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THE NORTH CAROLINA STATE BAR

Kemp D. Battle, *Editor*

Rule-Making: Recent Developments

F. E. WINSLOW*

The machinery for the administration of justice must be revamped at intervals, to meet the needs of changing times. In this respect the machinery of the courts is not different from the machinery used in any other process of modern life. If it does not operate efficiently and produce a quality product at a price the public is willing to pay, the public will find a substitute.

The first reaction of the public to delays, inconvenience, mounting expense, disturbance of business and peace of mind, and decisions bearing little relation to the weight of the evidence, is an attempt to improve the judicial machinery. This attempt is usually ineffective, and the second phase of the revolt is a refusal to employ the unsatisfactory facilities offered by the courts. Losses are charged off and forgotten. Settlements, just or unjust, are made, and arbitrations are effected. The next step is to get the government to set up new administrative tribunals or bureaus, operating in a summary manner, to give relief of a sort not otherwise obtainable on reasonable terms. The inferiority of the product is set off against the ease and speed of the process. The phenomenal recent growth of administrative law bears a direct relationship to the persistent failure of the authorities to adjust judicial administration to the public demand.

Three methods have been used to keep court machinery in working order. Two have been found wanting. The third is a comparatively recent development and gives promise of beneficial results.

The rules of procedure were originally the by-product of actual decision and *stare decisis*. Historically, all common law and equity courts had inherent power to determine how they would proceed. The rules were different in criminal, equity, and law courts, and the process of appeal served to enforce and preserve them, but not to amend them. There was no rule-making authority in the court system having the power to supplant an existing rule in the trial courts. This situation led to the adoption of legislative codes. The defects of this method have been long apparent. A statute is a strait-jacket. A huge gloss of judicial interpretation grows up around it. It is not revised from time to time to absorb the development by decision, like a rule of court. The

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efforts of the bar associations to bring about legislative amendments often encounter suspicion, but more often indifference, for lawyers as a group cannot muster much political power. On the other hand, politically powerful lobbies can command attention, even in matters of procedure. Organized insurance companies procured the passage by Congress of the first federal interpleader act, restoring the remedy of interpleader to its former usefulness, *but the benefits were limited to insurance companies!* And again, a legislature, though suspecting a bar association of "having an axe to grind", will pass an act for some member who has lost a case!¹ The susceptibility of legislatures to interested lobbying and their indifference to disinterested bar association recommendations is not confined to any one state. It is a nation-wide condition.²

Another device tried is reliance upon the inherent power of the courts to control judicial machinery by rules, without providing the courts with necessary working conditions and assistance. Both bench and legislature are too busy to make original studies of conditions, do the spade work, and the drafting. But whereas the legislature is open to both interested and disinterested suggestions, and considers bills *drafted by the interested parties*, the courts are immune to such assistance, which, bad as it is, is better than none. The results of this method have been disappointing. In Michigan, in 1850, the rule-making power was expressly confirmed in the supreme court by the constitution. For about seventy-five years, the court abdicated its function. During that time absolutely necessary rules were provided by legislative acts which were obviously unconstitutional, but were accepted without question by bench and bar. Finally, about ten years ago, the bar obtained enactment of acts *creating a judicial council, and requesting the court to act*. These acts, with intense bar interest, were the dominant factors in producing the revision of 1931.³ The development of pre-trial procedure in Wayne County Circuit Court, which has interested the bench and bar of the entire nation, stems from this move-

¹ Pound, *Practical Advantages of Rules of Court for Criminal Procedure* (1939) 25 A. B. A. J. 825, 826 describes the following incident: "... in my native state, when the state bar association was pressing for some belated and long needed simplifications of appellate procedure, it made no progress before the legislature. But a member of one of the houses who had not been able to procure a reversal of a decree in view of adverse findings of fact in the trial court, easily procured enactment of a statute. . . ." This statute required the supreme court to try *de novo*, upon evidence preserved in the bill of exceptions, all issues and questions of fact in every case. The supreme court was then three years behind with its docket.

