Indiana Law Journal

Volume 36 | Issue 1 Article 5

Fall 1960

# The Court v. the Legislature: Rule Making Power in Indiana

# THE COURT v. THE LEGISLATURE: RULE-MAKING POWER IN INDIANA

Without specific constitutional authority the Indiana Supreme Court has always prescribed rules to govern its functioning.[1] The power to

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70. Allen v. Safe Deposit & Trust Co., 177 Md. 26, 7 A.2d 180 (1939); Price v. Price, 162 Md. 656, 161 Atl. 2 (1932); 4 BOGERT, TRUSTS AND TRUSTEES § 993 (1948).

71. 89 C.J.S., TRUSTS §§ 9, 63 (1955).

72. SCOTT, *op. cit. supra* note 69, § 2.8.

73. Stephens v. Moore, 298 Mo. 215, 249 S.W. 601, 604 (1923).

1. WILTROUT & FLANAGAN, INDIANA PLEADING AND PROCEDURE (Supp. 1959, at 125). "The first rules were adopted in 1817." These were printed in the Indiana Reports, 1, 4, Blackford's Reports; subsequent additions and revisions were printed in 1, 14, 22, 23, 26, 30, 32, 34, 36, 40, 43 and 49, Indiana Reports. The practice of publishing the rules in the Indiana Reports was discontinued in 1889; rules for that year and for 1900, 1911, 1923, 1936, 1938, 1940, 1943, 1946, and 1949 were published in pamphlet form. The revisions to the rules in 1954 and 1958 were published by WEST PUBLISHING COMPANY. In 1940 the rules reappeared in the Indiana Reports (218 Ind.) and in the Appellate Court Reports (108 Ind. App.) with the stipulation that they would be published in those reports only when revisions had taken place since the last publication of the rules.

promulgate these rules seems to have been derived from the separation of powers clause[2] of the Indiana Constitution on the theory that the rule-making power is a judicial power.[3] But the fact that the rule-making power has not been regarded as exclusively a judicial power is demonstrated by the observation that the General Assembly has always enacted procedural statutes even when statutes which purport to lodge the rule-making power in the courts are in force.

In 1843 the Indiana legislature first attempted to define the authority of the supreme court in the field of procedure. In the Revised Statutes of that year,[4] broad powers were conferred on the court, including the power to prescribe rules governing practice and procedure in Indiana trial courts.[5] This statute, however, was not regarded as a grant of exclusive power, for procedural statutes were enacted in the same session of the General Assembly.[6]

In the Indiana Constitution of 1851 the legislature was given authority to study the need for procedural reform.[7] From this study the

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2. IND. CONST. art. 2 (1816): No person or department may exercise "any power properly attached to either of the others except as herein expressly permitted." The separation of powers clause is art. 3 of the constitution of 1851.

3. IND. CONST. art. 5 (1816). The judicial power is contained in art. 7 of the constitution of 1851.

Although Indiana courts have not expressly referred to it, the practice of English courts in prescribing rules has been regarded by some courts as a historical basis of the rule-making power. See, *e. g.*, an early expression of this view by the United States Supreme Court in Hayburn's Case, 2 Dall. 409, 1 L. Ed 436 (1792): "The Court considers the practice of the courts of *King's Bench* and *Chancery* in *England*, as affording outlines for the practice of this Court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary." (2 Dall. at 413). In Hanna v. Mitchell, 202 App. Div. 504, 512, 196 N.Y.S. 43, 52 (1922), *aff'd.* 235 N.Y. 534, 139 N.E. 724 (1923), it was stated that the power of courts to prescribe rules of procedure was "inherent in the courts of King's Bench, Common Pleas and Exchequer of England and would have been conferred without express grant of such power. . . ."

The validity of analogizing between English and American court structures has been questioned. See note *The Inherent Power of Courts to Formulate Rules of Practice*, 29 ILL. L. REV. 911 (1935). In this note it is argued that the power of supreme courts to prescribe rules for trial court practice cannot be derived from the English practice because of the independent status of many American constitutional courts. While the House of Lords exercises control over the court of King's Bench, most state supreme courts in the United States are constitutionally independent. They are, unlike English courts, in no sense agents of the executive or Legislative Departments.

4. IND. REV. STAT., c. 37, art. 1, § 81 (1843).

5. This power, however, apparently was never exercised. See WILTROUT & FLANAGAN, *op. cit. supra* note 1, at 125. In this connection, see text following notes 54-61 *infra*.

