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# THE RULE-MAKING POWER OF THE COURTS IN LOUISIANA\*

*Albert Tate, Jr.\*\**

Within the past year or so, a miniature storm stirred the Louisiana appellate judiciary, when the State Supreme Court struck down one of the Uniform Rules of the Courts of Appeal of Louisiana in *Wanless v. Louisiana Real Estate Board*<sup>1</sup> and *Jefferson v. Jefferson*.<sup>2</sup> This article is a reflection of the interest these decisions provoked as to the general nature and the extent of the rule-making power possessed by the Louisiana courts.

## 1. GENERAL BACKGROUND

During the nineteenth century, it was generally assumed that the legislature was the proper and principal organ of government to enact the rules governing practice and procedure before the courts.<sup>3</sup> Court-made rules were recognized as valid, however, but only to the extent that they were not in conflict with legislative provisions.

Nevertheless, commencing in the second decade of the present century, leading scholars and practitioners came to general agreement that rule-making powers with regard to practice and procedure should preferably be exercised by the courts instead of by the legislature.<sup>4</sup> In fact, so eminent an authority as Dean Wigmore suggested in 1928 that the making of rules of procedure was so much a judicial function that, under the constitutional doctrine of separation of powers, the legislature "ex-

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1. 243 La. 801, 147 So.2d 395 (1962).

2. 244 La. 493, 153 So.2d 368 (1963). See also the companion case, *State v. Lumpkin*, 244 La. 510, 153 So.2d 374 (1963).

3. Harris, *Rule-Making Power*, 2 F.R.D. 67 (1941); Annot., *Power of Court To Prescribe Rules of Pleadings, Practice, or Procedure*, 110 A.L.R. 22, 43-50 (1936).

4. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 91 *et seq.* (1949); AMERICAN BAR ASSOCIATION SECTION OF JUDICIAL ADMINISTRATION, *IN IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE: HANDBOOK, Rule-Making by the Courts*, 51-57 (4th ed. 1961) [hereinafter cited as A.B.A. HANDBOOK]; *Rule-Making Power of the Courts*, 13 A.B.A.J. No. 3 (March 1927).

ceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties"<sup>5</sup>—a view, which I hasten to add, is not in accord with the general view, and which the good Dean perhaps did not advance with full seriousness.<sup>6</sup>

Dean Roscoe Pound, for instance, pointed out that the legislative intrusion into regulation of judicial procedure was a relatively recent innovation in legal history.<sup>7</sup> Traditionally, he noted, the adoption of the rules of practice had been a function of the high appellate court, which adopted them to regulate practice both before it and also before the inferior courts subject to its jurisdiction. Dean Pound concluded:

"All experience shows that while statutory procedure runs to details, becomes elaborate and over-grown, and is of necessity rigid and unyielding, procedure prescribed by rules of court tends continually to become simple, adapted to its purposes, and adaptable by the simple process of judicial amendment to new situations and needs of practice."<sup>8</sup>

Dean (and later Chief Justice) Vanderbilt summarized the advantages of court-made rules as follows:

"Not only are [court-made rules] made by experts, but they are interpreted and applied by judges who are sympathetic with them. Changes may be made whenever occasion may require without waiting for stated legislative sessions and without overburdening already overworked legislators. Finally, procedure may be made subsidiary, as it should be, to the substantive rights of the litigants. The courts may avoid the snarls of procedural red tape and concentrate on the real questions at issue."<sup>9</sup>

In 1938, the House of Delegates of the American Bar Association adopted a report of its Section of Judicial Administration which, among other things, recommended that "practice and procedure in the courts should be regulated by rules of court, and . . . to this end the courts should be given full rule-

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

6. See Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitution Revision*, 107 U. PA. L. REV. 1, 27 (1958).

7. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926).

8. *Id.* at 603.

9. VANDERBILT, *CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* 23 (1952).

making powers."<sup>10</sup> This has consistently thereafter remained the position of this national professional organization.

At this point we should perhaps clarify what is meant by the full rule-making power which is sought for the courts—or, more precisely speaking, for the highest court of each jurisdiction. Perhaps we can best do this by quotation from two authoritative reports on the subject:

“By ‘rule-making’ reference is made not to those subsidiary or supplementary rules consistent with legislative acts which every state permits its highest court to provide, but to the power to amend, alter, and rescind any rule of practice and procedure, any law to the contrary notwithstanding, which does not abridge, enlarge, or modify the substantive rights of any litigant. This is often referred to as complete rule-making power.”<sup>11</sup> “Thus, full rule-making power in the courts requires that court procedure be wholly removed from the legislative sphere of authority.”<sup>12</sup>

While authorities on the subject now are in general agreement that the rule-making power should primarily be entrusted to the courts rather than the legislature, they do not agree that such judicial rule-making should be totally immune from legislative supervision.

