

The Proposed Civil Practice Law and Practice Rules--A Comment

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THE PROPOSED CIVIL PRACTICE LAW AND PRACTICE RULES—A COMMENT

PRESIDING Justice Edward R. Finch of the Appellate Division, First Department, has for many years devoted himself to improving the administration of justice in New York. His credo comprehends a simplified procedure, a short civil practice act and a restoration to the courts of the rule-making power. At his suggestion, the Association of the Bar of the City of New York, through its Committee on Court Rules, recently undertook the project implicit in these articles of faith. Through his instrumentality, and for this purpose, the Carnegie Corporation of New York placed at the disposal of the Committee a fund of \$10,000. Philip Halpern, Professor of Law at Buffalo University, Werner Ilsen, Professor of Law at St. John's University School of Law, and Theodore Richter, a member of the Committee, were retained to assist. The Committee prepared an act containing a CIVIL PRACTICE LAW and PRACTICE RULES, and submitted it to the Association of the Bar of the City of New York, in the form of a SPECIAL REPORT, together with a letter of transmittal requesting support in the State Legislature. Pending the introduction of the act, Presiding Justice Finch graciously made formal request for suggestions or criticism thereof. In response, I offer this comment.

THE EXISTING CIVIL PRACTICE ACT AND PRACTICE RULES

Our present Civil Practice Act and the Rules of Civil Practice (adopted by convention) became operative on Oc-

tober 1, 1921. The former now contains about 1,630 sections; the latter contain 236 Rules.¹

"Except as otherwise expressly provided," the Civil Practice Act applies "to the civil practice in all the courts of record of the State."² The Rules "are binding upon all the courts in this state and all the justices and judges thereof, except the court for the trial of impeachments and the court of appeals."³ Auxiliary to these, we have the New York City Court Act, the Surrogate's Court Act, the Court of Claims Act and the Justice Court Act.

The Civil Practice Act and the Rules superseded the Code of Civil Procedure (the Troop Code) of 1877. The Code of Civil Procedure had previously superseded the first Code of Procedure (the Field Code) of 1848.

The Civil Practice Act is subject to legislative amendment. Since 1924, the Rules of Civil Practice have been subject to amendment by a majority of the justices of the appellate division in the four departments.⁴

THE PROPOSED CIVIL PRACTICE LAW AND PRACTICE RULES

The sponsors of the proposed act desire to reduce substantially the legislative regulations now contained in the Practice Act and remove them to the Rules. We have already noted that there are about 1,630 sections in the present Practice Act and that there are about 236 Rules. In the proposed Civil Practice Law, there are 753 sections, and there are about 1,184 Rules.⁵ By the process of removal, the

¹ Special Report of the Committee on Court Rules of the Association of the Bar of the City of New York on the Extension of the Rule-making Power, at III.

² N. Y. C. P. A. (1920) §1.

³ *In re* Wills, 162 App. Div. 775, 147 N. Y. Supp. 930 (2d Dept. 1914).

⁴ N. Y. JUDICIARY LAW (1924) §82. The complete text of the statute is as follows: "Rules of practice. A majority of the justices of the appellate division in the four departments, by joint order of the four presiding justices or justices presiding, shall have the power, from time to time, to adopt, amend or rescind any rule of civil practice, not inconsistent with any statute; and a majority of the justices of the appellate division in each department, by order of such majority, shall have power, from time to time, to adopt, amend or rescind any special rule for such department not inconsistent with any statute or rule of civil practice." (As amended by L. 1924, c. 172.)