6. IND. REV. STAT., c. 37, art. 1, § 53 (1843), (time for filing pleadings); § 51 (summons to defendant); 66 (depositions); 70 (time allowed for appeal from interlocutory orders).

7. IND. CONST. art. 7, § 20:

"Section 20—*REVISION OF LAWS*

The General Assembly at its first session after the adoption of this Constitution, shall provide for the appointment of three Commissioners, whose duty

Code of 1852 resulted.[8] While it is arguable that this constitutional provision provides that the legislature will be supreme in the field of procedure, it does not appear that the legislature regarded the clause as a grant of exclusive power. It seems to have been viewed as a permissive grant of power to adopt a civil and criminal code, or if mandatory, to have been executed by the adoption of the 1852 Code.[9]

The most comprehensive statute which granted rule-making power to the courts was enacted by the Indiana General Assembly in 1937.[10] This statute, Chapter 91 of the Acts of 1937, granted power to the Indiana Supreme Court to prescribe rules of practice and procedure for its own practice and for the other courts in the state system.[11] Although

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it shall be, to revise, simplify, and abridge, the rules, practice, pleadings, and forms, of the courts of justice. And they shall provide for abolishing the distinct forms of action at law, now in use; and that justice shall be administered in a uniform mode of pleading, without distinction between law and equity. And the General Assembly may, also, make it the duty of said Commissioners to reduce into a systematic Code, the general statute law of the state; and said Commissioners shall report the result of their labors to the General Assembly, with such recommendations and suggestions, as to abridgment and amendment, as to such Commissioners may seem necessary or proper. . . .

8. IND. REV. STAT. (1852).

9. 1 GAVIT, INDIANA PLEADING AND PRACTICE 1-37 (2d ed. 1950) [hereinafter cited as GAVIT]. This work contains a full development of the historical background of the rule-making power in Indiana. Gavit points out that when the code was re-enacted in 1881, a commission was selected by the Indiana Supreme Court pursuant to a statute enacted by the legislature in 1879. *Id.*, at 39.

10. Ind. Acts, c. 91 (1937); (H. 70). IND. ANN. STAT. §§ 2-4718, 2-4719 (Burns 1951):

An act relating to procedure in the courts of this state, conferring powers upon the Supreme Court to make, prescribe, enforce, and promulgate rules and regulations in regard thereto; and repealing all laws in conflict therewith.

Section 1. Be it enacted by the General Assembly of the state of Indiana: All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The Supreme Court shall have the power to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the Supreme Court shall adopt, and thereafter all laws in conflict therewith shall be of no further force or effect. The purpose of this act is to enable the Supreme Court to simplify and abbreviate the pleadings and proceedings; to expedite the decision of causes; to remedy such abuses and imperfections as may be found to exist in the practice; to abolish all unnecessary forms and technicalities in pleading and practice and to abolish all fictitious and unnecessary process and proceedings.

Sec. 2. Other courts of the state shall have the power to establish rules for their own government, supplementary to and not conflicting with the rules prescribed by the Supreme Court, or any statute.

Sec. 3. All laws or parts of laws inconsistent with this act are hereby repealed.

11. This aspect of the 1937 statute codifies the pre-existing practice with respect to rules governing practice in the Indiana Appellate Court. The statute which created this court, Ind. Acts, c. 37 (1891), provided that the Chief Justice of the Supreme Court would meet with the judges of the Appellate Court and adopt for the latter court "the same Uniform Rules of practice as govern the Supreme Court." *Id.*, § 15.

the terms of the statute indicate that broad powers were conferred, again the Act was not considered as a grant of exclusive power as is evidenced by the fact that the 1937 session of the legislature enacted procedural statutes; and every subsequent session has legislated in this field.[12] The Act of 1937, hereafter referred to as "Chapter 91," indicated that pre-existing procedural statutes were converted into rules of court, subject to modification and abrogation by the supreme court. It is a reasonable inference that Chapter 91 also purported to render procedural statutes enacted after 1937 subject to similar treatment by the supreme court. As will be shown below, the Indiana Appellate Court has drawn this inference.[13]

Due to the limitations imposed by the separation of powers clause of the Indiana Constitution, the practice of the legislature in granting rule-making power to the courts while continuing to legislate in the field of procedure, leads to the conclusion that the rule-making power is neither exclusively legislative nor exclusively judicial. Were Chapter 91 regarded as a delegation of legislative power to the courts, it would be invalid under the constitution. For the same reason, if the statute is a legislative recognition that the rule-making power is a judicial power, procedural statutes would be unconstitutional.[14] As preliminary conclusions, then, it appears that Chapter 91 is a legislative concession that, while the rule-making power is a mixed legislative and judicial power,

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12. 1 GAVIT, at 7. Gavit examines all the statutes enacted in the 1937 session of the General Assembly. He concludes that while some may not be "procedural," others clearly are: *e.g.,* Chapter 68, which is entitled "Civil Procedure" in the act.

