Michigan Law Review

Volume 55 | Issue 5

1957

Rules of Practice and Procedure: A Study of Judicial Rule Making

Charles W. Joiner
University of Michigan Law School

Oscar J. Miller
University of Michigan Law School

MICHIGAN LAW REVIEW

Vol. 55 MARCH 1957 No. 5

RULES OF PRACTICE AND PROCEDURE: A STUDY OF JUDICIAL RULE MAKING†

*Charles W. Joiner** and *Oscar J. Miller***

THE rule-making power of the courts in the United States is is brought into focus wherever procedural reform is undertaken. As more and more states have undertaken revision of judicial procedures, the power and authority of courts to promulgate rules of practice and the definition of the scope of such rules have claimed increasingly the attention of legal writers.[1] This trend can be attributed in part to a growing realization that statutes governing practice and procedure in courts, enacted by legislatures meeting every year or two, have failed to achieve that minimum standard in the administration of justice necessary to satisfy the demands of a modern and complex society. Representative of the legal literature is the constructive criticism to be found in the stimulating and thought-provoking article by Dean Roscoe Pound, in which the defects of legislative regulation of court procedure and practice were spotlighted.[2] That

† This paper was prepared for the guidance of a Committee on Michigan Procedural Revision jointly created by the Michigan Legislature, the Supreme Court of Michigan, and the Michigan State Bar to recommend revision of Michigan procedural statutes and rules. The division of responsibility for court procedure between the courts and the legislature was thought to be so fundamental that this paper was prepared as the first basic study for the consideration of the committee. In it an attempt is made to bring to the attention of the Michigan lawyers, judges, and legislators the experience of other states and an analysis of that experience together with suggestions as to which portions of the regulations pertaining to the administration of justice should be promulgated by court rule and which should be enacted by statute. We hope that this discussion will also be useful elsewhere in the field of procedural reform.—The Authors.

* Professor of Law, University of Michigan; A.B. 1937, J.D. 1939, State University of Iowa; member, Iowa and Michigan Bars; Chairman, Joint Committee of the Michigan Judicial Conference, Michigan Legislature and Michigan State Bar on Michigan Procedural Revision.—Ed.

** Research Assistant, University of Michigan Law School; A.B. 1953, LL.B. 1956, University of Michigan; member, Michigan Bar.—Ed.

1 See bibliographies in 6 ORE. L. REV. 36 (1926); 16 A.B.A.J. 199 (1930); 51 W. VA. L. Q. 34 (1948); selected bibliography in A.B.A., JUDICIAL ADMINISTRATION, MONOGRAPH, Series A (1942) 18.

2 Pound, "Regulating Procedural Details by Rules of Court," 13 A.B.A.J. 12 (1927). The defects are lack of knowledge and expertness by legislators, division of responsibility between the judiciary and legislature, personal political interests of legislators, failure of legislative regulation to achieve simplicity, and difficulty of securing amendatory legislation.

such criticisms are well-founded is apparent from the vigorous and continuing procedural revisions involving the use of the rule-making power which have taken place in so many jurisdictions during the past twenty-five years.[3] It is the purpose of this paper to survey and discuss the sources and scope of the rule-making power and the extent to which it can and should be exercised.

I. SOURCES OF RULE-MAKING POWER

The existence of a rule-making power in the courts has been recognized as a historical development stemming from early English law.[4] One commentator dates the earliest known rule of court at 1457,[5] the thirty-fifth year of the reign of Henry VI. Various sources have been assigned as the foundation upon which the rule-making power rests. While one court has refused to promulgate rules of civil procedure in the absence of a legislative enabling act, and some members of the same court stated that the entire matter of rule making is not within the scope of judicial power,[6] a majority of states have recognized and held that courts possess an inherent power to regulate proceedings and facilitate the administration of justice by the promulgation of rules of practice.[7]

[3] VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 142 (1949): Alabama, 1940 (equity rules only); Arizona, 1940; California, 1943 (appellate procedure); Colorado, 1941; Delaware, 1948; Georgia, 1947; Indiana, 1940 (revised 1946, 1948); Iowa, 1943; Maryland, 1941 (revised 1945, 1948); New Jersey, 1948; New Mexico, 1941; Pennsylvania, 1937 (and various times since); South Dakota, 1939; Texas, 1941 (revised 1948); Washington, 1938; and Wisconsin, 1939 (and various times since).

For more recent revisions, see state-by-state analysis in INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS (June 1955). Florida, 1954, 1955; Territory of Hawaii, 1954; Idaho, 1951; Kentucky, 1953; Minnesota, 1952; Nevada, 1953; New Jersey, 1953; New Mexico, 1949; Utah, 1950; and Virginia, 1950. For Illinois supreme court rules, effective January 1, 1956, see Ill. Rev. Stat. (1955) c. 110, §§101.1 to 101.72.

[4] Tyler, "The Origin of the Rule-Making Power and Its Exercise by Legislatures," 22 A.B.A.J. 772 (1936).

[5] TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH, 3d ed., xli (1840).

[6] Petition of the Florida State Bar Association for Promulgation of New Florida Rules of Civil Procedure, 145 Fla. 223, 199 S. 57 (1940).

[7] For a collection of cases from 42 states see annotations, Power of Court To Prescribe Rules of Pleadings, Practice, or Procedure, 110 A.L.R. 23 (1937); 158 A.L.R. 706 (1945).

Typical comments and holdings are shown by the following cases: Burney v. Lee, 59 Ariz. 360 at 363, 129 P. (2d) 308 (1942): "It has been held almost unanimously from time immemorial that courts have the inherent power to prescribe rules of practice and rules to regulate their own proceedings in order to facilitate the determination of justice, without any express permission from the legislative branch." Kolkman v. People, 89 Colo. 8 at 33, 300 P. 575 (1931): ". . . the question with which we are concerned is the right, irrespective of the statutes and the common law, but in conformity with constitutional provisions, to make rules with reference to procedural matters for the conduct of judicial trials. This is inherent in the judicial department." Gyure v. Sloan Valve Co., 367 Ill. 489 at 493, 11 N.E. (2d) 963 (1937): "This court has not only the inherent power

Notwithstanding the fact that so many courts assert inherent power to promulgate rules of practice, an overwhelming majority of the same and other courts have also recognized the validity of enabling legislation and have held it to constitute a valid source of rule-making power.[8] At the least, such legislation is the catalyst necessary for some courts to make rules of practice.

It has been contended that the legislature cannot by statutory enactment confer rule-making authority upon the judicial branch, on the ground that this would constitute an invalid delegation of legislative powers.[9] In a leading case, the Wisconsin Supreme Court rejected this contention, holding in an extensive opinion that the rule-making power for judicial procedure is essentially a judicial function and such a statute did not delegate purely legislative powers to the judiciary.[10] Lending support to the conclusion of the Wisconsin court is a recent survey showing that general rule-making power grounded upon statutory enabling legislation exists in nineteen states, with the courts of twenty-five other states having had a more limited rule-making power conferred upon them by legislative action.[11]

A third source of the rule-making power is express constitutional grant,[12] by which the court is specifically authorized or directed by the constitution to make rules of practice and procedure. The constitutions of four states contain provisions granting general and complete rule-making power to the court.[13] Thus three sources of rule-making power must be examined as the basis of procedural reform.

While the court's inherent power to make rules of procedure

to prescribe rules of practice and procedure, but the power is expressly conferred by the statute." Epstein v. State, 190 Ind. 693 at 696, 127 N.E. 441 (1920): "This court is a constitutional court, and as such receives its essential and inherent powers, rights and jurisdiction from the Constitution, and not from the legislature, and it has power to prescribe rules for its own direct government independent of legislative enactment." State v. Roy, 40 N.M. 397 at 420, 60 P. (2d) 646 (1936): "We therefore hold that the trial court rules . . . were promulgated . . . by this court in the exercise of an inherent power lodged in us to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice."

8 For a collection of cases from 33 states see annotations, Power of Court To Prescribe Rules of Pleadings, Practice, or Procedure, 110 A.L.R. 28 (1937); 158 A.L.R. 707 (1945).

9 Walsh, "Rule-Making Power on the Law Side of Federal Practice," 13 A.B.A.J. 87 at 91 (1927).

10 Rules of Court Case, 204 Wis. 501, 236 N.W. 717 (1931).

11 VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 134 (1949).

12 Id. at 135.

13 MD. CONST. (ratified in 1944), art. IV, §18a; MICH. CONST. (1908), art. VII, §5; MO. CONST. (1945), art. V, §5; N.J. CONST. (1947), art. 6, §II, ¶3.

has been asserted[14] and denied[15] by individual writers, it is submitted that the only fair question in this respect is not whether inherent power exists at all, but rather, what is the scope of such power? It seems irrefutable that courts possess a certain measure of inherent rule-making power.[16] For example, the courts have exercised inherent rule-making power in establishing the requirements for admission to the bar, and this power is almost universally recognized throughout the United States.[17] Typical of the attitude of the courts is the Michigan decision of *People v. Brown*.[18] Inherent rule-making power of a trial court was upheld by the supreme court, with the statement that a court has an "inherent right to function and function efficiently."[19] The court held that a method of impanelling juries provided for by court rule was valid. Thus while the precise scope of the inherent rule-making power may be debatable, its existence in some measure seems clear.

The Michigan Constitution of 1908 expressly grants rule-making power to the court in the following language: "The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same."[20] A similar provision was found in the Constitution of 1850.[21] Thus the Michigan Supreme Court has not only inherent rule-making power, but also rule-making power stemming from an express constitutional grant. Only recently that court emphasized both the "inherent as well as constitutional rule-making power" in sustaining court rules providing for discovery before trial.[22]

Because of the broad inherent and constitutional rule-making power possessed by the Supreme Court of Michigan, there is no need for enabling legislation granting rule-making power to that court. Thus the delegation of powers argument, thoroughly discredited by the Wisconsin Supreme Court,[23] would seem to

14 Gertner, "The Inherent Power of Courts To Make Rules," 10 UNIV. CIN. L. REV. 32 (1936).

15 Williams, "The Source of Authority for Rules of Court Affecting Procedure," 22 WASH. UNIV. L. Q. 459 (1937).

16 Petition of Florida State Bar Association for the Adoption of Rules for Practice and Procedure, (Fla. 1945) 21 S. (2d) 605; 110 A.L.R. 23 (1937); 158 A.L.R. 706 (1945).