⁵ *Supra* note 1.

number of sections is *reduced* by approximately 877 sections, but by that very process, the number of Rules is *increased* by 948. The result is a net *increase* of 71 in the number of enumerated provisions.⁶

The two existing methods of amendment—legislative and judicial⁷—are retained, but the enlargement of the Rules operates to substantially increase the scope of judicial amendment.⁸

Statement of Principles Underlying Plan

One wishes that there had been a clearer enunciation of the principles that governed the preparation of the proposed act. The following principles are, however, discernible: "The plan of the Act is first: to enact as the Civil Practice Law all *substantive* law and *structural* provisions which are now found in the Civil Practice Act and such enabling sections as are appropriate to assure the power of the rule-making body to deal with the subjects committed to the rules; second: to provide that the present Civil Practice Rules and the sections transferred from the Civil Practice Act shall henceforth have force and effect only as rules of court subject to amendment, *etc.* by the body charged with making court rules."⁹ Sections contained in the existing

⁶ The Committee explains the increase as follows: "The increase in the total number of statutory provisions and rules is largely due to the fact that many sections of the Civil Practice Act were split and the substantive matter retained in the statute and the procedural matter transferred to the rules." *Ibid.*

⁷ The introductory clause to the proposed Practice rules is as follows: "The following provisions shall, from and after the effective date of this act, have force and effect, as and only as, rules of court and shall be known as the practice rules and may be amended, added to, suspended, abrogated or rescinded, in whole or in part, in the manner provided in section eighty-two of the judiciary law." *Id.* at 272.

Except where otherwise stated, italics used in this comment are mine.

For text of §82 of N. Y. Judiciary Law, see *supra* note 4.

⁸ It is interesting to note the following proposed rule of construction: "Inconsistency between statute and rule not to be found. Whenever a question of inconsistency between a statutory provision and a rule arises, the statutory provision shall be construed, in so far as its language may permit, so as to avoid inconsistency and to sustain the validity of the rule." CIVIL PRACTICE LAW §747, *supra* note 1, at 270.

⁹ *Id.* at III. The language quoted is stated by the Committee to be an adaptation of that used in the Wisconsin Act (L. 1929, c. 404).

Civil Practice Act that cannot be regarded as *jurisdictional*, *structural* or *substantive* have been transferred to the Rules.¹⁰ The Committee does not "favor going to the verge of constitutional power in transferring from statute to rule every procedural provision, no matter how fundamental. The Committee has proceeded upon the theory that a practice act is something more than a declaration of general liberal principles and that it should contain the outline of the procedure so long as it does not restrict the freedom of the rule-making power to simplify and expedite practice."¹¹ Substantive law provisions are kept in the Practice Law, for "the Committee can see no advantage to be gained from taking the substantive law out of the Civil Practice Act and placing it in consolidated laws, now existing or hereafter to be created, although substantive law would in strict theory be more appropriately found there. It does not interfere with procedure in the slightest to have substantive law in the practice law and the Committee has become convinced that the profession does not welcome the idea of taking the substantive law out of it. * * * The Committee's recommended act, therefore, leaves the substantive law where it was. * * *"¹² "No change in the practice is proposed."¹³

By application of these principles, all *substantive* provisions, all *jurisdictional* provisions and all *structural* or *fundamental* provisions are retained in the proposed Civil Practice Law. All else is transferred to the Rules. Substantially, nothing is eliminated nor is any change in practice effected. Reference to the text will illustrate the application of these principles.

Illustrations of Application of Underlying Principles

The provision now contained in §8 of the Civil Practice Act, merging equity and law actions, remains a statutory provision because it is *structural* or *fundamental*.¹⁴

¹⁰ *Id.* at 786 (Introductory note to mandamus proceeding).

¹¹ *Id.* at III.

¹² *Ibid.*

¹³ *Id.* at I.

¹⁴ *Id.* at 685. "The abolition of the distinction between law and equity is kept in the law as an *organic* provision."