13. See notes 40-43 *infra* and accompanying text.

14. This position is emphatically stated in Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally,* 23 ILL. L. REV. 276 (1928). His argument is in this form, substituting the applicable provisions of the Indiana Constitution for the Illinois provisions used in his note:

> 1. Any exercise by one department of government of a power properly exercisable by another department is void. IND. CONST. art. 3.
>
> 2. The judicial power is vested in the Supreme Court and the Circuit Courts, and in such other courts as the General Assembly may provide. IND. CONST. art 7, § 1.
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> 3. Restrictions and regulations are imposed only on the *jurisdiction* of the Supreme Court; this does not imply that the General Assembly has power to regulate *procedure.* IND. CONST. art 7, § 4.
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> 4. The provision that the legislature may not pass local and special laws regulating the practice in courts of justice, IND. CONST. art. 4, § 22, at best *implies* legislative power to regulate procedure. This is not sufficient, for art. 3 states that exceptions to the separation of powers clause must be *expressly* provided for in the constitution.

Wigmore calls this a "legal logic" basis for his argument. It is supplemented by the proposition that legislatures are manifestly lacking in competence in this field, that they meet too infrequently, are vulnerable to "improper pressures" and do not understand the needs of the courts. His conclusion is that "legal logic" and practical considerations indicate that procedural statutes are, and ought to be, void constitutionally, and that it is only by grace of judicial comity that such statutes survive.

the courts are supreme in this field and that procedural statutes which conflict with rules of court are void.[15]

The judicial decisions in the state have consistently taken this position even when the power to assert court superiority could not be based upon a rule-making statute. In *State ex rel. Blood v. Gibson Circuit Court*,[16] decided April 1, 1959 the validity of the Supreme Court's venue rule[17] was assailed on the ground that it conflicted with a statute.[18] In this case the petitioner sought a writ of prohibition to prevent the respondent trial judge from granting a change of judge in a levee proceeding. The ground of the objection was the failure of the party moving for the change of judge to comply with that part of the venue rule which required that the application be filed within ten days after the issues were closed on the merits. The movant admitted that it had not complied with the rule but insisted that the rule was invalid because the statute dealing with levee proceedings provided that a change of judge could be taken anytime before the work was declared established and referred to a superintendent for construction.[19]

In its preliminary discussion the court disposed of the distinction between "substance" and "procedure"[20] by finding that

> the *right* to a change of judge granted by [the statute] . . . is a substantive right which can be conferred only by the Legislature, *but* the *method* and *time* of asserting such right are matters of procedure and fall within the category of procedural rules.[21] (Emphasis by the court)

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15. The rule-making power under discussion in this note is the power to prescribe rules of "procedure." This note does not attempt an original definition of "procedure," nor is it considered useful to make a labored distinction between "substance" and "procedure." The literature is replete with such distinctions; the most useful source work would seem to be RESTATEMENT, CONFLICT OF LAWS, §§ 584, 585 (1934). In 1 GAVIT, at 11, all rules of law are divided into three classes, jurisdictional, procedural and substantive. Gavit then discusses the obvious problems in such a classification technique, overlapping and the so-called borderline case. For the purposes of this note the approach advised by Harris in *The Extent and Use of Rule-making Authority*, 22 J. Am. Jud. Soc. 27 (1938), has been adopted. Harris says that a definition of "procedure" is unnecessary "when rules are court-made under legislative sanction," for there is then "a proper balance of powers, and the court and legislature will by experience and decisions mark at least roughly the boundary between what constitutes procedure and what has traditionally been conceived to be exclusively under legislative control." *Id.*, at 29.

16. 157 N. E. 2d 475 (Ind. 1959).

17. Rule 1-12B, Rules of the Supreme Court, 1958.

18. Ind. Acts, c. 223, § 2 (1907) as amended, Ind. Acts, c. 249, § 1 (1947); IND. ANN. STAT. § 27-802 (Burns 1948).

19. *Id.*, § 1.

