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COURTS RULE - MAKING POWER

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COURTS — RULE-MAKING POWER — A statute of the State of New Mexico delegated to the supreme court of the state the power to promulgate rules regulating pleading, practice, and procedure in judicial proceedings for the purpose of simplifying the same and for the promotion of the speedy determination of litigation upon the merits. The act further provides that all statutes relating to pleading and practice now in force shall have effect only as rules of court and remain in effect as such unless modified or suspended by rules promulgated pursuant to this Act.[1] *Held*, that the rule-making power can constitutionally be delegated to the courts, and that the supreme court under its express constitutional power of superintending control may make rules for inferior courts even though such courts are of constitutional origin. *State v. Roy*, 40 N. M. 397, 60 P. (2d) 646 (1936).

The first attack on the constitutionality of the statute in the principal case was that it improperly delegates legislative power to the judiciary. In determining whether a power is properly judicial, it is essential to look to the construction given to judicial powers prior to and at the time of the adoption of the constitution.[2] The framers of the United States Constitution, upon which our state constitutions were modeled, in providing for a separation of power, expected it to be interpreted in the light of the institutions of their time as they then existed.[3] The resultant lines between the departments, under a constitution providing for separation of powers, are largely the result of historical growth and there is a presumption in favor of the constitutionality of the delegation.[4] The regulation of procedure in England was from earliest times regarded as a judicial function.[5] The procedure in this country at the time of the adoption of

[1] N. M. Laws (1933), c. 84, p. 147.

[2] State v. Harmon, 31 Ohio St. 250 at 258 (1877); Ex Parte Grossman, 267 U. S. 87 at 108, 109, 45 S. Ct. 332 (1924).

[3] See Ex Parte Grossman, 267 U. S. 87 at 108, 109, 45 S. Ct. 332 (1924), where Chief Justice Taft explained that the language of the Constitution cannot be safely interpreted without reference to the common law and to British institutions as they were when the instrument was formed and adopted, for when the statesmen and lawyers who drew the instrument integrated their ideas in that compact, they expected it to be interpreted in the light of institutions as they then existed.

[4] 1 STORY, CONSTITUTION OF THE UNITED STATES, 5th ed., § 527 (1891); State ex rel. Patterson v. Bates, 96 Minn. 110 at 116, 104 N. W. 709, 113 Am. St. Rep. 612 (1905).

[5] Jenks, speaking of rules and orders of court, states that the exact date of their rise has not been ascertained. Known Chancery Orders go back to 1388, and the oldest Common Law Rules date back as far as 1457. Apparently there were, however, older rules which seem to have disappeared. The oldest published rules of King's Bench

the Constitution was founded on the practice of the English courts.[6] As early as 1825, the Supreme Court of the United States formally recognized the power of the Court to make rules regulating its own procedure.[7] It is now well established that a court either inherently or by express legislative delegation may exercise power to regulate its own procedure.[8] The second attack on the constitutionality of the statute in the instant case was that inferior courts of constitutional origin have an inherent right to regulate their own procedure and that there is here an attempt to give to the supreme court a power which the constitution has vested in inferior courts of constitutional origin. An historical study of the courts at Westminster, whose jurisdiction has had an important influence upon the definitions of judicial power employed by American courts, tends to sustain the position of the Supreme Court of New Mexico as to the second objection. Dean Pound points out that the superior courts at Westminster promulgated rules which governed procedure in inferior courts.[9] And the supreme courts of the states have been said to occupy a position analogous to that of the Court of King's Bench in respect to the regulation of trial procedure in the causes which they have power to review and control.[10] The grant of the power of superintending control is an express authorization for the state supreme court to control litigation in the same manner and to the same extent as the Court of King's Bench.[11] Recent decisions on statutes closely approximating

date from 1604, but these were probably not the first in force. There are known Exchequer Rules dated 1571. JENKS, SHORT HISTORY OF ENGLISH LAW 91 (1912). See also Pound, "Regulation of Judicial Procedure by Rules of Court," 10 ILL. L. REV. 163 at 171 (1915).

[6] 2 U. S. (2 Dall.) 359, 1 L. Ed. 437 (1792).

[7] Wayman v. Southard, 10 Wheat. (23 U. S.) 1 at 46, 6 L. Ed. 253 (1825); United States Bank v. Halstead, 10 Wheat. (23 U. S.) 51 at 61, 6 L. Ed. 264 (1825). In Beers v. Haughton, 9 Pet. (34 U. S.) 328 at 360 (1835), Justice Story in commenting on the rule-making power sustained in the former decisions said, "And it was emphatically laid down, that a 'general superintendence over this subject seems to be properly within the judicial province and has always been so considered.'" See also Eberly v. Moore, 24 How. (65 U. S.) 147 at 158 (1860).

[8] Fullerton v. United States Bank, 1 Pet. (26 U. S.) 604, 7 L. Ed. 280 (1828); Weil v. Federal L. Ins. Co., 264 Ill. 425, 106 N. E. 246, Ann. Cas. 1915D 974 (1914); Hanna v. Mitchell, 202 App. Div. 504, 196 N. Y. S. 43 (1922); In re Constitutionality of Statute, 204 Wis. 501, 236 N. W. 717 (1931). On the analogous power to regulate admission and conduct of attorneys, see Clark v. Austin, (Mo. 1936) 101 S. W. (2d) 977.

[9] See Pound, "Regulation of Judicial Procedure by Rules of Court," 10 ILL. L. REV. 163 at 171 (1915).

[10] Ernest v. Lamb, 73 Colo. 132, 213 P. 994 (1923); State ex rel. Wyman-Foster Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928); In re Constitutionality of Statute, 204 Wis. 501, 236 N. W. 717 (1931). For detailed discussion of this point, see Pound, "Regulation of Judicial Procedure by Rules of Court," 10 ILL. L. REV. 163 at 172 (1915); Morgan, "Judicial Regulation of Court Procedure," 2 MINN. L. REV. 81 (1918); Paul, "The Rule-Making Power of the Courts," 1 WASH. L. REV. 223 (1926).

[11] See citations in note 10, supra. As to the general scope of the power of superintending control, see note in 51 L. R. A. 33 (1900). See also Seiler v. State, 112 Wis. 293 at 298, 87 N. W. 1072 (1901).

that in the principal case have sustained the proposition that the rule-making power over inferior courts can validly be delegated to the supreme court under a constitution which expressly or by implication gives to the supreme court power of superintending control.[12]

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[12] Ernest v. Lamb, 73 Colo. 132, 213 P. 994 (1923); In re Constitutionality of Statute, 204 Wis. 501, 236 N. W. 717 (1931) (under constitutions expressly giving the supreme court of the state the power of superintending control); State ex rel. Wyman-Foster Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928) (under a constitution where power of superintending control was not expressly granted).

States in which the constitution expressly gives to the supreme court of the state superintending control over inferior courts are: Alabama, Arkansas, Colorado, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, North Carolina, North Dakota, New Mexico, Oklahoma, South Dakota, Wisconsin and Wyoming.