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OPEN COURT

THE RULE MAKING POWER

The Rule Making Power was the subject of discussion at the third meeting of the class in Administration of Justice held on Thursday, December 12, 1929. At this meeting the following papers on the subject were presented:

1. Historical Background of the Rule Making Power.
2. Arguments for and against the Rule Making Power Being Given to the Courts.
3. Some Consequences of Legislative Control of the Rule Making Power.
4. The Constitutionality of Statutes Giving the Rule Making Power to Bodies Other Than the Legislature.
5. Suggested Plan for a Rule Making Body in North Carolina.

The last of these papers, prepared by one of the members of the class and revised as a result of the discussion, is presented herewith. The suggested organization is unique in that it differs widely from any now employed in formulating procedural rules in any of the judicial systems of this country. It is published, not as a mature or definitive proposal, but merely in the hope that it may provoke discussion by members of the bar.¹

FRED. B. McCALL.

SUGGESTED PLAN FOR A RULE MAKING BODY IN NORTH CAROLINA

In general North Carolina courts are regulated with regard to rules of procedure and practice by a Code of Civil Procedure enacted by the Legislature. The Supreme Court has the right, by the Constitution of 1868, to make its own rules. The Legislature has further given to the Supreme Court the power to prescribe rules of practice and procedure for the interior courts of the State where such rules do not conflict with legislative enactments; but the Supreme Court has failed to exercise this power to any appreciable extent. Thus the rule making power is almost completely in the hands of the Legislature at the present time. This unprofessional body, busily

¹ The following readings are suggested to those interested in the problem of the rule-making power: WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION*, Ch. XXXII; Sunderland, *The Exercise of the Rule-Making Power*, 12 A. B. A. J. 548; Pound, *Rule-Making Power of Courts*, 12 A. B. A. J. 599; Report of American Bar Association Committee on Rule-Making Power of Courts, 13 A. B. A. J. part II, pp. 1-16.

engaged in enacting laws of every description for a brief sixty-day period every two years, is constantly making ill-considered changes in the rules of practice and procedure, which changes throw out of gear the whole procedural program of the State.

In 1925 there was created a Judicial Conference composed of forty-six members, with an annual appropriation of two hundred and fifty dollars.¹ This Conference was privileged to recommend changes in the adjective law to the Legislature but was given no actual rule making power. The large membership, the lack of active leadership, and the small appropriation have limited the activities and efficiency of this organization. Furthermore, the Legislature has been reluctant to enact into law recommendations of the Conference with reference to procedural changes.

The following is a proposed remedy which the writer feels should greatly relieve the present situation. An attempt has been made to give a brief sketch of a possible Judicial Council having the facilities to study scientifically the organization of the judicial system of this and other states and the actual power to make rules of practice and procedure for all the courts of North Carolina. No state has as yet given the rule making power to a Judicial Council, but some of the more progressive states are now attempting to secure such power for their Councils. The question of the constitutionality of such a Judicial Council as the one suggested has not been considered in this paper. Such a Council would undoubtedly require an amendment of Article IV, §12 of the Constitution of the State of North Carolina. It is believed, however, that the measures necessary to the formation of such an organization would be justified by the benefits to be received by the judicial system of the State.

The proposed act would provide that:

1. The present Judicial Conference is hereby abolished.²
2. There shall be a Judicial Council for the continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the State. Said Council shall have the power to enact, repeal, enlarge, abridge, or modify all rules and methods of practice and procedure as is hereinafter provided.
3. The Judicial Council shall be composed of the Chief Justice

¹ In 1929 the Illinois Legislature created a Judicial Council and appropriated for its use \$10,000. In 1927 the appropriation for the California Judicial Council was \$40,000 and in 1929 it was \$27,000.

² The present Judicial Conference was established by Chapter 244, §§1, 2, 3, 4, and 5 of the Public Laws of North Carolina for 1925.

of the Supreme Court of North Carolina, who shall continue to serve so long as he remains the Chief Justice; one Associate Justice of the Supreme Court, who shall be elected by the members of that court; one Superior Court Judge from the Eastern Judicial Division and one from the Western Judicial Division of North Carolina, who shall be elected by the judges of their respective divisions; one practicing attorney from the Eastern Judicial Division and one from the Western Judicial Division, who shall be elected by the Supreme Court;³ one practicing attorney, who shall be elected by the North Carolina Bar Association from among its membership;⁴ one member of the faculty of the Law School of the University of North Carolina, who shall be elected by the faculty of said Law School;⁵ one Executive Secretary, who shall be elected by the Supreme Court as is hereinafter provided.

4. With the exception of the Chief Justice of the Supreme Court and the Executive Secretary the members of the Judicial Council shall serve for a term of six years. The elections shall be so arranged that the terms of a majority of the members of the Council shall never expire at the same time.

5. The Executive Secretary shall be elected by the Supreme Court from among the members of the Bench or Bar of the State for a term of eight years. His permanent office during his term shall be in Raleigh. It shall be his duty to study and examine the organization, rules, and methods of practice and procedure in effect in all the courts of the State and make recommendations to the Council regarding the more effective administration of justice. He shall further study the adjective laws and the judicial organizations of the various states of the Union and report such findings to the Council. He shall receive all suggestions and proposals from the members of the Court, the members of the Bar, and the citizens of the State regarding the judicial system and report such suggestions and proposals to the Council. He shall annually file a written report of the Council's activities with the Governor, the Legislature, and one copy shall be kept in the files

³ The Supreme Court is given the power of electing these attorneys because it, more than any other one organization in the state, is better qualified to determine the eligibility of persons for such an office.

⁴ The representative of the North Carolina Bar Association should, if possible, be a former or present member of the Legislature.

⁵ The member of the faculty of the Law School of the University is included on the Council in order that the theoretical aspect of the law may be represented. The presence of a professor of law on the Council has proved beneficial in Michigan and North Dakota. Recently the Dean of the Yale Law School has been made a member of the Judicial Council of Connecticut.

of the Council. He shall examine each case reversed by the Supreme Court on a procedural error and make recommendations to the Council, when possible, for the correction of such rules. He shall further fulfill the duties of the secretary of the Council.

6. The Executive Secretary shall receive an annual salary of \$7,500,⁶ plus such office, clerical, and traveling expenses as the Council may deem proper.

7. The remaining members of the Council shall receive no salary for their services but shall be reimbursed for all necessary expenses incurred by them in performance of their duties as members of the Council.

8. The Judicial Council shall meet two times each year in Raleigh for a session of one week or so long as the business of the Council shall demand.

9. Seven members shall constitute a quorum and may transact business as a complete Council.

10. The chairman of the Council shall be elected by the members for a term of four years and he shall have the authority to call a special session whenever he may deem it necessary.

11. The present Code of Civil Procedure and all adjective law now in effect in North Carolina shall henceforth be considered rules subject to repeal, enlargement, abridgement, or modification by the Judicial Council. An affirmative vote of six members of the Council is required to make such changes.

12. The Judicial Council shall have the power to enact new rules of practice and procedure for any or all courts of the State by a two-thirds vote of the members present at that session.

13. The Judicial Council shall have the power to recommend changes in the substantive or constitutional law of the State to the Legislature, which shall act upon such recommendations in the same manner in which recommendations of Legislative committees are acted upon.

14. The Legislature may repeal, enlarge, abridge, or modify any enactment or change made by the Judicial Council by a three-fifths affirmative vote.

MOORE BRYSON.

⁶This salary is the equivalent of that received by the Judges of the Superior Court.