20. See note 15, *supra*.

21. 157 N.E. 2d 475, at 477. Illustration of the distinction is afforded by reference to Square D Co. v. O'Neal, 225 Ind. 49, 72 N.E. 2d 654 (1947). In this case plaintiff asserted that a statute, IND. ANN. STAT. § 4-215 (Burns 1946), which required a deposit

From its examination of the judicial and legislative history of the state, the court concluded that the rule-making power is neither exclusively legislative nor exclusively judicial and that Chapter 91 resolved the inevitable conflicts which would result from a concurrent exercise of the power. The court stated:

> By the enactment of this statute, the Legislature abandoned any right it might have had under Article 7, § 4 of the Constitution of Indiana, to impose "regulations and restrictions" upon the jurisdiction of the Supreme Court with respect to "rules of court which shall govern and control practice and procedure in all the courts of this state."[22]

Referring to the clause of Chapter 91 which provided that all laws in conflict with that statute were repealed, the court held that the rule of court superseded the conflicting statute. Accordingly, the writ of prohibition issued to prevent the respondent from granting the petition for change of judge.

This decision, the most recent expression of the Indiana Supreme Court's position on the rule-making power question, is fully supported by an examination of the Indiana case law. In 1887 the supreme court asserted that rules of court are rules of law governing practice in that court.[23] In 1889 the court stated that a court rule "is something more than a rule of the presiding judge; it is a judicial act, and when taken by a court, and entered of record, becomes a law of procedure therein . . . until rescinded or modified by the court."[24] The court revealed its theory of the authority to prescribe these rules when it articulated the concept that courts have an inherent power to prescribe rules of procedure. In a case[25] in which it appeared that appellant had not complied with the

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of $50 to accompany a petition of transfer from the Appellate Court to the Supreme Court was invalid because the rule of court, Rule 2-23, dealing with transfers from the Appellate Court, did not require this deposit. The court held that the statute dealt with a "substantive" matter, and stated that "no rule which we could adopt would repeal this requirement. This court cannot change a rule of substantive law nor could the General Assembly vest us with such power." (72 N.E. 2d at 656).

22. 157 N.E. 2d 475, at 477. The court refers to article 7, § 4 of the constitution, and states that the legislature has "abandoned" what control it might have had, etc. This part of the constitution relates to jurisdiction. While venue is usually thought of as an aspect of jurisdiction, it would seem that the rule-making power is not an attribute of jurisdiction. (See note 15, *supra*). However, because the court was discussing its power to prescribe rules in a case in which the specific rule involved was a rule relating to venue, it would not seem to be accurate to conclude that the court confused rule-making with jurisdiction.

23. Rout v. Ninde, 111 Ind. 597, 13 N.E. 107 (1887).

24. Manguson v. Billings, 152 Ind. 177, 52 N.E. 803, 804 (1889). See Guthrie v. Blakely, 127 Ind. App. 119, 131 N.E. 2d 357 (1955), in which cases expressing this view are collected.

25. State v. Van Cleve, 157 Ind. 608, 62 N.E. 446 (1902).

rule[26] which required that errors relied on be marginally noted in the trial transcript, the appeal was dismissed. The court stated that "courts have the inherent power to ordain such rules as they may find necessary to a proper dispatch of business, and, when once established, they become invested with the force and effect of law."[27] In none of the cases thus far reviewed was a statute in conflict with the rule of court. Two cases dealing with the content of appellate briefs, however, clearly reveal that the court has not considered that conflicting statutes present obstacles to its rules.[28] In these cases the rule[29] was said to be in conflict with a statute[30] covering the same subject matter. In both cases the rule was sustained, and in one of the cases the court held that insofar as the statute "refers to the rules of this court and what shall be deemed a sufficient brief . . . the same is void."[31] In the other case, in reply to the appellant's argument that the rule-making power statute[32] under which the rule was prescribed impliedly rendered such rules subordinate to conflicting statutes, the court strongly asserted its superiority in the rule-making field:

> While the statute grants the court power to frame rules, it is quite clear on principle, as well as upon authority, that the court had such power without the statute. This court is a constitutional court, and as such receives its essential and inherent powers, rights and jurisdiction from the Constitution, and from the Legislature, and it has power to prescribe such rules for its own direct government, independent of legislative enactment.[33]

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26. Rule 31 of the Rules of Supreme Court.

27. 157 Ind. at 609, 62 N.E. at 447.