² Pound, *Practical Advantages of Rules of Court for Criminal Procedure* (1939) 25 A. B. A. J. 825.

³ Harris, *The Extent and Use of Rule-Making Authority* (1938) 22 J. Am. Jud. Soc. 27.

ment.⁴ In Colorado, the legislature in 1913 empowered the supreme court to make rules, but made no provision for ascertaining bar opinion or for assistance to the court by judicial council or practitioner advisers. The results were not extensive. In 1939 the legislature confirmed the power, and made provision for bar assistance, and a bar advisory committee is now at work. Every lawyer in the state will be able to voice his views, and finally the supreme court will complete the work.⁵ In Maryland, the court of appeals received full rule-making power in 1927, with no result,⁶ so in 1939 the legislature *requested* the court to act, and conferred on the court the power to ". . . appoint a standing committee of members of the bar . . . employ such assistants as may from time to time be necessary . . . expenses . . . shall be paid by the court of appeals out of such amount as may be appropriated for that purpose."⁷ The Bar Association of Baltimore City held a special meeting to celebrate the event. Work is now proceeding.

The power given by Congress in 1934 to the United States Supreme Court to make rules for the district courts was developed by the Supreme Court into a demonstration of the technique of effective rule-making which attracted nation-wide attention, gave a new direction to the movement to increase the effectiveness of the courts, and served as a model for the states. The method employed is the third to be tried, and the most promising. The use of an advisory committee to do the spade work in study, drafting and submission to the bar and public for criticism and suggestions makes it feasible for the courts to act. Their former reluctance is explained by the lack of such facilities. The work of our appellate courts has increased out of all proportion to what it was a century ago. The judges have not only been too busy, but they have been by their elevated position shut off from the current of demand for improvement and from acquaintance with what is actually happening in the trial courts and the practice. With either bar co-operation or the aid of an active judicial council, this situation is entirely changed. The results show that whether rules are made by legislature or court, the spade work is actually done by someone else; in the one case by some volunteer or some trade or business lobbyist, in the other by a bar committee or judicial council. The only question left in the controversy over the rule-making power is who shall pass on and reject or

⁴ *Review of Judicial Council Reports* (1939) 23 J. AM. JUD. SOC. 99, 103. "In 1938, out of 5,839 cases ready for trial, 3,533, or 60.5 per cent were finally disposed of without trial."

⁵ Harris, *The Extent and Use of Rule-Making Authority* (1938) 22 J. AM. JUD. SOC. 27; *Federal Trial Rules Stimulate State Reforms* (1939) 23 J. AM. JUD. SOC. 18, 19.

⁶ Harris, *The Extent and Use of Rule-Making Authority* (1938) 22 J. AM. JUD. SOC. 27, 29.

⁷ *Federal Trial Rules Stimulate State Reforms* (1939) 23 J. AM. JUD. SOC. 18.

adopt or amend and put into force. Shall it be the court or legislature? If either is too busy to do it well, it is the legislature.

Recent history, since 1934, shows a rapid jelling of opinion that the court can be trusted to do a better job of rule-making than the legislature. Since 1934, nine states have followed the federal precedent: 1935, West Virginia; 1937, South Dakota, Pennsylvania, Indiana; 1939, Arizona, Colorado (act of 1913 made effective), Maryland (act of 1927 implemented), Nebraska, and Texas.⁸ All these states follow the new technique.

In addition to the nine states acting since 1934, nine others already had given their highest courts the rule-making power: 1850, Michigan; 1912, New Jersey; 1925, Delaware and Washington; 1929, Florida and Wisconsin; 1930, Rhode Island; 1932, Tennessee; 1933, New Mexico; eighteen states in all. Of these latter nine, five have done effective work, and four have accomplished little. The five working courts are Michigan, which began work with a judicial council ten years ago after three-quarters of a century of inaction; Washington and Wisconsin, "where the courts have long been assisted by judicial councils";⁹ New Mexico, whose judicial council is regarded as a "rules committee" appointed by the supreme court to advise it on rules, and which has recently recommended for adoption certain of the new federal rules;¹⁰ and New Jersey.¹¹

