 784 (1911); *Knickerbocker Ice Co. v. Surprise*, 53 Ind. App. 286, 97 N. E. 357 (1912); *Laurel Canning Co. of Prince George's County v. Baltimore & Ohio Ry. Co.*, 115 Md. 638, 81 Atl. 126 (1911); *State of Mo. ex rel. Paramount Progressive Order of Moose v. Miller*, 216 Mo. App. 692, 273 S. W. 122 (1925); *State ex rel. Brockman Mfg. Co. v. Miller*, Circ. Judge, 241 S. W. 920 (Sup. Ct. Mo. 1922); *Uerling v. State*, 125 Neb. 374, 250 N. W. 243 (1933); *Rauchenberger v. Interurban St. Ry. Co.*, 102 N. Y. Supp. 561 (1907); *Farrell v. Malcom*, 236 N. Y. Supp. 704, 135 Misc. Rep. 101 (1929); *Pistell, Deans & Co. Inc. v. Wood*, 250 N. Y. Supp. 92 (1931); *Broome County Farmers' Fire Relief Ass'n v. New York State Electric and Gas Corp.*, 239 App. Div. 304, 268 N. Y. Supp. 131 (3rd Dept. 1933); *Van Ingen v. Berger*, 82 Ohio St. 255, 92 N. E. 433 (1910); *Meyer v. Brinsky*, 129 Ohio St. 371, 195 N. E. 702 (1935); *Zeuske v. Zeuske*, 55 Ore. 65, 105 Pac. 249 (1909); *Prack v. Strong*, 121 Ore. 688, 257 Pac. 19 (1927); *Bank of Beaverton v. Godwin*, 124 Ore. 166, 264 Pac. 356 (1928); *Carroll v. Quaker City Cabs, Inc.*, 308 Pa. 345, 162 Atl. 258 (1932); *Smith v. Ellwood City Ice Co.*, 311 Pa. 147, 166 Atl. 560 (1933); *Gregory v. Davis*, 177 Atl. 331 (Sup. Ct. Pa. 1935); *Missouri, K & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183 (1913); *McElroy v. State*, 76 Tex. Cr. Rep. 78, 172 S. W. 1144 (1915); *Vinson v. State*, 77 Tex. Cr. Rep. 546, 179 S. W. 574 (1915); *Lingo Lumber Co. v. Garvin*, 181 S. W. 561 (Tex. Ct. of Civ. App. 1916).

4. *Ernst v. Lamb*, 73 Colo. 132, 213 Pac. 994 (1923); *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928); *In re Constitutionality of Section 251, 18 Wisconsin Statutes*, 204 Wis. 501, 236 N. W. 717 (1931); *Morgan, Edmund M., Judicial Regulation of Court Procedure* (1918) 2 MINN. L. REV. 81; *Wayman v. Southard* 23 U. S. 1 (1825); *Bank of the United States v. Halstead*, 23 U. S. 50 (1825); *Beers v. Haughton*, 34 U. S. 329 (1835).

sentatives that the latter permit the courts to fashion the rules of procedure. This, admittedly, would be a long, hard, but not necessarily impossible, task. Is there a better way out of the present deplorable situation? Yes. The courts can, and should under such circumstances, assert their inherent power, and state that they will reassume their ancient prerogative of making all rules governing their proceedings.

Numerous capable and recognized authorities state that they can legally do this. Thus, a California court has stated, "In its own sphere of duties, this court cannot be trammled by any legislative restrictions."<sup>5</sup> From New York comes the declaration that rules of court can be inconsistent with the provisions of its Code of Civil Procedure.<sup>6</sup> Another judicial opinion from the same state is, "The power to make rules governing the practice and procedure in the courts is a judicial, and not a legislative power. . . . A change in the Constitution was necessary to confer the power upon the Legislature."<sup>7</sup> We hear from still another source:

"As Constitution, art. 1, sec. 8, provides that 'the legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from one another', the General Assembly can enact no rules of practice and procedure for this court which are prescribed solely by our rules of court."<sup>8</sup>