Probably (or at least in the writer's personal opinion) the better view is that the legislature, which represents the voice of the people, should have some powers to assure correction in the event that court-made rules become oppressive or over-technical insofar as the general public is concerned.<sup>13</sup> After all, the judicial reforms of the nineteenth century, in sweeping away cumbersome and inefficient ancient practices and procedures, were largely accomplished by the legislature over the opposition of the bulk of the bench and bar, who had so to speak a vested interest against improvement because of their

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10. 10 A.B.A. REP. 523 (1938); VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 505, Appendix A (1952) contains full text of report. The A.B.A. HANDBOOK at n.4 emphasizes the association's contemporary strong stand in favor of this recommendation. See also Miller, "Minimum Judicial Procedural Standards"—How Met in Louisiana, 9 LA. L. REV. 382 (1949).

11. 1 PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA, *The Rule-Making Power in the Courts* 979 (Louisiana State Law Institute 1954) [hereinafter cited as the LA. ST. L. INST. PROJET].

12. A.B.A. HANDBOOK at 55.

13. Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making, A Problem in Constitution Revision*, 107 U. PA. L. REV. 1, 27 (1958).

expertise in the old procedures, and who therefore resisted the change from them to the more efficient procedures demanded by reformers.

We must emphasize again that the judicial rule-making power recommended by the bar associations and the scholars is not intended to confer on each court, high and low, the power to make its own rules of pleadings, practice, and procedure. Rather, this power is sought only for the highest court of the state, with the rules of procedure and pleading to be adopted by it to regulate the practice before all courts of the jurisdiction.

As a result of this strong national movement, somewhat over half the states entrust more or less complete rule-making power to their highest court.<sup>14</sup> In almost all instances, however, the legislature retains some power to modify or disapprove the court-adopted rules, although the legislative power to do so is sometimes restricted.

## 2. RULE-MAKING POWER IN LOUISIANA

In Louisiana the rule-making power is entrusted primarily to the legislature, not to the courts. As our Supreme Court stated, invalidating a court of appeal rule in 1885, no court "can make and enforce a rule of court that contravenes an express legal [legislative] enactment."<sup>15</sup>

Nevertheless, the principle also has been consistently accepted in Louisiana that, as currently expressed by article 193 of the Code of Civil Procedure of 1960: "A court may adopt rules for the conduct of judicial business before it, including those governing matters of practice and procedure *which are not contrary to the rules provided by law.*" (Emphasis added.)

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14. For summary of state provisions, see INSTITUTE OF JUDICIAL ADMINISTRATION, RULE MAKING POWER OF THE COURTS (1955, Supp. 1962); THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 825-96 (N.Y. Legis. Docket 1959:17, 1959).

15. State *ex rel.* Tebault v. The Judges of the Fifth Circuit, 37 La. Ann. 596, 597 (1885). Likewise, in State *ex rel.* Tooreau v. Posey, 17 La. Ann. 252 (1865), a local court rule was declared invalid as conflicting with a Code of Practice article. The principle that a court rule is invalid if contravening an express legislative enactment was recognized as controlling, although the specific court rule in question was held to be valid, in Louisiana State Bar Ass'n v. Connolly, 201 La. 342, 9 So. 2d 582 (syllabus 11, 12) (1942); Hemler v. United Gas Public Service Co., 175 La. 285, 143 So. 265 (1932); Conery v. His Creditors, 118 La. 864, 43 So. 530 (1907); Iacoponelli v. LeBlanc, 126 So. 2d 864 (La. App. 4th Cir. 1961).

It is also accepted that, as stated by article 191 of this Code: "A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law."

The legislative power over rule-making for courts is not total, however.

The State Constitution provides that the legislature may not enact any local or special laws regarding matters of practice and procedure.<sup>16</sup> Further, the State Constitution in a very few limited instances directly authorizes court-made rules as to some particular procedural or practice matter.<sup>17</sup> In consequence, the State Supreme Court has declared invalid a procedural statute insofar as conflicting with a court rule adopted pursuant to the constitutional authorization to regulate the narrow matter in question.<sup>18</sup>

Of greater significance as a limitation on the legislative regulation of judicial procedure, at least in the recent decade, has been the court's very broad construction of the constitutional provision authorizing the appellate and the district courts "in aid of their respective jurisdictions . . . [to] issue writs of mandamus, certiorari, prohibition, quo warranto, and all other needful writs, orders and process."<sup>19</sup>

Based upon a broad construction of this provision, our Supreme Court in 1959 held unconstitutional a statute prohibiting the judicial issuance of restraining orders or injunctions in matters pertaining to the withholding or revoking of beer permits.<sup>20</sup> Partly in reliance upon this provision also, the court in 1954 had held to be unconstitutional Louisiana's "Little Norris-LaGuardia Act,"<sup>21</sup> which restricted the issuance of restraining orders and injunctions in labor disputes<sup>22</sup>—a decision much criticized at the time as an undue judicial interference with matters properly (and peculiarly) within the competency of the legislature to regulate.<sup>23</sup>

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16. LA. CONST. art. IV, § 4.