28. Solimito v. State, 188 Ind. 170, 122 N.E. 578 (1919). Epstein v. State, 190 Ind. 693, 127 N.E. 441, 128 N.E. 353 (1920). In addition to the cases discussed in the text see Eason v. Appellate Court of Indiana, 233 Ind. 46, 116 N.E. 2d 299 (1954); Ross v. Clore, 117 Ind. App. 548, 74 N.E. 2d 747 (1947); Hughes v. State Bank of West Terre Haute, 124 Ind. App. 511, 117 N.E. 2d 563 (1954); Bennett v. James H. Drew Corp., 126 Ind. App. 557, 133 N.E. 2d 886 (1956) and Evans v. Pope, 127 Ind. App. 386, 141 N.E. 2d 924 (1957).

29. Rule 22, subsection 5, Rules of Supreme Court. This rule required that the brief contain a concise statement of parts of the record which present every error and exception on which appellant relies.

30. Ind. Acts, c. 143, § 3 (1917). This statute contained a detailed procedural scheme for filling appellate briefs and a statement of required content.

31. Solimito v. State, 188 Ind. at 171, 122 N.E. at 578.

32. IND. REV. STAT. § 1302 (1881), IND. ANN. STAT. § 1373 (Burns 1914). This statute, less comprehensive than Chapter 91 of the 1937 Acts, provided that the Supreme Court had power to "establish modes of practice . . . [and] to establish regulations respecting proceedings which are requisite in such event in the exercise of its authority, not specially provided for by law."

33. Epstein v. State, 190 Ind. at 696, 128 N.E. at 353 (1920). See also Parkinson v Thompson, 164 Ind. 609, 73 N.E. 109 (1905).

The distinction between procedural rules to which the court tacitly alluded, that is, a distinction between rules relating to "direct court government" and other procedural rules which more immediately affect the rights of litigants, is not supported by the cases nor by independent analysis.[34] The major characteristic of any procedural rule is to enable courts to dispose of litigation in an efficient manner. Moreover, noncompliance with a rule in either category results in frustration of the ultimate "substantive right."[35] That this supposed distinction is unworkable is suggested by the first case which required judicial treatment of the rules adopted pursuant to the authority conferred by Chapter 91. In this case,[36] the *time* in which appeals could be taken was in issue. The applicable rule of court[37] allowed a shorter time than did the statute;[38] the statute pre-dated the adoption of the rule. Surely, the regulation of the court docket by imposition of time limits concerns the "direct government" of the court; it also severely affects the rights of the litigant. Without reference to this supposed distinction, and relying solely upon the authority of Chapter 91, the court held that the rule had superseded the statute.[39]

The foregoing supreme court cases hold only that the court properly may ignore procedural statutes in conflict with court rules where the enactment of the statute pre-dated the promulgation of the rule and do not answer the question whether Chapter 91 also gives rules precedence where the statute is enacted subsequent to the promulgation of the rule. Nevertheless, the Appellate Court has drawn the inference that the power conferred by the 1937 Act extends to this situation. In this case[40] the

34. See, *e.g.*, In Re Constitutionality of Section 251.18, Wisconsin Statutes, 204 Wisc. 501, 236 N.W. 717 (1931). It was argued that rules regulating the trial of lawsuits were legislative in nature and that power to prescribe them could not be delegated to the courts. The appellant conceded that courts have supreme power in matters of "direct government" such as briefs, transcripts, etc. This contention was rejected, and the court stated that the cases do not sustain this distinction. (236 N.W. at 721).

35. Note that in the *Solimito* and *Epstein* cases, failure to comply with the rule on briefs resulted in dismissal of the appeal. Whether this disposition is with prejudice or appellant can cure the defect and bring up the appeal again, is a matter within the discretion of the court. See Hansen v. Highland, 147 N.E. 2d 221 (Ind. 1958); State v. Jacobson, 229 Ind. 293, 89 N.E. 2d 187 (1951) and Hock v. Circuit Court of Morgan County, 118 Ind. App. 676, 83 N.E. 2d 51 (1948).

36. State v. Smith, 215 Ind. 276, 19 N.E. 2d 549 (1939).

37. Rule 1, now Rule 2-2, Rules of Supreme Court, 1958 Revision.

38. IND. ANN. STAT. § 9-2308 (Burns 1933). This statute provided that appeals could be taken within 180 days after judgment was entered or an adverse ruling on a motion for new trial was ordered. If further provided that the trial transcript would be filed within 60 days after taking the appeal. Rule 1 allowed 90 days for taking appeals and provided that the transcript be filed within 90 days after taking the appeal.

39. State v. Smith, 215 Ind. 276, 19 N.E. 2d 549 (1939). The clause of Chapter 91 repealing all inconsistent laws grounded the court's decision.