17 For a collection of cases see Green, "The Court's Power Over Admission and Disbarment," 4 TEX. L. REV. 1 at 12, n. 35 (1925).

18 238 Mich. 298, 212 N.W. 968 (1927).

19 People v. Brown, 238 Mich. 298 at 300, 212 N.W. 968 (1927).

20 MICH. CONST. (1908), art. VII, §5.

21 MICH. CONST. (1850), art. VI, §5.

22 Tomlinson v. Tomlinson, 338 Mich. 274 at 276, 61 N.W. (2d) 102 (1953).

23 Rules of Court Case, 204 Wis. 501, 236 N.W. 717 (1931).

have no application in this state. The Michigan legislature has, however, enacted legislation specifically charging the court with responsibility for establishing by "general rules" the practice in the supreme court and courts of record.[24] The court is also charged with the responsibility of revising the rules every two years to obtain certain improvements in the practice.[25] At a different time the legislature passed a statute charging the court with responsibility for appellate practice in the supreme court and other courts of record.[26] Although such legislation added nothing to the court's power, and although in the first statute it was limited to situations "not provided for by statute," it is heartening to note the spirit of cooperation existing beween these two great branches of government and the frank recognition by a coordinate branch of government of the judiciary's responsibility to provide for rules of practice. This fine spirit should be helpful in carrying out a procedural revision program involving a full definition and exercise of the court's rule-making power.

II. SCOPE OF THE RULE-MAKING POWER

As indicated above, the really significant issue in the area of rule-making is not the existence or the source but the actual

[24] P.A. 314, §14 (1915), being Mich. Comp. Laws (1948) §601.14: "The justices of the supreme court shall have power, and it shall be their duty, by general rules to establish, and from time to time thereafter to modify and amend, the practice in such court, and in all other courts of record. . . ."

[25] Ibid: ". . . and they shall, once at least in every 2 years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice:

1. The abolishing of distinctions between law and equity proceedings, as far as practicable;
2. The abolishing of all fictions and unnecessary process and proceedings;
3. The simplifying and abbreviating of the pleadings and proceedings;
4. The expediting of the decisions of causes;
5. The regulation of costs;
6. The remedying of such abuses and imperfections as may be found to exist in the practice;
7. The abolishing of all unnecessary forms and technicalities in pleading and practice;
8. To effectively prevent the defeat or abatement of any civil suit, ex contractu, for either any nonjoinder or misjoinder of parties, where the same can be done consistently with justice;
9. To provide for all necessary amendments of process, pleadings, or other proceedings in such case; and
10. To provide the manner by which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit and brought in to answer thereto, if within the jurisdiction of the court."

[26] P.A. 27 (1929), being Mich. Comp. Laws (1948) §691.21: "The supreme court may, by general rules, provide simplified forms, methods, and procedure by which such court and other courts of record shall exercise the appellate jurisdiction conferred upon them by law, and such rules, while in force, shall be controlling, any statutory provision to the contrary notwithstanding: *Provided*, That no right to a review conferred or preserved by the constitution of this state shall thereby be denied or diminished."

scope of the rule-making power. In ascertaining and determining its scope, the frame of reference will be the three power sources, examined in the light of political theory, case law, and the historical distinction between substance and procedure.

A. *Inherent Power To Make Rules*

In Michigan, as in the political structure of the federal government and many states, the powers of government are divided in the traditional American pattern between the legislative, executive, and judicial branches.[27] The judicial power is vested in the constitutionally created courts and such other courts as may be created by the legislature.[28] Wigmore argued in an editorial[29] referring to the pattern of government in Illinois (similar in this respect to that of Michigan) that all legislatively created rules of practice and procedure were constitutionally void, basing his argument on the logic of the constitution itself and the policy and experience with court rules and legislatively prescribed procedure. Two courts have recognized the validity of this argument.[30] In other words, giving effect in fullest measure to the theory of separation of powers, the judicial branch, and only the judicial branch, would be authorized to promulgate rules regulating court procedure. Some writers have taken Wigmore's argument as a jeu d'esprit[31] while another has taken it as a serious attempt to justify the judiciary's exercise of a complete and exclusive rule-making power.[32] However, the better interpretation of Wigmore's editorial would seem to be that he was pointing up the supremacy of judicially created rules of practice and procedure in the event of conflict with legislative rules and refuting the legislators who argued that rule making was a legislative power and could not constitutionally be delegated to the judicial branch.

27 MICH. CONST., art. IV, §1: "The powers of government are divided into three departments: the legislative, executive, and judicial."

28 MICH. CONST., art. VII, §1: "The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house."

29 Wigmore, "All Legislative Rules for Judiciary Procedure Are Void Constitutionally," 23 ILL. L. REV. 276 (1928).

30 Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931); Epstein v. State, 190 Ind. 693, 128 N.E. 353 (1920).

31 Kaplan and Greene, "The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury," 65 HARV. L. REV. 234 (1951).

32 Green, "To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?" 26 A.B.A.J. 482 (1940).

As interpreted by Dean Pound, Wigmore's proposition was that "if every power exercisable in government must go exclusively and as a whole into one of the three categories, the power of making detailed rules of legal procedure is analytically judicial—it is inherent in the exercise of the power committed to the judiciary of determining controversies and applying laws."[33] It is submitted that Wigmore was underlining the fallacy of a strictly logical chain of reasoning as concerns the classification of those powers exercisable by the three branches of government. In this connection it should be remembered that political science has also abandoned the theory of complete and exclusive authority over precisely delineated spheres of activity.[34] It is well established that the operational areas of everyday governmental functions are not defined with precision and are not capable of assignment to distinctive categories; instead there is and always has been a twilight zone of indefinition, wherein the functions and activities of the three branches overlap and conflict, and wherein cooperation among the three branches has been the key to the resolution of the conceptual puzzle. Therefore, it is submitted that while a purely theoretical argument can be made for total and exclusive possession of the rule-making power by the judiciary, such a position ignores the realities of practical operational techniques necessarily utilized in government and presumes that a total separation of powers is possible. The conclusion should rather be that theory must give way to reality. It must be recognized that there are areas in which it is not clear whether the legislature or the judiciary should establish the necessary rules.

The ultimate solution to a definition of the scope of judicial rule-making power will turn upon an answer to the question, power to make rules to do *what?* The purpose of the rule is essential to its proper classification. Thus while it is clear that inherent rule-making power is possessed by the courts, the scope of the power cannot be defined until we ascertain the purpose for which a rule is promulgated and the fullness of its impact. If the purpose of its promulgation is to permit a court to function and function efficiently, the rule-making power is inherent[35]

33 Pound, "Procedure Under Rules of Court in New Jersey," 66 HARV. L. REV. 28 at 37 (1952).

34 GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 20 (1893); UHLER, REVIEW OF ADMINISTRATIVE ACTS 23 (1942); CHEEVER AND HAVILAND, AMERICAN FOREIGN POLICY AND THE SEPARATION OF POWERS (1952); WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, 2d ed., 679-682 (1938).

35 People v. Brown, 238 Mich. 298, 212 N.W. 968 (1927).

unless its impact is such as to conflict with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of judicial business. Similarly, with the same limitations, the power is inherent to establish the requirements for admission to the bar,[36] to punish for contempt,[37] to incur and order paid expenses necessary for holding court and the discharge of the duties thereof,[38] to make rules with reference to procedural matters for the conduct of trials,[39] to require appellate briefs to contain a concise statement of the errors and exceptions relied upon,[40] and to investigate the conduct of court officers.[41]

Classified by Pound as proper subjects for rules of court are ". . . the orderly dispatch of judicial business, the saving of public time, and the maintenance of the dignity of tribunals."[42] As defined by Dowling, inherent power is that which "is essential to the existence, dignity, and functions of the court as a constitutional tribunal and from the very fact that is is a court. . . ."[43] A shorthand statement might be that the courts may provide for the "how" in the courts; the legislators, the "what." Thus when the purpose of the rule is to provide for the establishment and maintenance of the machinery essential for the efficient administration of judicial business, and it does only that, the scope of the inherent power vested in the courts is complete and supreme.

B. *Express Constitutional Grant*

The Michigan Supreme Court is a court created by the constitution.[44] The constitution provides that it "shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same,"[45] and that it "shall have a general superintending control over all inferior courts. . . ."[46] In determining the scope of the con-

36 In re Day, 181 Ill. 73, 54 N.E. 646 (1899).

37 Little v. State, 90 Ind. 338 (1883); Hale v. State, 55 Ohio St. 210, 45 N.E. 199 (1896).

38 Stowell v. Bd. of Supervisors, 57 Mich. 31, 23 N.W. 557 (1885); Schmelzel v. Bd. of County Commrs., 16 Idaho 32, 100 P. 106 (1909).

39 Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931).

40 Epstein v. State, 190 Ind. 693, 128 N.E. 353 (1920).

41 Emmons v. Smitt, (E.D. Mich. 1944) 58 F. Supp. 869, affd. (6th Cir. 1945) 149 F. (2d) 869.

42 Pound, "Canons of Procedural Reform," 51 A.B.A. REP. 290 at 298 (1926).

43 Dowling, "The Inherent Power of the Judiciary," 21 A.B.A.J. 635 at 636 (1935).

44 MICH. CONST., art. VII, §1.

45 Id., §5.

46 Id., §4.

stitutional rule-making power, the key word is "practice." Thus it is initially necessary to determine the breadth of meaning of the word "practice" as used in this constitutional provision.