17. Miller, "Minimum Judicial Procedural Standards"—*How Met in Louisiana*, 9 LA. L. REV. 382, 385 (1949).

18. *Brott v. New Orleans Land Co.*, 156 La. 807, 101 So. 150 (1924).

19. LA. CONST. art. VII, § 2.

20. *Roksvaag v. Reilly, Collector of Revenue*, 237 La. 1094, 113 So.2d 285 (1959).

21. La. Acts 1934, No. 203, LA. R.S. 23:8401 *et seq.* (1950).

22. *Douglas Public Service Corp. v. Gaspard*, 225 La. 972, 74 So.2d 182 (1954).

23. See *id.* at 989-93, 74 So.2d at 188-90 (dissenting opinion of Justice Haw-

Another, and perhaps the greatest, limitation upon the powers of the legislature to regulate pleading and practice before the courts is contained in the constitutional grant of supervisory powers to the Louisiana Supreme Court, which will be discussed later in this article.<sup>24</sup>

### 3. PROPOSALS FOR CHANGE IN RULE-MAKING POWERS IN LOUISIANA

In accordance with the judicial reform proposals of the American Bar Association, the standing recommendation of the Louisiana State Bar Association is for our State Supreme Court to be vested with rule-making power to regulate civil procedure in the courts of this state. The most recent report of the Louisiana bar's committee with interest in the matter is for "a continuation of the efforts to strengthen and expand the rule-making power of the judiciary."<sup>25</sup>

The 1954 projet for a new State Constitution prepared by the Louisiana State Law Institute contains a proposed section in the judiciary article which provides:

"The *legislature* may authorize the supreme court to make and promulgate general and uniform rules of pleading, practice, and procedure in all civil actions in the courts."<sup>26</sup> (Emphasis added.)

The Reporter's comments under this proposal state:

"The Institute has given very careful consideration to the manner in which the rule-making power should be treated in the Projet, because in Louisiana matters of practice and procedure have always been statutory, and the Code of Practice completely covers not only matters of practice in the

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thorne); *The Work of the Louisiana Supreme Court for the 1953-1954 Term — Labor Law*, 15 LA. L. REV. 255, 324-27 (1955).

24. See section 4 of this paper *infra*.

25. 2 LA. ST. L. INST. PROJET 577, referring to a 1950 Committee Report adopted by the state bar convention that year, and to a 1951 report of the Standing Committee on Jurisprudence and Law Reform of the state's bar association, which was re-adopted in 1953. See 1 LA. B.J. 74 (1953). By letter of March 11, 1964, Colonel Eberhard P. Deutsch, chairman of the Association's Committee on Law Reform, informed the writer that "there has been no change in the State Bar Association's position that the Supreme Court should have rule-making power to regulate procedure in civil cases." He noted, however, that, "it is perhaps fair to add that the issue has not been a live one in recent years, no action apparently having been taken by the Association in this regard since the [1953] report mentioned in your letter."

26. 2 LA. ST. L. INST. PROJET 570 (proposed art. VI, § 10, of new constitution).

courts but extends to such matters as conservatory writs, probate matters, and the execution of judgments. It was decided that any constitutional provision conferring the rule-making power upon the supreme court should be so phrased that the integrity of the Code of Practice itself would at all times be preserved. For this reason it was considered preferable to grant to the supreme court only a supplementary rule-making power and to provide that the legislature in its discretion might authorize the court to go further into that portion of the field of practice and procedure now covered by the Code of Practice."<sup>27</sup>

In a Law Institute study of judicial rule-making power made in connection with the projet, the report noted the arguments in favor of a procedural system provided by the legislature, including "Louisiana's traditional position as a civil law jurisdiction" and the "primary reliance of the Louisiana lawyer upon positive, legislative law." On the other hand, the report noted the arguments in favor of the court's exercising rule-making authority in the matter, such as those stated earlier in this paper.

The report then noted:

"Perhaps, also, a third alternative may be available: the adoption initially of a legislative code, with the power and responsibility for subsequent changes granted to the courts, subject to the legislative exercise of the police power."<sup>28</sup>

#### 4. THE STATE SUPREME COURT'S SUPERVISORY POWERS

The judicial rule-making power in Louisiana cannot be discussed without noting the supervisory jurisdiction of the State Supreme Court.