40. Holt v. Basore, 118 Ind. App. 146, 77 N.E. 2d 903 (1948).

rule of court[41] was held to prevail over an inconsistent procedural statute[42] which had been enacted after the rule was adopted. The court did not consider it necessary to make a finding that the statute was in fact inconsistent with the rule; it was regarded as sufficient to observe that

> at the time of the enactment of this Act the rule of the Supreme Court . . . was in force. Any Legislative enactment in conflict therewith would necessarily be ineffective. Both by virtue of [Chapter 91] . . . and by reason of its inherent powers, the superior authority for making rules of practice lies in the Supreme Court.[43]

The foregoing analysis of the Indiana case law reveals that the decision in the *Blood* case is a sound application of Indiana precedents. The Indiana Constitution, however, does not compel the conclusion that rules of court are superior to procedural statutes unless it is assumed that the rule-making power is a judicial power and not a legislative one.[44] No case has been found in which an Indiana court stated its position so adamantly. Consequently, the concurrent exercise of the power has occasioned inevitable conflicts; and the function of Chapter 91, as well as that of the inherent power formula, has been to resolve these conflicts in a practical manner. Whether the legislature, which meets only biennially, is more competent to prescribe rules governing practice in the courts than are the courts themselves, is a matter of polemics which cannot be treated here. It would seem sufficient to observe that the Indiana judiciary has made its position clear.

The presence of the separation of powers doctrine in the constitutions of other states has occasioned similar disputes concerning the rule-making power. Of these, only New York would seem to be sufficiently similar to the Indiana situation to justify extended comment.[45] It is be-

41. Rule 1-3: "All defenses shall be provable under a specific denial or statement of no information, which were heretofore available under an answer or reply in general denial." Before this rule was promulgated, contributory negligence was available under an answer in general denial.

42. IND. ANN. STAT. § 2-305 (Burns 1946). This statute requires a specific plea of contributory negligence unless personal injury and property damage actions are joined.

43. 118 Ind. App. at 149, 77 N.E. 2d at 904.

44. See note 14 *supra*.

45. Because of variations in constitutional provisions, dissimilar statutory language and the divergent verbal formulae used in judicial opinions, a state-by-state analysis of the rule-making power would be unproductive. Exhaustive annotations in 110 A.L.R. 22 and 158 A.L.R. 705 summarize the positions taken by most American courts.

The federal practice does not afford useful principles concerning state court rule-making power because federal courts, with the exception of the United States Supreme Court, are statutory courts and are dependent upon Congress for their powers. The rule-making power is presently contained in 28 U.S.C. § 2071, 63 Stat. 104 (1948). 28 U.S.C. §§ 723 (b) and 723 (c) (1934), under which the Federal Rules of Civil

cause the Indiana Constitution of 1851 and the Code of 1852 were largely copied from those existing in New York at the time,[46] that the treatment of the rule-making power by the courts of that State would seem to be significant. In *Hanna* v. *Mitchell*[47] it was argued unsuccessfully that the statute which purported to confer on the court the power to prescribe rules was unconstitutional as an attempt to delegate legislative power. Although the judicial and legislative history of that state is somewhat different from that which has developed in Indiana,[48] the conclusion reached by the court supports the proposition that procedural statutes are subordinate and supplementary to rules of court. The court held that the act granting rule-making power to the court "was but a legislative recognition of a power that had long existed, which was embodied with other pre-existing laws in the Revised Statutes."[49] The rule-making power was held to be "a judicial power inherent in, and expressly conferred upon the Supreme Court."[50] The fact that the New York court considered it the function of the legislature to assist the court in prescribing rules of practice, is illustrated by its statement that the "act creating the convention [of judges] . . . to adopt rules of civil practice merely provided a method and means whereby the court could conveniently and expeditiously exercise its judicial duty. . . ."[51]

The rule-making power exercised by the Indiana Supreme Court is a broad one. Under the Act of 1937, the power extends to regulation of trial court practice as well as appellate court procedure.[52] The logic of the "inherent power" rationale which has been invoked to sustain court

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Procedure were promulgated, is now 28 U.S.C. § 2072, as amended May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158.

"Such Rules shall not take effect until they have been reported to Congress by the Chief Justice at or before the beginning of a regular session thereof. . . ." 28 U.S.C. c. 131, § 2071, 63 Stat. 104 (1948), as amended. "Such Rules shall be consistent with Acts of Congress." See 2 MOORE, FEDERAL PRACTICE. ¶ 102[5], at 9. And in 7 MOORE, FEDERAL PRACTICE. ¶ 86.04[4], at 4965 it is stated:

> The validity of a federal rule is, however, open to challenge on the ground that it improperly affects a substantive right, impairs the constitutional right of jury trial, or improperly affects jurisdiction or venue. *And, of course, Congress which has always exercised a plenary power over jurisdiction and practice could by statute supersede any or all of the Rules. . . .*" (Emphasis added)

46. 1 GAVIT, 37-39 (2d ed. 1950).