Procedural law has been defined as "the method of enforcing rights or obtaining redress for their invasion,"[47] and as "the machinery for carrying on the suit."[48] Practice has been defined as "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from the product."[49] Similarly, "practice includes the formula by which that power is first asserted and afterward exercised in respect to any litigation in all its phases, until the same is finally completed."[50] As stated by the Illinois Supreme Court, "The 'proceedings and practice' of the courts must be construed to mean the form in which actions are brought and the manner of conducting and carrying on suits."[51]

In a leading English case,[52] the court was confronted with an alleged distinction between the words "practice" and "procedure." A "rule of procedure" of the Judicature Act of 1873[53] provided that " . . . Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant . . ."[54] said rule being applicable only to the High Court of Justice. Under authority of the County Courts Act,[55] the same rule was made applicable to county court proceedings. In the instant case, plaintiff had instituted an action and was nonsuited, with no direction otherwise. Some eight months later the plaintiff instituted another action on the same cause, and received judg-

47 Mix v. Bd. of County Commrs., 18 Idaho 695 at 709, 112 P. 215 (1910).
48 Jones v. Erie R. Co., 106 Ohio St. 408 at 412, 140 N.E. 366 (1922).
49 Poyser v. Minors, 7 Q. B. D. 329 at 333 (1881).
50 In re McCormick's Estate, 72 Ore. 608 at 616, 144 P. 425 (1914).
51 People v. Raymond, 186 Ill. 407 at 414-415, 57 N.E. 1066 (1900).
52 Poyser v. Minors, 7 Q. B. D. 329 at 333 (1881).
53 Judicature Act of 1873, 36 & 37 Vict., c. 66.
54 Id., Rule 46 of Schedule.
55 County Courts Act of 1856, 19 & 20 Vict., c. 108, §32: "The Lord Chancellor may appoint five county court Judges, and from time to time fill up any vacancies in their number, to frame rules and orders for regulating the practice of the courts, and forms of proceedings therein, and from time to time to amend such rules, orders, and forms; and such rules, orders, and forms, or amended rules, orders, and forms, certified under the hands of such Judges or any three or more of them, shall be submitted to the Lord Chancellor, who may allow or disallow or alter the same; and the rules, orders, and forms, or amended rules, orders, and forms, so allowed or altered, shall, from a day to be named by the Lord Chancellor, be in force in every county court."

ment. The defendant urged the court rule on appeal as a bar to this second action, while plaintiff contended that the court rule was ultra vires as concerned county courts because the rule was initially promulgated as a "rule of procedure" under the Judicature Act of 1873, whereas the County Court Act provision[56] permitted the promulgation of "practice" rules only. In construing the grant of rule-making power under the Judicature and County Court Acts, Lush, L. J., rejected the alleged distinction between "practice" and "procedure," and stated as follows: " 'practice,' in its larger sense—the sense in which it was obviously used in that Act, like 'procedure' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product. 'Practice,' and 'procedure,' as applied to this subject, I take to be convertible terms."[57] Lord Justice Lush's analysis seems to be the generally accepted view in the United States.[58]

[56] County Courts Act of 1856, 19 & 20 Vict., c. 108, §32: ". . . to frame rules and orders for regulating the *practice* of the courts, and the forms of proceedings therein. . . ." Emphasis added.

[57] Poyser v. Minors, 7 Q. B. D. 329 at 333-334 (1881).

[58] Morris v. City of Newark, 73 N.J.L. 268 at 270, 62 A. 1005 (1906). An act was passed regulating the determination of compensation due for property condemned for public use. The practice under this act was to supersede existing practice except in condemnation situations of taking land for public use where benefits could be set off against damage awards. Contention was made that the exception applied only to practice and not to procedure. In rejecting this contention, the court said: ". . . we think 'practice' was used by the legislature as synonymous with procedure, and hence includes the tribunal as well as the conduct of matters before it."

Estate of Morrison, 125 Cal. App. 504 at 508, 14 P. (2d) 102 (1932). A statute prescribed that proceedings in probate courts should be governed by rules of practice applicable to civil actions. Another statute provided that civil actions be dismissed if not brought to trial within 5 years after answer was filed. A will contest in probate was so dismissed and appeal was taken on the ground that the 5-year statute was not a rule of practice, and thus was not applicable to probate proceedings. The appellate court said: "Rules of practice are designed to establish the manner of bringing parties into court, and when they are there, prescribe the course to be followed by the parties and the court throughout the various stages of the litigation, in hearing, dealing with, and disposing of the matters in dispute. The purpose is to harmonize and facilitate the conduct of litigation; and since such rules deal with all phases of a case from its inception to final judgment, the time within which an action or proceeding shall either be brought to trial or dismissed as burdensome to an adversary and to the court as well, is a proper subject for an administrative formula in aid of a definite and uniform mode of procedure."

People v. Central Pac. R. Co., 83 Cal. 393 at 403-404, 23 P. 303 (1890). A constitutional provision prohibited the legislature from passing local or special laws regulating the practice of courts of justice. A statute for taxation of railroads authorized a different form of complaint in such cases than was proper under the Code of Civil Procedure. In rejecting the contention that the statute related only to pleading and not to practice, the court said: "It is evident that the words of this inhibitory clause of the constitution are used in their general sense, and in that sense, the words 'practice of courts of justice'

By virtue of its constitutional rule-making authority to prescribe rules of "practice," using a broad definition of practice, the Michigan Supreme Court has held valid a court rule providing for the taxation as costs of a bond premium,[59] a court rule that after an answer plaintiff may discontinue upon notice and payment of costs only on stipulation, or by order of the court on a motion supported by affidavit,[60] a court rule authorizing the issuance of an alias attachment writ,[61] a court rule adopting a circuit court rule providing that an order staying execution shall be inoperative unless a writ of error be issued within ten days after the settlement of a bill of exceptions,[62] a circuit court rule shortening the time for making a default absolute,[63] a rule providing for the time within which appearance should be made on notice to plead,[64] a circuit court rule authorizing a friend of the court to initiate contempt proceedings on a failure to pay

include all 'pleadings.' . . . It is impossible to contemplate the subject of 'practice of the courts of justice,' and eliminate from the mind all thought of 'pleading.'"

Wright v. State, 5 Ind. 290 at 294, 61 Am. Dec. 90 (1854): An 1843 statute provided, "If at the expiration of the time fixed by law for the continuance of the term of any court, the trial of a cause shall be progressing, said court may continue its sitting beyond such time, and require the attendance of the jury and witnesses, and do, transact, and enforce all other matters which shall be necessary for the determination of such cause; and in such case, the term of said court shall not be deemed to be ended, until the cause shall have been fully disposed of by said court." This statute was not carried over in the 1852 revision, but an omnibus section of the 1852 revision did provide that "the laws . . . relative to pleading and practice, in criminal actions . . . as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force." Contention was made that the 1843 statute did not relate to "practice" so as to be continued in force by virtue of the omnibus section. In rejecting such contention, the court said: "All that relates to the manner and time in which a case shall be conducted and tried, from its inception to final judgment and execution, is generally embraced under the title of practice."

Fleischman v. Walker, 91 Ill. 318 at 320 (1878). "The mode and order of procedure in obtaining compensation for an injury by action or suit in the legally established courts, from the inception of such suit until it ends in the final determination of the court of last resort, is all comprehended in the term 'practice.'"

But see State v. Pavelich, 153 Wash. 379 at 383, 279 P. 1102 (1929): A statute, which provided that the court must instruct that no inference of guilt shall arise because of the accused's failure to testify in his own behalf, was abrogated by court rule. Contention was made that the court rule was not valid because it attempted to change substantive law. The court said: "While procedure is to some extent, broader than practice, it seldom includes substantive rights. When it does, it is by reason of some constitutional or fundamental right. In such case, no rule of court can abolish it. Such, as we view it, is not the case here. While practice and procedure are not always identical, they are always correlative. One cannot exist without the other." (It should be noted, however, that the court held that the court rule did not invade the realm of substantive law.)

59 Behr v. Baker, 257 Mich. 487, 241 N.W. 229 (1932).
60 Pear v. Graham, 258 Mich. 161, 241 N.W. 865 (1932).
61 Van Benschoten v. Fales, 126 Mich. 176, 85 N.W. 476 (1901).
62 Ismond v. Scougale, 119 Mich. 501, 78 N.W. 546 (1899).
63 Howard v. Tomlinson, 27 Mich. 168 (1873).
64 Norvell v. McHenry, 1 Mich. 227 (1849).

alimony ordered in a separate maintenance suit,[65] court rules prescribing procedures for new trial, judgment notwithstanding the verdict, and matters raised on appeal,[66] a court rule providing for pre-trial discovery,[67] court rules governing the procedures for probate appeals,[68] and court rules governing the procedure whereby the court obtains jurisdiction to review conviction and sentence in a criminal case.[69]

Considering the accepted definitions of the terms "practice" and "procedure," and recognizing the types of matters which have been held to be within the term "practice" as used in the rule-making grant of authority, it seems clear that the words are generally used synonymously. Thus it is submitted that the word "practice" as utilized in the Michigan constitutional provision embraces the entire area known as procedural or adjective law. It clearly embraces all "how," leaving to the legislature "what" in substantive law creating legal rights and duties.

Equating "practice" with "procedure" or adjective law does not necessarily solve the problem of defining the full scope of the constitutionally granted rule-making power to control "practice."[70] It is helpful in that it shows how broad is the rule-making power but the problem of definition is ever present. It is fundamental that court rules cannot contravene constitutional provisions,[71] extend or abridge jurisdiction of the court over the subject matter,[72] abrogate or modify substantive law.[73] The

65 Gray v. Gray, (E.D. Mich. 1945) 61 F. Supp. 367.

66 St. John v. Nichols, 331 Mich. 148, 49 N.W. (2d) 113 (1951).

67 Tomlinson v. Tomlinson, 338 Mich. 274, 61 N.W. (2d) 102 (1953).

68 In re Koss Estate, 340 Mich. 185, 65 N.W. (2d) 316 (1954).

69 People v. Stanley, 344 Mich. 530, 75 N.W. (2d) 39 (1956).

70 In New Jersey a constitutional grant of power to the supreme court to make rules "subject to law" was interpreted as drawing the line on judicial rule making at the substantive-procedural distinction. Winberry v. Salisbury, 5 N.J. 240, 74 A. (2d) 406 (1950). This has led to a series of cases drawing the line between substance and procedure. Thus in Sattelberger v. Telep, 14 N.J. 353 at 369-370, 102 A. (2d) 577 (1954), the court said: "Since third party practice is procedural and not substantive in nature, it is within the rule-making function vested in the Supreme Court by the Judicial Article of the 1947 Constitution." Similarly, in Early v. Early, 18 N.J. Super. 280 at 284 (1952), the court said ". . . *Rule* 3:84-2 requires that an affidavit of noncollusion and verification be attached to the complaint or counterclaim for divorce, but this is a rule of practice and procedure rather than a jurisdictional requirement." In the following cases, the matters indicated were determined to be procedural and not substantive: State v. Ahrens, 25 N.J. Super. 201 (1953) (form of criminal process); State v. Haines, 18 N.J. 550, 115 A. (2d) 24 (1955) (continuance of term of grand jury beyond expiration of term for which it was impanelled); Hager v. Weber, 7 N.J. 201, 81 A. (2d) 155 (1951) (appellate court's power, in reviewing causes involving issues of fact determined by jury verdict, to set aside such verdict if contrary to the weight of the evidence).