The new method of co-operation between bench and bar in rule-making has met the objections that the judges would not act, and were too busy to act. There remains the objection that the profession "will have to learn procedure all over again". This is true whether action is by legislature or court. But legislatures act spasmodically, to effect a great "reform", and adopt new "codes", when they act at all, whereas courts can proceed gradually as experience requires. Imitation is a large factor in legislation. Statutes, even drastic ones, are copied wholesale. Doubtless, a court would consider well-drafted rules from other jurisdictions, but there is little likelihood that any set of rules would be copied wholesale. A court would be careful to adapt its rules to local conditions. On the other hand, the courts would have the opportunity gradually to bring the rules of the state and federal courts into substantial conformity, which would be a gain all around.

The significant progress of recent years has been the result of com-

⁸ Harris, *The Extent and Use of Rule-Making Authority* (1938) 22 J. AM. JUD. SOC. 27, 30.

⁹ *More States Adhere to Rule-Making Principle* (1939) 23 J. AM. JUD. SOC. 65.

¹⁰ *Review of Judicial Council Reports* (1939) 23 J. AM. JUD. SOC. 99, 109.

¹¹ New Jersey has a judicial council, but it lacks adequate financial support, and the writer is not informed as to the method used in New Jersey to facilitate rule-making by the court.

bined efforts of lawyers and judges. The courts have not stood aside and assumed a neutral position in those states where efforts of the bar have met with success. In Pennsylvania, Chief Justice John W. Kephart originated the plan, which was approved by the supreme court.¹² In Missouri, where the original act failed, a compromise was effected in 1939, through the efforts of Chief Justice Tipton, who gave assurance that the supreme court would welcome the legislature's invitation to submit suggestions for revised rules, and would create a drafting commission.¹³ In Arizona, and other successful states, the Judicial Council, which included the supreme court, recommended passage. And in still other states, such as Utah,¹⁴ the Council in 1939 has recommended that the State Bar seek rule-making power for the supreme court, and that the Council be designated as the advisory body.

The North Carolina Bar Association in 1938, after full discussion, including favorable comment by two members of the supreme court,¹⁵ endorsed the proposal to confer rule-making power on the supreme court. Its committee drafted a bill, having before it the acts of other states, and adapting the principles to local conditions.¹⁶ It was submitted to the Governor, the Attorney-General, the members of the supreme court, and circulated among the members of the bar and General Assembly. The Chief Justice was asked to make suggestions as to form, which were incorporated in the bill.¹⁷ No member of the court expressed to the committee any opposition. The Assistant Director of the Budget advised as to the financial provisions,¹⁸ so as to avoid the Appropriations Committee. When the bill was set for hearing before the House Committee on Courts and Judicial Districts, Bar Association members from every section of the state, and the Attorney-General, were present to recommend the bill. The supreme court was invited to publicly express its willingness to assume the burdens imposed upon the court, but took no official action on the request. The court advised that it was necessarily in a position of neutrality. (One may respect the delicacy of the court's feeling on this subject without agree-

¹² *Review of Judicial Council Reports* (1939) 23 J. AM. JUD. SOC. 99, 107.

¹³ *More States Adhere to Rule-Making Principle* (1939) 23 J. AM. JUD. SOC. 65.

¹⁴ *Review of Judicial Council Reports* (1939) 23 J. AM. JUD. SOC. 99, 108.

¹⁵ *Report of Committee on Courts and Court Procedure* (1938) 40 N. C. B. A. REP. 110 (Justice Devin, Chairman); *Some Suggested Reforms in Our Judicial System and in Procedural Rules* (1938) 40 N. C. B. A. REP. 196 (Address prepared by Justice Barnhill).

¹⁶ *The Rulemaking Bill* (1938) 17 N. C. L. REV. 86.