Non-judicial writers of note have come to the same conclusion. Abraham Gertner of the Columbus, Ohio bar made a study of this matter under the auspices of the Judicial Council of Ohio. In the course of his report, he said:

"If a court has inherent power to make rules, the mere fact that the legislature has acted upon the same subject should make no difference. A legislature cannot destroy the inherent power of a court by passing an act regulating a matter with which a court has dealt by rule. If the court had the power before the statutory regulation, it also has it afterwards, and the statute should be held void."<sup>9</sup>

One of the most famous of living lawyers in this country, Dean Roscoe Pound of the Harvard Law school, declares that from an historical viewpoint the courts regularly exercised a power of regulation of judicial procedure by rules of court. He observes that rules of court still employed by the Court of Common Pleas when our country was established were originally made as early as 1457, and that we inherited a system of regulating procedure by rules

5. *Houston v. Williams*, 13 Cal. 24 (1859).

6. *Ackerman v. Ackerman*, 123 App. Div. 750, 108 N. Y. Supp. 534 (2nd Dept. 1908).

7. *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43 (1st Dept. 1922).

8. *Cooper v. Board of Comr's of Franklin Co.*, 184 N. C. 615, 113 S. E. 569 (1922).

9. Gertner, *The Inherent Power of Courts to Make Rules* (1936) 10 U. OF CIN. L. REV.

of court.<sup>10</sup> The greatest living authority on the law of evidence, John H. Wigmore, dean emeritus of Northwestern University School of Law, says:

“We assert that the legislature (federal or state) exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary’s duties; and that therefore all legislatively declared rules of procedure, civil or criminal, in the courts, are void, except such as are expressly stated in the constitution. This is true logically under the constitutional provision that the powers of government are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as expressly directed and permitted.”<sup>11</sup>

We next encounter another question. Can the highest judicial tribunal of a state promulgate rules of procedure for other courts in the state? Although there is some opinion to the contrary, there is eminent authority to the effect that it can. The usual, and certainly a cogent, reason given for this conclusion is that the Supreme Court is given superintending control over all inferior courts.<sup>12</sup> Dean Pound shows us that historically this should be the decision. He says that for centuries prior to the adoption of American constitutions the power to make general rules governing the procedure of the lower courts, as well as their own, was in the King’s courts at Westminster. This power, he claims, was received from England as part of our institutions, and was recognized by courts in this country.<sup>13</sup>

To the writer, it seems certain that, from the legal angle, the courts have the power to make rules of practice which are inconsistent with legislative enactments, and that the highest court of a governmental unit may make such rules for all courts over which it has supervisory power, as well as for itself.

Let us proceed next to explore the field of the practicality of such a stand. It is submitted that from *this* viewpoint, as well as from the legal one, every valid argument points toward giving to the courts, rather than to the legislatures, the work of creating rules of court. I propose to examine this matter point by point.

---

10. Pound, *Senator Walsh, on Rule Making Power on Law Side of Federal Practice* (1927) 13 A. B. A. J. 84.

11. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally* (1928) 23 ILL. L. REV. 276.

12. *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931); Hudson, *The Proposed Regulation of Missouri Procedure by Rules of Court* (1916) 17 U. OF MO. BULL. L. SER. 13, 3

13. Pound, *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599.

The courts are responsible for the enforcement of court procedure, and are blamed for injustices resulting from improper rules. They, not the legislatures, should, therefore, have the authority to make the rules.<sup>14</sup>

Procedural rules need to be flexible. They should be easily amendable.<sup>15</sup> Flexibility can be more readily attained by having the rules made by courts, for legislative rules cannot be easily amended, because the legislative sessions are infrequent, overcrowded with business, and of limited duration.<sup>16</sup> Courts are in session most of the time. A legislative rule of court cannot be suspended when it will operate unjustly, but a rule of court can be.<sup>17</sup>

Closely connected with this thought is the fact that legislative enactments of procedural rules are, at least often, if not usually, carelessly drawn. If they happen to be carefully drawn, they are likely to be carelessly changed in committee or on the floor. Insufficient consideration is often given to procedural statutes before enactment.<sup>18</sup> All this leads to much litigation over the meaning of procedural statutes.<sup>19</sup> Courts, and those aiding them in the drafting of court rules, would go painstakingly about their duty of framing them.