71 People v. Metropolitan Surety Co., 164 Cal. 174, 128 P. 324 (1912).

72 Ray Jewelry Co. v. Darling, 251 Mich. 157, 231 N.W. 101 (1930).

73 Wash'n-Southern Co. v. Baltimore Co., 263 U.S. 629 (1924); Shannon v. Ottawa Circuit Judge, 245 Mich. 220, 222 N.W. 168 (1928).

general statement that court rules can neither abrogate nor modify matters of substance assumes that the distinction between procedure and substance is capable of precise delineation. But as one writer points out, a clear-cut distinction for all purposes is impossible of formulation.[74] For example, a New York statute which changed the burden of proof for contributory negligence was held to be procedural and thus applicable to pending actions,[75] while the same court held that a comparative negligence statute of another state would govern as to the burden of proof in an action brought in New York,[76] indicating that burden of proof is substantive in nature. Thus what may be considered procedural for one purpose may be considered substantive for another.

A test to supplant the substance-procedure distinction in the field of evidence rule-making is stated: "whether a given rule of evidence is a device with which to promote the adequate, simple, prompt, and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of general public policy."[77] This test closely approximates the suggestion made above: "while it is clear that inherent rule-making power is possessed by the courts, the scope of the power cannot be defined until we ascertain the purpose for which a rule is promulgated and the fullness of its impact. If the purpose of its promulgation is to permit a court to function and function efficiently, the rule-making power is inherent unless its impact is such as to conflict with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of judicial business."[78] It is believed that such a test could be successfully used in determining whether a matter is within the scope of the term "practice" as used in the constitutional grant of rule-making power. If a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration, such as the doctor-patient privilege, the rule should yield. But where the purpose of the rule is to govern "practice," such as, oath administration, the rule should be controlling. As noted previously, rules of court which prescribe the methodology for initiating, conducting, and conclud-

[74] Green, "To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?" 26 A.B.A.J. 482 (1940).

[75] Sackheim v. Pigueron, 215 N.Y. 62, 109 N.E. 109 (1915).

[76] Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 169 N.E. 112 (1929).

[77] Riedl, "To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?" 26 A.B.A.J. 601 at 604 (1940).

[78] See p. 629 supra.

ing litigation are properly within the scope of the term "practice." In summary it would seem that where the purpose of promulgated court rules is to regulate "practice," and it does only this, the constitutional mandate clearly authorizes and sustains the exercise of rule-making power extending to all phases of the litigation process.[79]

C. *Enabling Legislation*

Enabling legislation is not needed in Michigan to vest the court with rule-making power.[80] While it might seem that two statutes[81] do delegate rule-making authority to the supreme court, it is clear that these statutes merely extend confirmatory recognition to power already possessed by the court. The court expressed this thought in commenting upon the appellate practice statute when it stated: "The court rules of 1931 and 1933 were adopted in pursuance of legislative desire that this court reassume its constitutional function to establish the practice."[82] By such an act the legislature did not delegate power at all because the court already possessed, by virtue of the constitutional provision, the rule-making power attempted to be conferred.[83] Instead, the legislation confirmed the existing power and stimulated the court into action.

The legislative direction to the supreme court to abolish the distinction between law and equity, found in section 601.14, Mich-

[79] Jones v. Eastern Michigan Motorbuses, 287 Mich. 619 at 645-646, 283 N.W. 710 (1939): On appeal from a law case tried without a jury, it was claimed that the judgment was against the preponderance of the evidence in accordance with Supreme Court rule 64. Such rule was alleged by appellee to be invalid as changing substantive rights by changing the law review or error to the equity type review. In the course of holding that rule 64 was constitutional, the court said: "The issue is whether this court under the Constitution has the power to promulgate such a rule." After citing sections 1, 4 and 5 of Article VII of the Constitution, the court continued: "Under the above constitutional provisions all judicial power is vested in the Supreme Court and other inferior courts over which the Supreme Court has supervision and control. With judicial power thus vested by the Constitution, it seems too clear for argument that the power to regulate procedure is inherently vested in the Supreme Court, to be exercised under its rule-making powers."

[80] MICH. CONST., art. VII, §5. People v. Stanley, 344 Mich. 530, 75 N.W. (2d) 39 (1956), discussed p. 641 infra. St. John v. Nichols, 331 Mich. 148 at 159, 49 N.W. (2d) 113 (1951): In upholding court rules which prescribed procedures for new trial, judgment notwithstanding the verdict, and matters raised on appeal, the court said: "We note, in passing, that the granting of a new trial here is not inconsistent with CL 1948, §691.692 (Stat. Ann. §27.1462). We do not base decision thereon inasmuch as the subject comes within the exclusive powers of this Court and is, therefore, outside the legislative province. (Const. 1908, art. 4, §1, 2; art. 7, §1, 5)."

[81] P.A. 314, §14 (1915), being Mich. Comp. Laws (1948) §601.14. The text of this section is set out in note 24 supra.

[82] In re Widening Woodward Avenue, 265 Mich. 87 at 91, 251 N.W. 379 (1933).

[83] MICH. CONST., art. VII, §§1, 4, 5.

igan Compiled Laws of 1948,[84] might be thought to be a delegation of power not theretofore held by the court. Such a conclusion gains plausibility from a provision of the constitution: "The legislature shall, as far as practicable, abolish the distinction between law and equity proceedings."[85] It is submitted, however, that even in the absence of the enabling legislation, the court has the power and duty to abolish the procedural distinctions and to merge the actions at law and in equity.

The distinctions between law and equity are of two kinds: (1) practice or procedural distinctions, (2) substantive law distinctions. The court by virtue of its constitutional rule-making mandate has the power to abolish procedural distinctions between law and equity except for those distinctions in practice written into the constitution, such as jury trial. The court cannot inherently, constitutionally, nor as a result of enabling legislation enact rules of substantive law. The court has always recognized legislative superiority in this matter.[86] What then is the effect of this additional constitutional directive to the legislature to abolish the law-equity distinctions? It is submitted that in the matter of abolishing the law-equity distinction, both the supreme court and the legislature possess power of accomplishment; the court under its rule-making power; the legislature pursuant to the special constitutional grant. In short, this is an area where a power is concurrently possessed by two branches of government with the basis therefor grounded in history.

A survey of the proceedings and debates of the 1850 Michigan Constitutional Convention makes it obvious why the legislature was also assigned the function of abolishing the law-equity distinction. The convention had under consideration two plans for the judicial branch — the circuit system, whereby circuit court judges performing circuit duties would sit en banc to comprise the supreme court, and the independent supreme bench system, under which the supreme court justices performed no circuit duties.[87] The circuit system was existent in Michigan at the time of the convention. Some delegates opposed the circuit plan, pointing out that these courts had failed to administer justice satisfactorily, as a result of which it had been necessary to establish the county

84 P.A. 314, §14 (1915), being Mich. Comp. Laws (1948) §601.14.

85 MICH. CONST., art. VII, §5.

86 Shannon v. Ottawa Circuit Judge, 245 Mich. 220, 222 N.W. 168 (1928).

87 Remarks of Mr. E. S. Moore, delegate from St. Joseph County, Report of the Proceedings and Debates, Michigan Constitutional Convention (1850) at 721-722.

courts.[88] The judiciary and the legal profession were considered responsible for the extreme technicalities which existed in procedure,[89] and some delegates called for the abolition of the law-equity distinction so as to enable cases to be tried on their merits rather than on procedural niceties.[90] One delegate proposed that a board of commissioners be established to make rules of practice for the courts, such board being responsible to the legislature.[91] It is submitted that while the supreme court's rule-making grant included the power to abolish the law-equity distinction, it was the intention of the majority of the delegates to provide a safeguard against inertia and non-exercise of such power by the judiciary; thus the legislature was given concurrent power, to be utilized in case the supreme court did not act. One delegate even proposed an amendment to the rule-making section which would have imposed a *duty* on the supreme court to make rules,[92] as compared with a mere authorization to promulgate rules. In short, the tenor of the times, as expressed in the constitutional debates, demanded the abolition of the law-equity distinction and the legislature was given an effective weapon designed to encourage the supreme court to take necessary action under its constitutional rule-making power. The result, of course, is the enabling statute referred to above.

It is interesting to note that the direction to the legislature occurs in the *judicial* article of the constitution, not the legislative article. Had the convention intended this function to be carried out exclusively by the legislature, the direction and grant of power would likely have been included in the article concerned with the legislative department.

In conclusion, the court's inherent rule-making power and that expressly granted by the constitution would seem to be very broad, permitting the promulgation of rules which cover all phases of the litigation process, from inception of the action to final judgment and execution, including matters of pleading, evidence, and trial procedure. Thus enabling legislation and its problem of delegation of powers present no obstacles to procedural revision in

88 Remarks of Mr. A. S. Robertson, delegate from Macomb County, Report of the Proceedings and Debates, Michigan Constitutional Convention (1850) at 728-729; Remarks of Mr. A. H. Hanscom, delegate from Oakland County, Report of the Proceedings and Debates, Michigan Constitutional Convention (1850) at 711.

89 Remarks of Mr. E. S. Moore, delegate from St. Joseph County, Report of the Proceedings and Debates, Michigan Constitutional Convention (1850) at 721.

90 Id. at 596.

91 Ibid.

92 Remarks of Mr. A. S. Robertson, delegate from Macomb County, Report of the Proceedings and Debates, Michigan Constitutional Convention (1850) at 809.

Michigan. Such legislation adds nothing to the powers already held by the court except to confirm them and to provide a happy climate of common purpose in the accomplishment of procedural reform.