47. 202 App. Div. 504, 196 N.Y.S. 43 (1922), *aff'd.* 235 N.Y. 534, 139 N.E. 724 (1923).

48. As traced in Hanna v. Mitchell, the Colonial Laws of the Colony, May 6, 1691, granted rule-making power to the courts which power was said to be equivalent to that which the courts of King's Bench and Exchequer "have or ought to have." 202 App. Div. at 508, 196 N.Y.S. at 45. See note 3 *supra.*

49. 202 App. Div. at 513, 196 N.Y.S. at 52.

50. *Ibid.*

51. *Ibid.*

52. IND. ANN. STAT. § 2-4719 (Burns 1951). See note 10 *supra.*

rules in cases where the power to prescribe rules could not be derived from a statute such as Chapter 91, will not readily support the conclusion that the supreme court has power to prescribe rules of practice for trial courts. It has been argued that such a power inheres in the structure of the court system, that courts which are empowered to review decisions of lower courts necessarily have the power to regulate, at least in broad outline, practice before those lower courts.[53] Most of the Indiana cases do not discuss this aspect of the rule-making power. It was, however, raised in issue when the supreme court revised its rules in 1958.

While it is true that the Indiana Supreme Court did not exercise the power to prescribe trial court rules granted to it in 1843,[54] it does not appear that this reluctance was based on a belief that such an exercise would be unconstitutional. Surely, the modern judicial history does not reveal a marked reluctance to exercise this power. It is therefore difficult to explain the position of two judges who dissented from the adoption of certain rules in the 1958 Revision.[55]

In memorandum opinions,[56] Judges Bobbitt and Emmert dissented from the adoption of the disputed rules. Judge Emmert argued, with scant citation of authority, that the power of the court in this field—prescribing rules for trial courts—was solely dependent upon Chapter 91 and that the supreme court should resist inviting legislative revocation of "this extraordinary power."[57] Judge Bobbitt submitted that as to some of the rules, adoption would be ill-advised because they were either

53. Dowling, *The Inherent Power of the Judiciary,* 11 IND. L. J. 116 (1935).

54. See note 5 *supra.*

55. The rules in question were:

Rule 1-1B, providing for service of process and complaint together, requiring plaintiffs to supply the server with sufficient copies to enable service on all defendants, ommitting the requirement of endorsing a return date on the complaint in cases where personal service is made, and setting up time for answer, giving the trial court discretion to extend the time upon the filing of a verified motion stating the grounds for the requested extension.

This rule, similar to Rule 12 (a), Fed. R. Civ. P., was adopted on October 15, 1957, to take effect on January 1, 1958. But on March 10, 1958, the effective date was suspended indefinitely. WILTROUT & FLANAGAN, INDIANA PLEADING AND PROCEDURE (Supp. 1959, at 130).

Rule 1-1A, also dealing with service of process.

Rule 1-17, setting up a method of administering receiverships.

Rule 1-7B, making provision for trial courts to make findings of fact and render conclusions of law without having been requested to do so by counsel.

Rule 2-17, relating to appellate practice, providing that appellant's brief set out verbatim the relevant parts of statutes relied on for reversal.

56. In Re Adoption of Rule 1-1B, 145 N.E. 2d 294 (Ind. 1957), dissenting opinion by Emmert, J.; Bobbitt, J., concurred; In Re Adoption of Rule 1-1B, 1-1A, 1-17, 1-7B, and 2-17, dissenting opinion by Bobbitt, J.

57. 145 N.E. 2d 294. Judge Emmert added: "There is nothing to prevent the legislature from repealing the existing law granting our court the extraordinary power to make rules of procedure for the trial courts." (*Ibid.*)

unnecessary or were not desired by the bench and bar.[58] As to the other rules,[59] he stated that they were not "proper subjects" for the exercise of the rule-making power. Since the argument did not refer to the distinction between "substance" and "procedure," it is not possible to determine whether his belief that the court should not adopt the questioned rule was based on the theory that it was beyond the court's power or was merely an opinion that the legislature would be more competent in the matter. That the latter would seem more probable is indicated by the observation that he did not question the power to adopt the other disputed rules, asserting only that they were not necessary or were not wanted by the bench and bar. Since Judge Emmert is no longer a member of the court,[60] and since Judge Bobbitt later wrote the opinion in the *Blood* case,[61] which, it will be recalled, concerned the validity of the venue rule, it would seem to be doubtful that the court will hold that its power to enact rules governing trial court practice is more narrow than its power to prescribe rules governing appellate practice.