¹⁷ The bill as thus amended appears in *The Rule-Making Bill* (1939) 41 N. C. B. A. REP. 172. *Report of Committee on Courts and Court Procedure* (1939) 41 N. C. B. A. REP. 178 (Justice Devin, Chairman) makes a strong argument for the rule-making principle.

¹⁸ The provision was \$1500 per year for expenses to be paid out of the Contingency and Emergency Fund.

ing with the conclusion that the court should be neutral on a question which substantially affects the functioning of the system of courts, of which it is the head.) The bill received a favorable report from the Committee by one or two votes, in the last days of the session of 1939, was re-referred to the Committee on Appropriations, and there reported unfavorably without a hearing. Its sponsors were, of course, disappointed that North Carolina should not be at the head of the rule-making procession, but are hopeful for the future.

During the thirty years of activity of the American Bar Association in promoting reform of judicial procedure, nothing achieved seems likely to prove of such permanent and far-reaching importance as the revival, or recognition, or extension, as the case may be, of the rule-making power of the courts. In these days of change and growth, it will be a great advantage to have at hand an easy, speedy, and flexible method of adapting procedure to new conditions.¹⁹

Suggested Lists of Books for New Bar Libraries

At the 1938 Fall meeting of the Carolina Law Library Association, a committee was appointed to make tentative drafts of suggested lists of books for bar libraries in North Carolina cities, the libraries to cost approximately \$2,000, \$3,000 and \$5,000. These original drafts were submitted to the Association at its 1939 Spring meeting, attended by several practicing North Carolina attorneys. Much interesting discussion revolved around them and helpful suggestions were made. The Committee was continued with instructions to revise the drafts, in accordance with the approved suggestions, and submit the revisions to the Association at its meeting in Raleigh, N. C., October 26, 1939.

Prior to this revision the tentative drafts were submitted to the members of the Committees of the North Carolina State Bar and North Carolina Bar Association on Libraries and Publications, appointed subsequent to the earlier meetings of the Association, and to a small number of additional attorneys. The Law Library Association gladly takes this opportunity of publicly thanking these members of the legal profession for their interest and cooperation, and for the presence of a number of them at the meeting of the Association in Raleigh, October 26. This meeting was devoted largely to a discussion of ways and means of encouraging, and assisting in, the establishment and maintenance of bar libraries in the State, and to the selection of books for such libraries.

¹⁹ Judicial Council of New York, Fifth Annual Report (1939) (Hon. Leonard S. Saxe, Executive Secretary) makes a complete study of the rule-making power in New York, and contains a short bibliography of the subject and a tabulation showing the status of the rule-making power in all the states. Pertinent sections of constitutions and statutes are given verbatim. This is a valuable source book.

In revising the drafts of suggested lists of books for bar libraries, it was thought wise not to attempt as sharp a dividing line between Lists I, II and III as appeared in the original drafts, but to include in each a sufficient number of titles to permit of some selection according to the needs of individual communities as reflected in the judgment of their library committees. The items on List I, as revised, total approximately \$3,000. The Association suggests that the \$2,000 library be selected from this list. Lists II and III contain additional suggestions for consideration in making further purchases looking toward the establishments of \$3,000 and \$5,000 libraries, respectively. The prices indicated on Lists I, II, III represent the publishers' quotations, whereas considerable saving can frequently be effected by the purchase of used items in good condition. The purchase of a number of books, for establishing bar libraries, would very probably result in a substantial discount.

The revised tentative drafts of suggested lists of books for bar libraries, which appear below, do not purport to be perfect models to be followed without deviation. They should not be so considered, regardless of the number of future revisions, since the frequent appearance of new publications, and the special needs of individual lawyers, and groups of lawyers, render impossible such a compilation. This fact has been demonstrated in the divergence of opinion of members of the State Bar and the Bar Association to whom the drafts have already been submitted. The guiding principle in the making of these lists has been the selection of materials which the Association feels are highly important to the practice of law in North Carolina. It is true that in some communities all this material may be readily accessible; while in others very little may be available. Many individual lawyers have much larger and much better libraries than those suggested in these tentative drafts; many young lawyers are faced with an almost total lack of library facilities. It is to provide necessary facilities for those without them, to save further duplication of purchases, and to make available expensive and unusual materials which individual lawyers scarcely feel justified in purchasing, that this Association is interested in the establishment of Bar Libraries.