D. *Supplementary Legislation*

The promulgation of court rules by the Michigan Supreme Court has been sporadic, piecemeal, and incomplete. During the territorial period both court rules and statutes governed matters of practice, the rules being promulgated pursuant to legislation of the Legislature of the Michigan Territory,[93] and this precedent was followed during the period 1835-1850 under Michigan's first constitution.[94] The constitution of 1850 vested the rule-making power in the supreme court.[95] Under this grant of power some court rules were promulgated between 1853-1930,[96] but the vast bulk of practice regulations were created by statute. Because the judiciary failed to exercise fully its rule-making power, the legislature felt justified in enacting supplementary legislation to provide a scheme of procedure for Michigan's courts.[97] These supplemental regulatory efforts reached a climax in 1915 with the passage of a comprehensive group of statutes known as the Judicature Act.[98] The growing realization of the need and desirability for court rules

[93] 1 BLUME, TRANSACTIONS OF THE SUPREME COURT OF MICHIGAN, 1814-1824, p. xx (1938). ". . . the governor and judges as a legislature 'established' a supreme court for the territory and provided that it should 'consist of the three judges appointed and commissioned by the President of the United States.' This act, which was entitled 'AN ACT *concerning the supreme court of the territory of Michigan* . . . contained the following important sections: . . . 'Section 9. *And be it enacted,* That the supreme court shall and may, from time to time, make, record, and establish all such rules and regulations, with respect to the admission of counsel and attornies, and all other rules respecting modes of trial and the conduct of business, as the discretion of the court shall dictate. . . .'" See also 1 BLUME, TRANSACTIONS OF THE SUPREME COURT OF MICHIGAN 1805-1814, p. xl (1935).

[94] Rev. Stat. 1838, Part III, Title I, Ch. I, §5, p. 358; HONIGMAN, MICHIGAN COURT RULES ANNOTATED (1949) p. v (History of Michigan Court Rules, by Hon. Walter H. North, Justice of Supreme Court of Michigan).

[95] MICH. CONST. (1850) art. VI, §5. Present provision, MICH. CONST. art. XII, §5.

[96] General revisions of court rules were made in 1853, 1858, 1897, and 1916. The rules of 1853 were adopted pursuant to the grant of power under the constitution of 1850. The revision of 1858 reflected the changed form of composition of the supreme court, and the rules of 1916 were enacted after the passage of the Judicature Act of 1915.

[97] Sunderland, "The New Michigan Court Rules," 29 MICH. L. REV. 586 (1931).

[98] P.A. 314 (1915), being Mich. Comp. Laws (1948) §§600.1 ff. "An Act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this State; the powers and duties of such courts, and of the judges and other officers thereof; the forms of civil actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act."

to govern practice led to the enactment of a statute[99] authorizing the appointment of a revisional commission in 1927. The efforts of the commission were reflected in the adoption of a set of court rules in 1931. However, these court rules did not encompass the entire area of procedural regulation, with the result that much statutory regulation remained in full force and effect.[100] The result was that in those areas where the supreme court had acted and promulgated rules, such rules were controlling.[101] In those areas where the supreme court had not acted, legislative enactments were still recognized as embodying the rules of practice.[102] Thus Michigan lawyers had to take cognizance of both court rules and statutes in matters of practice, and to choose whether to comply with one or the other.

In the areas where the court clearly possessed rule-making power, legislative regulation was given full effect if the court had not preempted the field by adopting rules covering that area.[103] The case of *Ayers v. Hadaway* is an example. In that case the court held that it had inherent rule-making power to regulate the qualifications of persons who may practice law in Michigan.[104] The court had not made rules on the subject. The legislature passed a statute authorizing the creation of the State Bar of Michigan.[105] Court rules promulgated pursuant to the statutory provision divided membership into two classes (active and inactive) and restricted the practice of law to active members.[106] The right of

99 P.A. 377 (1927): "An Act to provide for the appointment by the governor of a commission of five practicing attorneys-at-law of this state to confer with the justices of the supreme court and to suggest to such court revised rules of practice and procedure in such court and in all other courts of record and a simplified method of appellate procedure."

100 Michigan Court Rule No. 1, §3 (1931): "Rules of practice heretofore set forth in any statute, not in conflict with any of these rules, shall be deemed to be in effect until superseded by rules adopted by the supreme court."

101 In re Koss Estate, 340 Mich. 185 at 189, 65 N.W. (2d) 316 (1954). Contention was made that an appeal from a probate court to a circuit court should be dismissed because of failure to appeal within the time prescribed by statute. The supreme court noted that the procedure governing appeals from probate courts was established by court rule in 1949, and that such court rules supersede statutory provisions, stating: "The Supreme Court may establish rules of procedure governing appellate practice in the courts of this State. Michigan Constitution (1908), art. 7, §5; CL 1948, §691.21 (Stat. Ann. §27.111). The propriety of the circuit court's action in denying appellant's motion to dismiss must be determined under Court Rule No. 75, as amended, and without express regard to any general statutory provisions controlling appeals from probate courts."

102 Michigan Court Rule No. 1, §3 (1945).

103 Ayers v. Hadaway, 303 Mich. 589, 6 N.W. (2d) 905 (1942).

104 Id. at 597.

105 P.A. 58 (1935), being Mich. Comp. Laws (1948) §691.51.

106 Supreme Court Rules concerning the State Bar of Michigan, 273 Mich. xxxv (1935), §3: "Members of the State Bar shall be divided into two classes, namely, active members and inactive members. . . . No inactive member shall practice law, vote or hold office in the State bar. . . ."

an inactive member to represent a client in court was challenged. The supreme court, while asserting that it had inherent power wholly independent of statute to regulate the qualifications of persons seeking to practice law in Michigan, held that the legislature could constitutionally enact such a statute.[107] It is obvious that until an area of "practice" is "preempted" by rules of court, the court will give full effect to legislation in the area.[108] This is a healthy development, for it shows the reverse side of the fine spirit of cooperation existing between the legislative and judicial branches of government in the field of procedural reform.

Preemption of an area of "practice" by rule of court in conflict with legislative provision creates quite a different problem. The superiority in case of conflict between a statute and court rule purporting to govern the same matter of practice must be decided. For example, assume that a court rule allowed twenty days for appearance after initial process, and a supplementary statutory enactment allowed only fifteen days for such appearance. Which would be effective? Obviously the rule of court providing for twenty days is a matter of "practice" and as inherent and constitutional judicial business, it would control.[109] Only if the court rule were not promulgated would the legislative excursion into the field of procedural regulation be recognized as effective.

In *People v. Stanley*[110] the Michigan Supreme Court only recently has squarely indicated its attitude on the superiority of court rules over legislative enactments in the field of "practice." In 1953 and 1954 the legislature amended section 650.1 Michigan Compiled Laws (1948) by providing for appeal as of right in criminal cases resulting in conviction. Defendant was convicted of wrongfully taking a motor vehicle and attempted to invoke directly the provision of this new law without complying with the provisions of court rules requiring that the defendant first obtain

107 Ayers v. Hadaway, 303 Mich. 589 at 597-598, 6 N.W. (2d) 905 (1942): "In our opinion there is inherent power in the Supreme Court to regulate the qualifications of persons who may be permitted to practice law in this State. That the legislature has seen fit to adopt legislation to this end does not make the act unconstitutional."

108 Michigan Court Rule No. 1, §3 (1945).

109 Berman v. Psiharis, 325 Mich. 528 at 533, 39 N.W. (2d) 58 (1949). A statute required leave of court to amend a pleading. A court rule permitted amendment as of right within fifteen days from filing date. The court held that a decree entered within the fifteen-day period must be reversed because it deprived defendant, who now claimed he desired to amend his answer and cross bill, of the right to amend as granted by the rule. "Notwithstanding the statute, the court rule must be given its full force and effect." People v. Stanley, 344 Mich. 530, 75 N.W. (2d) 39 (1956); Talbot v. Collins, 33 Idaho 169, 191 P. 354 (1920); Solimeto v. State, 188 Ind. 170, 122 N.E. 578 (1919); Epstein v. State, 190 Ind. 693, 128 N.E. 353 (1920).

110 344 Mich. 530, 75 N.W. (2d) 39 (1956).

leave to appeal. In striking down the statute as modifying the practice provided for by the court rule, the court among other reasons pointed out that it has both inherent and constitutional authority to make rules of practice; that when it makes such rules, legislation that conflicts therewith, even though subsequently enacted, is of no force and effect. The court was careful to emphasize that, at least so far as this reason went, it did not question the party's *right* of review; but since he did not comply with the procedure established by court rule as distinguished from that enacted by statute, the appeal must be dismissed. The opinion is a moving statement in support of the superiority of inherent and constitutional rule-making when brought into conflict with legislative meddling with practice.

In summary, the supreme court has exercised its rule-making power only to a limited extent. Where it has acted to regulate "practice," the rule is supreme whether or not the legislature has also acted. Where it has not acted, supplementary legislative enactments regulating "practice" will be recognized as the effective rules of practice until such time as the court exercises its full inherent and constitutional obligations. Thus in the absence of conflict between them, both court rules and supplementary legislation constitute effective practice regulation.

III. EXTENT TO WHICH THE RULE-MAKING POWER SHOULD BE EXERCISED

The great debates of the 1920's concerning the rule-making power of the courts contain all of the arguments for and against the use of judicial rule making.[111] During the succeeding thirty years the existence in the courts of inherent, constitutional, and granted rule-making power has become recognized and well accepted. Thus attention can now be turned to a re-examination of the claims and counterclaims of the proponents and opponents of judicial rule making to determine fairly its value and whether or not it should be used to its fullest extent in modern procedural reform movements.

The following arguments against statutory regulation of practice appear to remain valid:

1. The rigidity of procedural statutes oftentimes results in injustice. Courts are bound by statutes. They cannot be suspended or modified to meet situations unforeseen at the time of their enactment.

111 See note 1 supra.

2. The ambiguity in legislative rules is difficult to clarify. The legislature, being busy with other important problems, is often not receptive to suggestions for clarification. Courts must clarify ambiguities in cases and controversies, thus making lawsuits turn on questions of practice.

3. Although made up of competent, sincere, elected representatives, the legislature as a whole does not have, as do the judges, the expertise or interest to handle the problem of providing rules of practice or of constantly re-examining them.