Almost all of the provisions on limitations of time (Statute of Limitations) remain statutory as part of substantive law; but the provisions contained in §30 of the Civil Practice Act, governing the manner of taking objections that the action was not commenced within the time limited, are transferred to the Rules because they are purely procedural.¹⁵ The provisions as to jurisdiction and powers of courts, judges and referees are retained in the Law.¹⁶ Civil Practice Act §211-a creating a right of contribution where a judgment has been recovered against joint tort-feasors, retains its place in the Law because it is *substantive*.¹⁷ Civil Practice Act §§182-188 governing the rules of venue are transferred to the Rules because they are procedural; but Civil Practice Act §§189 and 190 authorizing transfers of trials from one court to another, retain their place in the Law because they are *jurisdictional*.¹⁸ Civil Practice Act §254 providing that "the first pleading, on the part of the plaintiff is the complaint," is retained in the Law "as part of the structure to which other procedural provisions may be attached."¹⁹ Like treatment is given to Civil Practice Act §260 which provides that "The only pleading, on the part of the defendant, is the answer."²⁰ Sections on the forms of pleadings and their effect, amended and supplemental pleadings, bill of particulars and verification are transferred to the Rules, because they are *procedural*.²¹ Civil Practice Act §23-a, providing that, in specified cases, an action for negligence for a maritime tort may be brought within one year after May 1, 1923, is one of the few provisions eliminated because of obsolescence. Changes are not made even in the face of actual or apparent inconsistencies.²²

¹⁵ *Id.* at 686.

¹⁶ *Id.* at 687.

¹⁷ *Id.* at 700.

¹⁸ *Id.* at 698.

¹⁹ *Id.* at 703.

²⁰ *Id.* at 704.

²¹ *Id.* at 703.

²² *Id.* at 692 (notes to §§115-118) and at 746 (notes to §§897-901).

THE PROBLEM

Whether it is desirable that the Legislature pass the proposed act is determinable only after a satisfactory solution of two questions:

1. Is the instant revision sound?
2. Is the principle of judicial rule-making by a majority of the justices of the appellate division in the four departments, adopted as the basis of the proposed act, sound?

The first question relating to the soundness of the instant revision requires consideration of the validity of the underlying principles and their application. With one significant exception, it may be conceded that the principles are sound, and, on the whole, well applied. I doubt, however, the soundness of any revision, the major premise of which is to make no change in the practice. No revision worth the name should be confined by any such strait-jacket principle.

The second question relating to judicial rule-making is, in my judgment, more significant and it is primarily this phase of the problem upon which I desire to make comment.

JUDICIAL VERSUS LEGISLATIVE RULE-MAKING.

Too much dogmatism has been uttered by judicial rule-making enthusiasts. Judicial procedure is not inherently good and wise.²³ A movement whose prime motive is to shorten the Practice Act and enlarge the Rules must probe the problem of who is most competent to be the rule-making authority. The Committee on Court Rules of the Association of the Bar of the City of New York advises us that the proposed act is designed "to afford to the judiciary, rather than to the legislature, the duty and opportunity to improve

²³ Mr. Herbert Harley, Secretary of the American Judicature Society, speaking of judicial rule-making, recently said: "There has been too much dogmatism on behalf of this movement. Its proponents have generally taken the position that legislative procedure is inherently evil and that reform would inevitably follow a restoration of this power to the Supreme Court." Herbert Harley, *The Argument for Judicial Rule-Making*, 167 ANNALS AM. ACAD. POL. & SOC. SCIENCE 93.

procedure. * * * The Committee favors the principle of leaving to the courts the prescribing of court procedure. * * * It is submitted that the adoption of the act will give to the judiciary the opportunity and duty to simplify and expedite civil practice and that the judicial regulation of practice is as natural a function as the legislative regulation of legislative practice, while the legislative regulation of practice in the courts is as unnatural as would be the judicial regulation of practice in the legislature.”²⁴

Let us briefly state the case (1) in favor of *judicial* rule-making, and (2) in favor of *legislative* rule-making.

Case in Favor of Judicial Rule-Making

1. Prior to the adoption of the Field Code in 1848, procedural rules were evolved by the courts as part of the common law. It was only when the courts failed in their task of adapting procedural law to changing needs that recourse was had to the legislature. The change back to judicial rule-making would therefore not be a radical innovation. It would be substantially a return to earlier practice. This is the *historical argument* in favor of judicial rule-making.

2. If the courts are to be held responsible for the administration of justice, they ought to be allowed to fix their own procedure. The administrator is most competent to judge his needs, and to detect, localize and remedy defects in the system. Responsibility without power is neither just to the administrator nor advantageous to the public.