Lawmakers have not, in many instances, the expert knowledge essential to the making of proper rules of procedure.<sup>20</sup> Judges are in a better position than legislators to know and to appreciate the practical problems of the administration of justice.<sup>21</sup> Edson R. Sunderland, one of our outstanding procedural lawyers, says that, normally, legislatures are timid about making important procedural changes, because they lack technical information. They are inclined to leave the subject alone or to busy themselves with meddlesome changes in minor bills, which can be easily passed with little debate.<sup>22</sup>

Again, politics plays a part in legislative enactments. Legislators may vote for or against a bill to favor someone else, or to get others to vote for measures which they desire to get passed. This is only a suggestion of what the effect of politics may have when legislatures control rules of procedure. It does not lead to just results.

14. *Judicial Versus Legislative Determination of Rules of Practice and Procedure—A Symposium* (1926) 6 ORE. L. REV. 36.

15. Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 ILL. L. REV. 163; Morgan, *Judicial Regulation of Court Procedure* (1918) 2 MINN. L. REV. 81.

16. Sunderland, *The Exercise of the Rule Making Power* (1926) 12 A. B. A. J. 548; 6 ORE. L. REV. 36, *supra* note 14; Morgan, *loc. cit. supra* note 15.

17. *Smith v. State ex. rel. Hamill*, 137 Ind. 198, 140 Ind. 340, 36 N. E. 708 (1894); 6 ORE. L. REV. 36, *supra* note 14.

18. Morgan, *loc. cit. supra* note 15.

19. 6 ORE. L. REV. 36, *supra* note 14.

20. *Ibid.*

21. Morgan, *supra* note 15.

22. Sunderland, *supra* note 16.

Is this not a sufficiently formidable array of facts to prove that the only practical thing to do is have our courts draw the procedural rules? The writer believes it is.

The idea that the courts of Missouri should claim the right to make their practice rules is not a new one. Committees of the Missouri Bar Association have many times recommended this. An excellent resume of the early history of the efforts of the bar of this state along this line is given by Professor Manley O. Hudson in an article written by him in 1916.<sup>23</sup> He says that in 1912, 1913, and 1915 such committees made a recommendation of that type, and he, working for another committee of our bar association, agreed with earlier reports. But the courts are still following the procedure code found in our statutes. Is it that the statutes of this state do not give our courts the power to throw off the shackles of the statutes. No! Article III of our state constitution divides the powers of the government into three distinct departments and says that each of them "shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted." There is no exception bearing on our problem. The judicial power is vested in the courts by Art. VI, sec. 1, of our Constitution. By Art. VI, sec. 3, the Supreme Court is given general superintending control over all of the inferior courts of the state. Moreover, does not the excerpt from the *Richards* case which is quoted at the beginning of this article almost direct the courts of the state to take from the legislature the business of making rules of procedure?

To the writer's mind, it is certain that from every point of view the Supreme Court of Missouri has a remarkable chance to render with propriety a splendid service to our commonwealth by assuming its rightful position as the principal rule-making body of this state. It should, of course, leave to the other courts the right to make certain special rules peculiarly applicable to their own practice. May they embrace their opportunity. May the words of Governor Park become a reality. Recently, stepping into the role of a prophet, he said that the time is not far off when our Supreme Court will take back unto itself the authority conferred by the constitution, and will adopt rules that will greatly simplify our practice and procedure. He added that, if this should be done, unnecessarily long delays in the trials and in the final determination of cases would be avoided, much expense to litigants would be saved, and speedier justice would be guaranteed.<sup>24</sup>

---

23. Hudson, *supra* note 12.

24. Park, Gov. Guy B., *Constitution and Courts* (1936) 7 Mo. B. JNE. 43.