4. The legislature is not responsible in the eyes of the public for the prompt and efficient administration of justice and often lacks sufficient interest to correct the administrative rules of a coordinate department.

5. Legislative sessions occur only at yearly intervals. They are crowded with other important problems. Preliminary study on the part of the legislature and an understanding of the need for a bill on a technical matter of procedure are often lacking.

6. Too often, needed revision is passed over by the legislature when no organized, effective voice is raised in its support, and ill-considered practice provisions are passed by the legislature when they have the interest of one or more politically effective persons, thus making possible the creation of cumbersome, over-particularized, and complicated machinery for the administration of justice.

The following arguments in favor of judicial rule making in its broadest sense have been proved during the past thirty years:

1. The courts are responsible for the proper and efficient administration of justice. They have proved themselves capable and interested in the problem of providing sound rules of practice. It is apparent that in all jurisdictions where the courts have exercised full rule-making power, docket crowding and delay have been lessened.

2. A random comparison of decisions by courts exercising rule-making power before and after their court rules were adopted indicates that there are fewer decisions turning on procedural questions after the rules were adopted.

3. As a general rule the courts exercising rule-making power have periodically re-examined the rules of procedure to eliminate inequities in the rules and to improve them.[112]

[112] Recently the Supreme Court of the United States took an unfortunate step in discharging its standing advisory committee on Rules of Civil Procedure. The court now has no organized committee of lawyers to advise it on matters of procedural reform.

4. Interpretation of the rules by the same group that promulgated them has seemingly resulted in an interpretation more in spirit with the established rules of procedure and less in reliance on technicalities.

Thus just as it was advisable thirty years ago for courts to exercise their rule-making power, it is even more advisable today for courts to exercise this power to its fullest extent to achieve all of the benefits inherent in a system of judicial rule making. The administration of justice will be served if the court will exercise all of its inherent, constitutional, and delegated rule-making power. Responsibility for good judicial administration will be centered in the courts instead of divided between the legislature and the courts. Practice and procedure should never be an end in and of itself. It must be considered only as a means to an end, that is, administration. To function properly, the details of administration of justice should be assumed by the court and not left by default to a separate branch of government.

Although lawyers may hold different opinions as to the details of the Federal Rules of Civil Procedure, the last eighteen years under the federal rules amply support the recommendation of the American Bar Association made in 1938: "that practice and procedure in the courts should be regulated by the court;"[113] and of the Committee on Judicial Administration at that same time: "Where legal procedure is prescribed by legislation, it should be restored to the courts and defined by rules of court."[114]

The following paragraphs contain a functional breakdown of many phases of judicial administration. In each paragraph an effort is made, in light of the conclusions drawn in the foregoing material, to indicate whether or not the matter therein discussed should properly be dealt with by statute or court rule. The conclusions are documented where authorities are available.

Court Creation and Organization, Court Officers, and Salaries. There can be no doubt that the legislature, as limited by the constitution, is the proper body to deal with the creation of courts[115] and the rules for selection and payment of the salaries of the various court officials. Except for certain officials to be appointed by the highest court,[116] no one would contend that this would be a

113 63 A.B.A. REP. 523 (1938), Report of the Section of Judicial Administration, Recommendation 1. (1).

114 63 A.B.A. REP. 530 (1938), Report of the Committee on Judicial Administration (to the Section of Judicial Administration), Proposal 1.

115 MICH. CONST., art. VII, §1.

116 Id., §6.

proper subject for court rule. In a like manner the constitution prescribes the basic form of court organization with certain legislative responsibility.[117]

Limitations of Actions. Whether or not a state should prevent the enforcement of a right because of the lapse of time involves considerations other than the orderly dispatch of judicial business. Other policy considerations such as the need for certainty of property and contract indicate that the statutes of limitation should be left for legislative determination.[118]

Basis for Jurisdiction. The Michigan Constitution provides that "Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this constitution and not prohibited by law. . . ."[119] Thus the kinds of cases that may be decided by the courts of this state are initially provided for in the constitution subject to such regulation that the legislature may prescribe. This involves policies over and above the orderly dispatch of judicial business and is properly a subject for decision by the people's elected representatives.[120] Whether there is a tribunal to protect a right goes to the very heart of the right itself and thus involves more than practice. The same can be said of the relationship with the state of the person or property involved in an action as the basis for jurisdiction over that person and property. Whether or not that relationship is sufficiently close to subject the person or property to the jurisdiction of a court of the state is something that involves fundamental policy considerations beyond those matters essential for the orderly dispatch of judicial business.[121] On the other hand, how such persons and property should be brought before the courts clearly is practice and must be so considered. If the legislature makes the determination that a certain class of persons or property should be subjected to the power of the courts of this state, the supreme court has the obligation to

117 Id., §§2, 3, 8. "The legislature may by law arrange the various circuits into judicial districts, and provide for the manner of holding courts therein. Circuits and districts may be created, altered or discontinued by law, but no such alteration or discontinuance shall have the effect to remove a judge from office." (id., §8)

118 Fulghum v. Baxley, (Tex. Civ. App. 1949) 219 S.W. (2d) 1014.

119 MICH. CONST., art. VII, §10.

120 Standish v. Gold Creek Min. Co., (9th Cir. 1937) 92 F. (2d) 662, cert. den. 302 U.S. 765 (1938); Universal Credit Co. v. Antonsen, 374 Ill. 194, 29 N.E. (2d) 96 (1940).

121 An example of such policy decisions by the legislature is the determination that persons who drive automobiles on the highways of the state and have accidents in the state stand in a sufficiently close relationship to the state to justify subjecting them to the jurisdiction of the courts of the state for actions arising out of such accidents. Non-Resident Motor Vehicle Statutes.

establish rules prescribing how and in what manner such persons or property shall be brought before the courts.[122]

Form of Action. A court's inherent power and the constitutional provision directing the supreme court by general rules to modify and amend the practice of courts of record and to simplify the same, make it clear that the rule-making power should be exercised to prescribe the form in which actions may be brought and by such rules to protect the substantive rights of the parties as declared by the legislature. The method of bringing an action into court, what it is called, what it is necessary to say, all involve matters of practice within the power of the court to prescribe rules therefor.[123]

Commencement of the Action. How an action is commenced involves questions of practice within the constitutional rule-making power and also involves the orderly dispatch of judicial business, so as to bring this matter within the inherent power of the court to establish rules therefor.[124]

Notice of the Action. Although there are constitutional limitations upon the kind of notice that must be given a defendant in an action, the form of that notice and how it should be served involve the orderly dispatch of judicial business and should clearly be considered as within the rule-making power. This should be true both as a result of an interpretation of the word "practice" as it appears in the Michigan Constitution and from an examination of the court's inherent power. The limitations

122 Present court rules have covered this area of practice. Federal Rule 4. Michigan Court Rules 13, 14, and 15. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946). Court Rule changing statutory provision prescribing range of process held valid. Rule held valid which provided for service by alias writ of attachment. Van Benschoten v. Fales, 126 Mich. 176, 85 N.W. 476 (1901). Practice includes the mode of serving mesne process and the mode of executing final process. It refers to the manner in which attachment and fieri facias writs are to be levied. Union Nat. Bank v. Byram, 131 Ill. 92, 22 N.E. 842 (1889). Practice includes the time and mode of issuing and returning final process in ejectment suits. Wilson v. Trustees of Schools, 138 Ill. 285, 27 N.E. 1103 (1891). Practice includes the mode of serving process. J. E. Petty & Co. v. Dock Contractor Co., (3d Cir. 1922) 283 F. 341. A court rule which stated that service of notice by registered mail was to be deemed valid if delivered to addressee or any other person qualified to receive addressee's registered mail was valid. *(dicta)* Wise v. Herzog, (D.C. Cir. 1940) 114 F. (2d) 486.

123 State v. Bogart, 41 N.M. 1, 62 P. (2d) 1149 (1936); State v. Ahrens, 25 N.J. Super. 201, 95 A. (2d) 755 (1953). The form an appeal should take as prescribed by court rule was sustained in Michigan. Jones v. Eastern Michigan Motorbuses, 287 Mich. 619, 283 N.W. 710 (1939).

124 Example Federal Rule 3. Rule held valid which provided for the time within which appearance should be made on notice to plead. Norvell v. McHenry, 1 Mich. 227 (1849).

upon the kind of notice that may be prescribed by the court in its rules are the limitations of due process of law. All notice must be reasonably calculated to apprise the defendant of the action and give him an opportunity to defend.[125] The notice that must be given a defendant must be distinguished from the basis for the exercise of jurisdiction. The basis for the exercise of jurisdiction, that is, the relationship that exists between the defendant or the property and the state, is a legislative matter.[126] Within the limitations of due process of law, the kind of notice to be given is a matter for court rule.[127] The first involves matters of policy over and above those indicating the orderly dispatch of judicial business. The second involves only the orderly dispatch of judicial business. For example, the legislature may prescribe that persons who have accidents on highways in the state of Michigan should be subject to the jurisdiction of Michigan courts. Thus the having of an accident on the highways of the state is a sufficient relationship between such person and the state to justify the exercise of jurisdiction over such a person. On the other hand, a court rule should prescribe the notice to be given in such cases, and such a rule should be valid and controlling in case of conflict with a legislative provision as to notice. The method by which a defendant is notified of judicial proceedings is a matter involving the orderly dispatch of judicial business and within the meaning of the word "practice" as prescribed in the constitutional provision granting rule-making power to the courts.