3. The doctrine of separation of powers under our constitutional form of government should preclude the legislative branch from regulating the procedure of the judicial branch, quite as much as the judicial branch is precluded from regulating the procedure of the legislative branch.

4. Legislative rule-making for the courts is inconsistent with the policy pursued by the legislatures upon the

²⁴ *Supra* note 1, at I, IV.

creation of administrative tribunals—such as the Public Service Commission, the State Transit Commission, the Interstate Commerce Commission, the Federal Trade Commission, Customs Courts—some of them exercising only quasi-judicial powers. These tribunals are unrestricted respecting their procedure, though many of their members have had no legal training. And the concensus of opinion is that administrative tribunals have functioned well.

5. Rule-making for the courts should be the work of technicians. Legislative rule-making is haphazard and inexpert. Members of the legislature are not elected to office because of ability for rule-making.

These, and more, are the arguments urged in favor of *judicial* rule-making.

But what say the protagonists of *legislative* rule-making?

Case in Favor of Legislative Rule-Making

1. To return to the old system of permitting the courts to establish rules for themselves is, to employ the language of a seasoned legislator, "a step backward."²⁵ Return to judicial rule-making is not a mark of progress; it is a sign of retrogression.

2. Because of the popular election of members of the legislature at frequent intervals, legislative rule-making is more expressive of the will of the people.

3. Judicial rule-making, under the provisions of §82 of the Judiciary Law, by a majority of the justices of the appellate division in the four departments, does not at present operate satisfactorily. "Where the rules are modified as under §82 of the Judiciary Law, by the round-robin method, from one Appellate Division to another, there is no opportunity for the people to be heard, or even for the bar to

²⁵ Burton T. Esmond, "Rule-Making by the Legislature, 167 ANNALS AM. ACAD. POL. & SOC. SCIENCE 102.

present their views.”²⁶ The legislature contrariwise functions through committees who hold hearings and give ample notice. The legislature meets at definite periods of the year, and changes in the rules are effected during these sessions and no other. Moreover, legislative enactments, except in extraordinary cases, are made to take effect on September 1st. Often, substantive law is not severable from procedural law, and the power to amend both must be in a single body. The emergency rent laws of New York contained a legislative declaration of the existence of an emergency and regulated the procedure in the courts respecting actions for rent and dispossess proceedings. A declaration by the courts of the existence of an emergency would have been beyond the province of the courts.²⁷

An Appraisal

A fair consideration and appraisal of these conflicting contentions necessitates a quest for an alternative rule-making authority. Neither the legislative nor the judicial method is altogether satisfactory.

Rule-making for the courts should not be the task of the legislature. This is my conclusion, though I feel that the Legislature of New York has assiduously performed the task assigned to it. We should never forget that through the legislature, a modern system of procedure was evolved in the face of the voluntary default and abdication by the courts. This is the genesis of the Field Code.

Rule-making is not primarily the task of the legislature because it demands the competency of the technician.

Nor do I believe that the historical argument, offered in support of judicial rule-making, is deserving of much consideration. History also shows that the courts failed in their assigned task.

²⁶ Esmond, *supra* note 25, at 103.

²⁷ The arguments in favor of and in opposition to judicial rule-making have been restated recently in the articles referred to in Annals, *supra* notes 23 and 25. The volumes of the Journal of American Judicature Society should also be consulted on this subject.

Little significance, too, is to be attached to the all but obsolete political doctrine of separation of powers.

Is rule-making by a majority of the justices of the appellate divisions in the four departments, pursuant to §82 of the Judiciary Law, the best solution? I answer in the negative.

The rule-making process demands the ability not only of members of the appellate courts. Trial judges constantly, and, at first hand, deal with procedural problems. They should be, and are, eminently competent to participate in the process of rule-making. Nor should we omit to implement the ability of other officers of the court—the lawyers. Are they not qualified for the task? Who more than they?

Our experience with judicial rule-making, pursuant to §82 of the Judiciary Law, does not warrant its extension. Excepting the recent significant amendments to Rule 113 affecting motions for summary judgment and a few other, comparatively minor, amendments, very little has been done by the rule-making authority under its existing powers. Nor should the current practice of rule-making without notice, hearing and full discussion pass without criticism. It is indefensible.