## CONCLUSIONS

The Indiana Constitution provides that the judicial power is vested in the constitutional courts, and that no department of the state government may exercise any power properly exercisable by either of the other departments. Tight division of governmental powers into three "departments" may afford a logical symmetry in court opinions; it does not always lend itself to practical solution of governmental problems. It is for this reason that the rule-making power has been regarded as neither exclusively judicial nor exclusively legislative. Consequently, the rule-making Act of 1937 is not an unconstitutional delegation of legislative power. Further, enactment of procedural statutes is not an unconstitutional exercise of judicial power. In order to resolve the inevitable conflicts which accompany a concurrent exercise of the rule-making power, the Indiana courts have consistently held that the superior authority in this field inheres in the courts. The Act of 1937 would seem to be a legislative recognition of this inherent power in the field of procedure.

It is concluded that whenever a given rule of court is properly classified as procedural, the Indiana courts will hold that it supersedes all

58. 145 N.E. 2d 295. This was his criticism of the rules providing for changes in service of process, etc. Further, arguing that the court had full access to a law library, he submitted that Rule 2-17 was not needed.

59. Rules 1-1A and 1-17, considering these to be proper subjects for legislative treatment.

60. His term expired at the close of the November term, 1958. He was not re-elected.

61. State *ex. rel.* Blood v. Gibson Circuit Court, 157 N.E.2d 475 (Ind. 1959). See text following note 16 *supra.*

procedural statutes in conflict with it. This is clearly demonstrated by the cases dealing with rules governing appellate practice. Recent indications that the rule-making power may be of less force in the area of trial court rules, do not appear to have been reflected in actual litigation. It has been forcefully argued that procedural statutes exist solely by grace of judicial comity.[62] No Indiana case has been found in which the court stated its position so strongly. The courts have, however, consistently asserted their superiority in the field of procedure when legislative enactments conflict with rules of court.

## THE UNIFORM TRAFFIC TICKET v. INDIANA CRIMINAL PROCEDURE: CONFLICT OR COMPATABILITY?

A procedural device new to Indiana traffic law enforcement has recently been introduced in this state. It will be interesting to note the progress of the uniform traffic ticket and complaint[1] which has been adopted by several Hoosier police departments[2] as a result of the progressive influence of the American Bar Association's Traffic Court program.[3] Will this multi-purposed vehicle withstand the test of Indiana's rigid criminal procedure requirements, or will it fall by the wayside as an unsuccessful experiment? The answer to this question would seem to depend on the ability of the uniform traffic ticket to perform the functions for which it is designed under the requirements of the Indiana law,[4]

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62. See note 14 *supra.*

1. For a composite descripiton of the ticket, its purpose, and mechanics of its use, see: ECONOMOS, UNIFORM TRAFFIC TICKET AND COMPLAINT AND MODEL RULES GOVERNING PROCEDURE IN TRAFFIC CASES (1958), a pamphlet prepared by the American Bar Association Traffic Court Program and published by Weger Governmental Systems, 117 Shiawassee St., Lansing, Michigan.

2. Among the Indiana cities which use a form of uniform traffic ticket and complaint are Evansville, Goshen, and West Lafayette. The Indiana State Police Department adopted the uniform traffic ticket and complaint on January 1, 1959.

3. Stressing the educational advantages of printing the leading causes of traffic accidents on the face of the uniform ticket, the American Bar Association Traffic Court Program has recommended a form of the ticket which is now used by over eleven hundred cities. It has also been recommended by the Action Program of the President's Highway Safety Conference, a Conference of Chief Justices, a Governor's Conference, a Public Official's Safety Conference, and by the National Sheriffs' Association. See ECONOMOS, *op cit. supra* note 1, at inside front cover. See also Economos, *The Uniform Traffic Ticket and Complaint - A Judicial Function,* 1958 WIS L. REV. 189.

4. Briefly, the functions which the uniform traffic ticket is designed to perform are: (1) police notice or citation (2) police arrest record (3) traffic court docket (4) abstract of court record for state licensing authority and (5) criminal complaint or affidavit. The ticket is also designed to facilitate strict accountability,