Pleading and Motion Practice. What must be said in pleading involves the orderly dispatch of judicial business. The form of pleadings,[128] whether or not and how they can be amended,[129]

125 Milliken v. Meyer, 311 U.S. 457 (1940).

126 Note 120 supra.

127 Note 122 supra.

128 Pleadings are included within the meaning of "practice." Bond v. Duntley Mfg. Co., 195 Ill. App. 576 (1915); Matthiessen v. Duntley, 225 Ill. App. 249 (1922). Statutory enactments relating to practice and pleading are procedural and can be modified by court rule. State v. Arnold, 51 N.M. 311, 183 P. (2d) 845 (1947). A court rule which requires that an affidavit of verification and noncollusion be filed with a complaint or counterclaim in divorce proceedings pertains to practice and procedure and is not a jurisdictional requirement. Early v. Early, 18 N.J. Super. 280, 87 A. (2d) 371 (1952). A court rule which prescribes a reasonable time for the filing of pleadings is valid. Timlin v. City of Scranton, 139 Pa. Super. 508, 12 A. (2d) 501 (1940) *(dicta)*. A court rule which provides that a partnership can sue or be sued in the partnership name is a matter of practice and not of substance. Collateral Finance Co. v. Braud, 298 Ill. App. 130, 18 N.E. (2d) 392 (1938). A court has inherent power to make a court rule providing for the sealing of the pleadings in divorce actions. Stevenson v. News Syndicate Co., 276 App. Div. 614, 96 N.Y.S. (2d) 751 (1950). Matters which may be regulated by court rule include the necessity of pleading. Weil v. Federal Life Ins. Co., 264 Ill. 425, 106 N.E. 246 (1914). The form and sufficiency of pleadings is a proper matter for regulation by

are matters of procedure and practice. The methods of attacking pleadings,[130] and the methods of attacking jurisdiction,[131] involve the orderly dispatch of judicial business and are subject to the rule-making power of the courts. Pleading and motion practice involves practice and procedure, not substance. It involves how, not what. The creation of a cause of action obviously belongs to the legislature, but how it should be stated and the method by which it can be attacked in court is a matter of practice for judicial rule making.

Joinder of Causes. Nothing could be more a part of practice than a determination as to what causes should be joined in a single action.[132] Whether a counterclaim should be permitted to be filed or required, whether a crossclaim should be permitted or required, whether third-party claims should be permitted, all involve the orderly dispatch of judicial business and fall within the court's rule-making power.[133]

Parties. The same thing that was said about the joinder of causes can be said about parties. Who are required or permitted to be plaintiffs or defendants, are matters involving the orderly dispatch of judicial business.[134] Intervention, substitution, interpleader, third-party practice, class actions, all are matters of judicial procedure and involve the how instead of the what. Court rules should cover these matters.[135]

Pre-trial Practice and Discovery. One of the most important functions of any court is the process of fact-finding. The method by which the fact-finding process proceeds is an intimate part of

court rule. Chicago v. Willoughby, 294 Ill. 327, 128 N.E. 497 (1920). A court rule which regulates the form and sufficiency of briefs is valid. Shoecraft v. Cain, 23 Ind. 169 (1864). The manner of making issues is a proper matter for regulation by court rule. King v. Curtin, 31 D.C. App. 23 (1908). A court rule which provides for the effect of a failure to deny averments in the pleadings is valid. Blair v. Ford China Co., 26 Pa. Super. 374 (1904). A court rule requiring defendant to submit affidavits of merits or defense is valid. Hogg v. Charlton, 25 Pa. 200 (1855).

129 Berman v. Psiharis, 325 Mich. 529, 39 N.W. (2d) 58 (1949).

130 State v. Lane, 69 Ariz. 236, 211 P. (2d) 821 (1949); Timlin v. City of Scranton, 139 Pa. Super. 508, 12 A. (2d) 501 (1940); Coombs Land Co. v. Lanier, 222 Ky. 139, 300 S.W. 328 (1927); Crawford v. Roloson, 262 Mass. 527, 160 N.E. 303 (1928); Murta v. Reilly, 274 Pa. 584, 118 A. 563 (1922); Teter v. George, 86 W. Va. 454, 103 S.E. 275 (1920).

131 Mahr v. Union Pac. R. Co., (E.D. Wash. 1905) 140 F. 921.

132 State v. Pierce, 59 Ariz. 411, 129 P. (2d) 916 (1942).

133 Examples of rule making involving counterclaims are Federal Rule 13, third-party claims, Federal Rule 14.

134 Examples of rules involving joinder of parties are Federal Rules 19, 20.

135 Examples of interpleader, Federal Rule 22; intervention, Federal Rule 24; class actions, Federal Rule 23, Michigan Court Rule 16; substitution, Federal Rule 25.

the practice of the courts. Whether or not a court has methods for judicially enforced discovery prior to trial[136] or for pre-trial conferences between judges and lawyers[137] involves the orderly dispatch of judicial business and is a proper subject of rule making.

Venue. Where a case should be tried involves something more than the orderly dispatch of judicial business. The people of the state should have the power to pass rules pertaining to the place of initiating lawsuits. Such rules may involve policies other than the orderly dispatch of judicial business. Initial venue is a matter for legislative determination.[138] However, changing venue in cases begun at the wrong place, for prejudice, for convenience, or any other cause, can involve the orderly dispatch of judicial business and should be subjects of judicial rule making.[139] Thus statutes should provide the initial place of venue, and court rules should provide the grounds and methods of changing venue from one court to another.

The Mechanical Problem of Getting Cases up for Trial. The problem of assignment, of keeping calendars, of providing jury terms, and the mechanical aspect of getting cases up for trial clearly involve the orderly dispatch of judicial business and, subject to any constitutional provisions, should fall within the court's rule-making power.[140]

136 Tomlinson v. Tomlinson, 338 Mich. 274, 61 N.W. (2d) 102 (1953); State ex rel. Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1 (1928); T. Vidal & Co. v. Beatty Brokerage Co., (1st Cir. 1929) 31 F. (2d) 98; Ollam v. Shaw, 27 Ind. 388 (1866); Sibbach v. Wilson & Co., 321 U.S. 1 (1941).

137 State v. District Court, 121 Mont. 320, 194 P. (2d) 256 (1948).

138 Barnard v. Hinkley, 10 Mich. 458 (1862).

139 Example, Michigan Court Rule 34. State v. Veneman, 209 Ind. 575, 200 N.E. 216 (1936); State v. Weir, 210 Ind. 601, 4 N.E. (2d) 542 (1936); but see Agar Packing & Provision Corp. v. United Packinghouse Workers, 311 Ill. App. 502, 36 N.E. (2d) 750 (1941).

140 Court calendars and dockets can be regulated by court rules. Laurel Canning Co. v. Baltimore & O. R. Co., 115 Md. 638, 81 A. 126 (1911). Continuing the term of a grand jury beyond the expiration date for which it was impanelled is within the rule-making power of the supreme court. Such is not a matter of substantive law. State v. Haines, 18 N.J. 550, 115 A. (2d) 24 (1955). A court rule was valid which provided that the three divisions of the court of appeals would hold three sessions per year in each of three places, and which provided also that cases would be docketed consecutively by counties. Savely v. Phillips, 25 Tenn. App. 654, 166 S.W. (2d) 780 (1940). Court rules can regulate the publication of legal notices or trial lists. McGreevy v. Kulp, 126 Pa. 97, 17 A. 541 (1889). The time of trial or hearing is a proper matter for regulation by court rule. Hall v. Eversole's Admr., 251 Ky. 296, 64 S.W. (2d) 891 (1933); In re Road in Hamption Twp., 72 Pa. Super. 484 (1919); Hall v. O'Brien, 97 W. Va. 77, 124 S.E. 507 (1924). A court rule which provides for the time and place of trial or hearing is valid. Rochell v. City of Florence, 236 Ala. 313, 182 S. 50 (1938). A court rule which provided that cases not finally determined within two years of the filing of the petition could be dismissed without prejudice for want of prosecution was valid. Hammon v. Gilson, 227 Iowa 1366, 291 N.W. 448 (1940).

Trial. If the conclusions drawn earlier are correct to the effect that the rule-making power involves rules having as a purpose permitting a court to function and function efficiently when not in conflict with policies involving other than the orderly dispatch of judicial business, the problems of the trial should be covered entirely by rules.[141] The method by which cases are dismissed or discontinued,[142] continuances are granted,[143] proceedings stayed,[144] cases are consolidated or separated,[145] all involve the orderly dispatch of judicial business. The method by which jurors are selected,[146] jury demand made,[147] the method of making objection and exceptions,[148] of requesting instructions,[149] of subpoenaing witnesses, [150] also involve matters of practice and are within the rule-making power. How the court submits instructions to the juries,[151] the order of trial, the method of making and ruling on motions for directed verdicts,[152] the form of verdicts,[153] regulation of findings,[154] the methods of dealing with stipulations and agreements,[155] all clearly are matters subject to the rule-making power.

Evidence. Most rules of evidence have been made by courts. Now and then the legislature has, as a result of policy considera-

141 State v. Pierce, 59 Ariz. 411, 129 P. (2d) 916 (1942).

142 Pear v. Graham, 258 Mich. 161, 241 N.W. 865 (1932); In re J. R. Palmenberg Sons, (2d Cir. 1935) 76 F. (2d) 935, cert. granted Bronx Brass Foundry v. Irving Trust Co., 296 U.S. 565 (1935), affd. 297 U.S. 230 (1936); Ptacek v. Coleman, 364 Ill. 618, 5 N.E. (2d) 467 (1936); Workman v. District Court, 222 Iowa 364, 269 N.W. 27 (1936); Cheney v. Boston & Maine R. Co., 246 Mass. 502, 141 N.E. 502 (1923); Lamb v. Greenhouse, 59 Pa. Super. 329 (1915); O'Brien v. McCarthy, 306 Ill. App. 151, 28 N.E. (2d) 334 (1940).

143 Conrad Schopp Fruit Co. v. Bondurant, 134 Ky. 568, 121 S.W. 482 (1909).

144 Boyajian v. Hart, 312 Mass. 264, 44 N.E. (2d) 964 (1942).

145 Example, Federal Rule 42.

146 Smith v. Louisville & N. R. Co., 219 Ala. 676, 123 S. 57 (1929); People v. Traeger, 374 Ill. 355, 29 N.E. (2d) 519 (1940); People v. Brown, 238 Mich. 298, 212 N.W. 968 (1929).

147 See Petition of Doar, 248 Wis. 113, 21 N.W. (2d) 1 (1945). Example, Federal Rule 38 (d), Michigan Court Rule 33.

148 Crawford v. Roloson, 262 Mass. 529, 160 N.E. 303 (1928); Russell v. Foley, 278 Mass. 145, 179 N.E. 619 (1932); Jovaag v. O'Donnell, 189 Minn. 315, 249 N.W. 676 (1933); Maberry v. Morse, 43 Me. 176 (1857). Example, Federal Rule 46.