Needless to say, these lists cannot be all inclusive. Occasionally one treatise is listed when preference might suggest another; with a limited amount of money for investment the purchase price may be an important factor. The different titles suggest the fields in which the Association thinks purchases should be made. In the matter of specific items, it is realized that there is a wide difference of opinion, and it is

well that, in selecting books for bar libraries, final decisions rest with local committees.

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LIST I

1. North Carolina Code	\$ 40.00
2. North Carolina session laws for the last few years	50.00
3. Shepard—North Carolina Citations to cases and statutes, and cumulative supplements	45.00
4. North Carolina State Reports (or South Eastern Reporter) including advance sheets	575.00
5. North Carolina "Lifetime" Digest (or North Carolina and South Eastern Digest)	200.00
6. Simms—North Carolina Form Book, 9th edition	6.50
7. McIntosh—North Carolina Practice and Procedure in civil cases...	15.00
8. North Carolina Supreme Court Appeal Briefs (per year)	15.00
9. Mordecai—Law Lectures	6.50
10. Jerome—North Carolina Criminal Code. 5th edition	10.00
11. Lockhart—Evidence. 2nd edition	6.50
12. North Carolina Workmen's Compensation Act, Annotated, including 1935 amendments50
13. Vartanian—Law of Automobiles in North Carolina	6.00
14. Vartanian—Law of Wills in North Carolina	6.00
15. Vartanian—Law of Corporations in North Carolina	8.00
16. North Carolina Law Review (annual subscription)	3.00
(\$1.00 to members of the North Carolina State Bar)	
17. North Carolina Law Review—Cumulative Index Digest	2.00
18. American Jurisprudence, or Corpus Juris and Corpus Juris Secun- dum. (Individual preference might be for American Law Re- ports, \$657.00.)	490.00
19. Black's Law Dictionary	6.50
Bouvier's Dictionary, 1 vol. ed.	
20. Supreme Court Reporter	174.00
United States Supreme Court Reports, Official Edition	
United States Supreme Court Reports, Lawyer's Edition	
21. Federal Code Annotated	160.00
U. S. C. A. with Supplements	
22. Code of laws of the U. S. with supplement	14.00
23. Shepard—U. S. Citations	50.00
24. Form books: (1) Nichols	20.00
(2) Jones, 8th edition	\$15.00
(3) Cutter's edition of Tiffany	20.00
(4) Winslow's Forms of Pleading and Practice, seven volume edition	37.50
25. North Carolina Tax Service	30.00
26. Williston—Contracts, 2nd edition	85.00

27. Wigmore—Evidence, 2nd edition	50.00
28. Wharton—Criminal Law, 12th edition	30.00
29. Paul and Merten—The Law of Federal Income Taxation	60.00
30. Collier or Remington—Bankruptcy	50.00
31. Scott—Law of Trusts	50.00
32. Tiffany—Real Property, 1939 edition	60.00
Thompson—Real Property	\$120.00
33. Fletcher—Cyclopedia of Corporations	52.00
34. Federal Tax Service—Prentice Hall, or Commerce Clearing House	80.00
35. Montgomery—Federal Income Tax Handbook, 1938-1939	6.00
36. Montgomery—Federal Taxes on Estates, Trusts and Gifts	7.50
37. Zollman—Banks and Banking	72.00
38. Schneider—Workmen's Compensation	
39. Couch—Cyclopedia of Insurance Law	75.00
40. Cooley—Taxation, 4th edition	40.00
41. Pomeroy—Equity Jurisprudence, 4th edition	30.00
42. Brannon—Negotiable Instruments	10.00
43. McQuillan—Municipal Corporations	80.00
44. Cooley—Torts, 4th edition	25.00
45. Freeman—Judgments, 5th edition	30.00
46. Sedgwick—Damages	30.00
47. Beale—Conflict of Laws	30.00
48. Simes—Future Interests	25.00
49. Gray—Rules Against Perpetuities	10.00
50. North Carolina State Bar Reports	
51. North Carolina Bar Association Reports.....	
52. Moore—Federal Practice	24.00
*53. Code of Federal Regulations and supplement	

Note: Where several selections are offered, the price of the first is indicated in the cost column. In several instances the price of the alternative is shown slightly to the left of this column.