The rule-making authority should be a Judicial Council—a mixed tribunal composed of judges, lawyers, members of law faculties and laymen—equipped with ability and power adequate to the high task and full opportunities for its realization.

CONCLUSION

The proposed Act should not be passed by the Legislature.

A Commission on Revision of the Civil Practice Act should be appointed to consider the extent and manner of revision of our existing civil practice and the feasibility of creating a Judicial Council.

January 15, 1934.

Because of the timeliness of the subject treated in the foregoing comment, it was deemed advisable to release the same for publication in advance of its appearance here. Accordingly, on February 1, 1934, copies thereof were made available to attorneys practicing in New York State. At about the time of release, the Commission on the Administration of Justice in New York State issued its report,²⁸ dated January 25, 1934, and, among other things, recommended the establishment of a Judicial Council and the creation of a Law Revision Commission.

Since the submission of said report, and very largely because of it, an act creating and establishing the Judicial Council of the State of New York has become law.²⁹ The powers of the Judicial Council as defined in the Act are largely advisory. It has no rule-making power except with respect to the manner of keeping records of the business of any court.³⁰

²⁸ N. Y. LEGISLATIVE DOCUMENT (1934) No. 50.

²⁹ N. Y. Laws 1934, c. 128. For criticism of Act, see p. 5, *et seq.*, Report by Joint Committee of New York City Bar Associations with respect to report of the New York State Commission on the Administration of Justice (March 15, 1934).

³⁰ The powers and duties of the Judicial Council are thus defined: "Sec. 45. Powers and duties. The council shall have the powers and shall be charged with the following duties:

(a) To make a continuous survey and study of the organization, jurisdiction, procedure, practice, rules and methods of administration and operation of each and all the courts of the state, including both courts of record and courts not of record, the volume and condition of business in said courts, the work accomplished and the results obtained.

(b) To collect, compile, analyze and publish the judicial statistics of the state in compliance with article six, section twenty-two of the constitution.

(c) To receive, consider and in its discretion investigate criticisms and suggestions from any source pertaining to the administration of justice and to make recommendations in reference thereto.

(d) To keep advised concerning the decisions of the courts relating to the procedure and practice therein and concerning pending legislation affecting the organization, jurisdiction, operation, procedure and practice of the courts.

(e) To recommend from time to time to the legislature any changes in the organization, jurisdiction, operation, procedure and methods of conducting the business in the courts which can be put into effect only by legislative action and to recommend to any court or to any body vested with the rule-making power for any court any changes in the rules and practice of said courts or the methods of administering judicial business therein which, in the judgment of the council, would simplify and expedite or otherwise improve the administration of justice therein.

(f) To adopt and from time to time amend and promulgate with the force and effect of law rules and regulations not inconsistent with any statute with respect to the manner of keeping records of the business of any court." N. Y. Laws 1934, c. 128.

The second recommendation of the Commission on the Administration of Justice for the establishment of a Law Revision Commission (to consist of five members, of whom two shall be members of the faculties of law schools within the state of New York) is, at present writing, pending before the legislature of New York with all indications pointing to its enactment. The proposed Law Revision Commission is not to consider matters of administration of law since this falls within the scope of the Judicial Council.³¹

Information presently at hand indicates that the proposed Civil Practice Law and Practice Rules will be submitted for consideration to the Law Revision Commission when appointed by the Governor. I expect that, in that event, the Law Revision Commission will consider the feasibility of amending section 82 of the Judiciary Law as well as the Act creating the Judicial Council, to the end that the rule-making power may be vested in the latter body.

April 16, 1934.

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³¹ The purposes of the Law Revision Commission as set forth in the pending act prepared by the Commission on the Administration of Justice are as follows:

"1. To examine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms;

"2. To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies;

"3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law;

"4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions;

"5. To report its proceedings annually to the legislature on or before February first, and, if it deems advisable, to accompany its report with proposed bills to carry out any of its recommendations." *Supra* note 28, at 55.