149 Locander v. Joliet & Eastern Traction Co., 225 Ill. App. 143 (1922).

150 Example, Federal Rule 45.

151 People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929); People v. Jennings, 312 Ill. 606, 144 N.E. 316 (1924).

152 Example, Federal Rule 50. Legislation invalid, People v. McMurchy, 249 Mich. 147 at 156, 228 N.W. 723 (1930); Bielecki v. United Trucking Service, 247 Mich. 661, 226 N.W. 675 (1929).

153 Example, Federal Rules 48, 49.

154 Clark Inv. Co. v. Cunningham, 108 Kan. 703, 197 P. 212 (1921); Schuler v. Collins, 63 Kan. 372, 65 P. 662 (1901).

155 Haley v. Eureka County Bank, 20 Nev. 410, 22 P. 1098 (1889); Billington v. National Standard Life Ins. Co., (Tex. Civ. App. 1934) 68 S.W. (2d) 239 (1934). Example, Michigan Court Rule 11.

tion over and beyond matters involving the orderly dispatch of judicial business, enacted rules of evidence. The distinction previously pointed out between policy considerations involving the orderly dispatch of judicial business on the one hand and policy considerations involving something more than that on the other hand is the distinction that must be carried through into the evidence field. Most rules of evidence involve only the orderly dispatch of judicial business and should be subject to court rule.[156] On the other hand, there are rules of evidence which involve other policy considerations and should be enacted by the legislature. An example of a provision of the latter type is the doctor-patient privilege. The reason for the privilege involves something other than the orderly dispatch of judicial business. It involves the decision on the part of the legislature that in order to be certain that all persons receive good medical treatment, it is wise to seal the mouth of the doctor who has learned facts in the course of treatment.

Judgment. Quite clearly the rules that pertain to the acquisition of a judgment involve practice and are subject to rule-making powers.[157] The ultimate effect of a judgment as a means of collecting a debt may involve other policy considerations and may be proper matters for legislative action. The procedures by which such a judgment is enforced may involve the orderly dispatch of judicial business and at least in part should be subject to rule-making power. The effect of a judgment as res judicata in preventing other actions clearly involves the orderly dispatch of judicial business and should be subject to rule-making power. The same is true as to the review of the correctness of a judgment.[158]

Post-Trial Proceedings. It should be clear that efforts made by litigants to correct errors committed by the trial court and the rules governing the method by which litigants can correct such errors, such as the motion for new trial,[159] the motion for judg-

156 Example, Commission on Uniform State Laws, Model Rules of Evidence. Washington Nat. Ins. Co. v. McLemore, (La. App. 1935) 163 S. 773 (1935); Appeal of Dattilo, 136 Conn. 488, 72 A. (2d) 50 (1950). Riedl, "To What Extent May Courts Under Rule-Making Power Prescribe Rules of Evidence?" 26 A.B.A.J. 601 (1940); Green, "To What Extent May Courts Under Rule-Making Power Prescribe Rules of Evidence?" 26 A.B.A.J. 482 (1940).

157 See Section on Trial, supra. Howard v. Tomlinson, 27 Mich. 168 (1873); Kaufman v. Buckley, 285 Mass. 83, 188 N.E. 607 (1933); St. John v. Nichols, 331 Mich. 148, 49 N.W. (2d) 113 (1951).

158 See Section on Review, infra.

159 St. John v. Nichols, 331 Mich. 148, 49 N.W. (2d) 113 (1951); Hager v. Weber, 7 N.J. 201, 81 A. (2d) 155 (1952); Vengrow v. Grimes, 274 Mass. 278, 174 N.E. 505 (1931).

ment notwithstanding the verdict,[160] stay of proceedings,[161] harmless error rule,[162] etc., all are matters of practice and subject to the court's rule-making power.

Review. The constitution expressly directs the supreme court to establish by general rule the practice in such court, thus giving it complete power over review proceedings.[163] As an inherent matter such proceedings involve the orderly dispatch of judicial business providing a means for the correction of alleged errors on the part of the trial court. How these should be corrected, whether the proceedings should be stayed, whether rehearing should be granted, all are matters that should be subject to court rule.[164]

160 St. John v. Nichols, 331 Mich. 148, 49 N.W. (2d) 113 (1951).

161 Boyajian v. Hart, 312 Mass. 264, 44 N.E. (2d) 964 (1942).

162 Example, Federal Rule 61. Boyajian v. Hart, 312 Mass. 264, 44 N.E. (2d) 964 (1942).

163 MICH. CONST., art. VII, §5.

164 Procedure for taking appeal as enunciated in rules prevails over statutory procedure. In re Widening Woodward Ave., 265 Mich. 87, 251 N.W. 379 (1933). Court rules were valid which provided that nonjury law cases could be appealed on the ground that the judgment was against the preponderance of the evidence. Jones v. Eastern Michigan Motorbuses, 287 Mich. 619, 283 N.W. 710 (1939). Procedure for matters raised in appeal were held to be not subject to legislative action but within the exclusive power of the court prescribed rules of practice. St. John v. Nichols, 331 Mich. 148, 49 N.W. (2d) 113 (1951). Procedure for probate court appeals as enunciated in rules prevail over statutory procedure. In re Koss Estate, 340 Mich. 185, 65 N.W. (2d) 316 (1954). Method for appeal in criminal cases as provided for in court rules must be followed. People v. Stanley, 344 Mich. 530, 75 N.W. (2d) 39 (1956). Determination on appeal whether error was committed by trial court is a matter of "practice." King v. Schumacher, 32 Cal. App. (2d) 172, 89 P. (2d) 466 (1939). Practice includes the mode or manner of removing cases from the county or probate court to the appellate court by appeal or writ of error. Lynn v. Lynn, 160 Ill. 307, 43 N.E. 482 (1896). Courts possess the power to make court rules fixing the time within which appeals may be taken. Snider v. Rhodes, 53 Wyo. 157, 79 P. (2d) 481 (1938). The form and nature of appellate briefs are proper subjects for regulation by court rule. Siesseger v. Puth, 211 Iowa 775, 234 N.W. 540 (1931). A rule which provided that appeals must be taken within 30 days is valid. Nudd v. Fuller, 150 Wash. 389, 273 P. 200 (1928). An appeal is not a commencement of a new action, but merely a step in the original action, and thus a court rule limiting the time within which appeals can be taken is within the court's power to promulgate rules regulating procedure. Winberry v. Salisbury, 5 N.J. Super. 30, 68 A. (2d) 332 (1949). A court rule is valid which requires a party to file a verified petition stating claim and facts material thereto in cases where the claim of report is disallowed. Wilson v. Checker Taxi Co., 263 Mass. 425, 161 N.E. 803 (1928). A court rule which requires that evidence summaries be appended to a master's report to enable court to decide whether evidence was sufficient to sustain the findings was valid. Morin v. Clark, 296 Mass. 479, 6 N.E. (2d) 830 (1937) *(dicta)*. A court rule which required appellate briefs to contain a concise statement of the errors and exceptions relied upon was valid. Epstein v. State, 190 Ind. 693, 128 N.E. 353 (1920). A court rule which required the submission of civil causes on abstracts of record was valid. Smith v. Guckenheimer, 42 Fla. 1, 27 S. 900 (1900). A court rule which requires briefs to be filed within 50 days of the filing of notice of appeal is valid. Anderson v. Industrial Commission, 135 Ohio St. 77, 19 N.E. (2d) 509 (1939). A court rule is valid which requires the appellate brief to contain a statement of the errors relied upon for reversal. Gyure v. Sloan Valve Co., 367 Ill. 489, 11 N.E. (2d) 963 (1937).

Special Proceedings. The question as to whether or not there should be attachment, garnishment, receivership, etc., proceedings in a given state is a question of policy to be determined by the legislature. On the other hand, the question as to how the attachments, garnishments, receiverships, etc., should be carried on are questions of practice to be determined by the court. In other words, the distinction is drawn again between what, which is to be determined by the legislature, and how, which is to be determined by the court under its rule-making power. The use of other writs, such as, mandamus, certiorari, habeas corpus, injunction, quo warranto, is expressly authorized by the constitution; and being discretionary in their nature, it is within the power of the courts to grant or withhold them. This is an additional reason why it is proper for the court to establish rules pertaining to these writs.

Court Expense. The court has the power to incur expenses to carry out the orderly dispatch of judicial business.[165]

Taxation of Costs. How costs should be taxed seems to involve the orderly dispatch of judicial business, but the policy consideration as to the amount of costs involves something more than the orderly dispatch of judicial business. It subsumes a fundamental decision as to how much of the expense of litigation the state shall bear. This thus becomes a legislative problem.

Substantive Law. It is clear, of course, that no court should by rule attempt to establish or modify the substantive law. It cannot be denied that courts do create law by judicial decisions, but the establishment of rules for future conduct have always been left to the legislature when they involve matters of substantive law and the creation of substantive rights.

IV. CONCLUSION

The power of a court to establish rules of practice is very broad indeed. It stems from the court's inherent power to provide for the orderly dispatch of judicial business. It is augmented by constitutional provisions in certain states expressly granting to the supreme court the power to establish rules of practice for all courts of record. It is still further embellished by the wise action of the legislatures of a very large number of states confirming the

[165] Stowell v. Bd. of Supervisors, 57 Mich. 31, 23 N.W. 557 (1885).

existence of rule-making power in the courts through the enactment of enabling legislation.

That the courts and the legislatures have recognized the desirability of close cooperation in providing sound judicial procedure for the citizens of a state is noted in two fields. The legislature has by legislation recognized the court's obligation to make rules of practice, and the court has recognized the validity of legislative excursions into rule making when they do not conflict with judicially created rules. In other words, until the court preempts the field, legislative rules are recognized as valid.

The pattern for procedural reform, however, is clear. The value of judicial rule making is so great that the highest courts must be ever conscious of their obligation, inherent in them as courts, granted by the constitutions, and confirmed by the legislatures, to exercise their full rule-making power on all matters of practice and procedure. Only if all matters of practice and procedure are brought within the scope of judicially promulgated rules will the responsibility for smoothly functioning machinery for the administration of justice be placed where it belongs and will the necessary constant readjustment of rules and practices be accomplished. The courts have the power. They must show the interest and bear the responsibility for improvement of practice and procedure to reduce the expenditure of time, effort, and money by litigants and dispose of cases more readily on the merits.