The items on this list total approximately \$3,000 instead of \$2,000. The Association suggests that the \$2,000 library be selected from this list.

LIST II

1. Wiltie—Mortgage Foreclosure and Mortgages, 5th edition	\$ 30.00
2. Schouler—Wills, Executors and Administrators, 6th edition (4 volumes)	50.00
3. Medical Jurisprudence	15.00
4. Willoughby—Constitution of the United States	36.00
5. Patton—Digest of Legal Opinions	20.00
6. Clark—Receivers (2 volumes)	15.00
7. Tracey—Corporate Foreclosures	12.00
8. Gray—Restraint on Alienation	3.15
9. American Law Reports (if not purchased in first selection)	657.00
10. Ballantine—Corporations	
11. Decisions and Orders of the N. L. R. B., including advance sheets, approximately \$1.75 per volume	20.00

* This Code will not be off the press until the Spring of 1940, when it will be available through the Bureau of National Affairs.

12. Daniels—Negotiable Instruments Law	25.00
13. Negligence and Compensation Cases, N. S. per volume	7.50
14. Goldstein—Trial Technique	10.00
15. Wigmore—Science of Judicial Proof	10.00
16. Restatement of Contracts, North Carolina Annotations	2.00
17. Legal Periodical Digest (or Index to Legal Periodicals)	20.00
18. Martindale-Hubbell Legal Directory	25.00
19. Association of American Law Schools—Selected Essays on Constitutional Law	60.00
20. Internal Revenue Bulletins	
21. Blashfield—Automobile Law, Permanent Edition	110.00

List II contains additional suggestions for further purchases in the establishment of a \$3,000 Bar Library.

LIST III

American Digest System	\$1,200.00
1. Century Digest, 50 volumes, covering 1658-1896	\$250.00
2. First Decennial Digest, 25 vols. 1897-1906	162.00
3. Second Decennial Digest, 25 vols. 1907-1916	175.00
4. Third Decennial Digest, 29 vols. 1916-1926	250.00
5. Fourth Decennial Digest, 35 vols. 1926-1936	300.00
6. General Digest, vols. 1-7, per volume	10.00
(This includes the advance sheet service)	
7. North Eastern Reporter, thin paper edition, 200 volumes and second series, volumes 1 to 17 inclusive	434.00
(If South Eastern Reporter was included under List I.)	

In case the entire Digest System cannot be acquired at one time, it is suggested that the Fourth Decennial and General Digest be purchased first.

For the benefit of individuals or libraries desiring to purchase additional units of the National Reporter System, there is listed below the title of each unit, and the purchase price of so much thereof as has appeared in bound form.

Atlantic Reporter, thin paper edition, 200 volumes and second series volumes 1 and 2	\$404.00
North Western Reporter, thin paper edition, 282 volumes	564.00
Pacific Reporter, thin paper edition, 300 volumes and second series, volumes 1 to 84 inclusive	768.00
Southern Reporter, thin paper edition, 184 volumes	460.00
South Eastern Reporter, thin paper edition, 199 volumes	497.60
South Western Reporter, thin paper edition, 300 volumes, and second series, volumes 1 to 121 inclusive	842.00
New York Supplement, thin paper edition, 300 volumes, and second series, volumes 1 to 7 inclusive	614.00
Federal Reporter, thin paper edition, 300 volumes, and second series, volumes 1 to 99 inclusive, and federal supplement, volumes 1 to 24 inclusive	846.00

For information on this subject address:

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