The State Constitution provides: "The supreme court shall have control of, and general supervision over all inferior courts."<sup>29</sup> Supervisory jurisdiction of this nature was first conferred upon the Supreme Court by the Constitution of 1879, and the Supreme Court has interpreted this constitutional grant of power as plenary, unfettered by jurisdictional requirements, and to be exercised completely within the discretion of that court.<sup>30</sup>

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27. *Id.* at 74.

28. 1 *id.* at 985-86.

29. LA. CONST. art. VII, § 10.

30. See Comment, *Supervisory Powers of the Supreme Court of Louisiana*

The Supreme Court has consistently invalidated procedural statutes which attempt to inhibit or prevent resort to its supervisory jurisdiction by parties before the lower courts.

Recently, for instance, in *State v. Gatlin*,<sup>31</sup> on such ground the court held to be invalid a procedural statute which provided that a trial court's denial of a motion for a directed verdict was not subject to review by any appellate court. In fact, even though unconstitutionality had not been pleaded, the court nevertheless noticed of its own motion the unconstitutionality of the statute and stated that "when its jurisdiction is invoked, the Court has the duty to strike down any legislation which interferes with or curtails plenary power vested in it by the Constitution."<sup>32</sup>

In the *Gatlin* decision, reference was also made to several other decisions, such as *State v. Doucet*,<sup>33</sup> which had held invalid various articles of the Code of Criminal Procedure insofar as they sought to prevent any application to the supervisory powers of the Supreme Court to review interlocutory rulings in criminal proceedings.

We note the supervisory powers of the Supreme Court in connection with rule-making authority, because in several jurisdictions the state's highest court prescribes the rules of practice and procedure for the trial and other inferior courts by virtue of a "supervisory control" given the high court by constitutional provisions similar to that granting supervisory power to our own Supreme Court.<sup>34</sup>

In a 1949 survey made for the National Conference of Judicial Councils, it was indicated that court-made rules prevailed over an inconsistent legislative enactment in at least four of the thirteen states in which the highest court promulgates court rules pursuant to supervisory powers similar to Louisiana's.<sup>35</sup> Nevertheless, such a constitutional grant to the courts of rule-

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*over Inferior Courts*, 34 TUL. L. REV. 165 (1959) for excellent history and summary of the Supreme Court's use of these constitutional supervisory powers.

31. 241 La. 321, 129 So.2d 4 (1961).

32. *Id.* at 336, 129 So.2d at 9.

33. 199 La. 276, 5 So.2d 894 (1942).

34. THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 830 (N.Y. Legis. Docket 1959:17, 1959).

35. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 135-37 (1949). These states seem to be Colorado, New Mexico, North Dakota, and South Dakota, by comparison of the listing of states with constitutional supervisory powers with the listing of states in which court-made rules prevail over contrary legislation.

making authority under its supervisory powers has usually been viewed as a power to be exercised concurrently by the court with the legislature.<sup>36</sup> It is usually exercised by the state's highest court only after the enactment of legislation "enabling" the court to do so and indicating the legislature's withdrawal from the field.<sup>37</sup>

For instance, the New Mexico Constitution provides that its Supreme Court "shall have a superintending control over all inferior courts."<sup>38</sup> (This is quite similar to Louisiana's above-quoted constitutional provision that our own high court "shall have control of and general supervision over all inferior courts.")<sup>39</sup> In 1936, in affirming a conviction and death sentence based upon a short form indictment authorized by the court-adopted rules of pleading and practice, the New Mexico Supreme Court held that, by virtue of its constitutionally granted "superintending control," lodged in itself was the "power to provide rules of pleading, practice, and procedure for the conduct of litigation in the district courts, as well as the rules of appellate procedure."<sup>40</sup> The New Mexico Supreme Court further held that rules of procedure for the lower courts "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."<sup>41</sup>

According to Dean Vanderbilt, the provisions granting supervisory jurisdiction to the supreme courts of several of the other states, including Louisiana, "have had little effect due [only] to the unwillingness of the courts to assert themselves or the failure of the bar to stir them into action." Dean Vanderbilt concluded that, whether or not the legislature voluntarily vacates the field of judicial procedure, "only the will to act is needed to have such provisions furnish the basis for upholding the right of the court of last resort to make rules for other courts."<sup>42</sup>

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36. THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 830 (N.Y. Legis. Docket 1959:17, 1959).

37. *Ibid.*

38. N.M. CONST. art. 6, § 3.

39. LA. CONST. art. VII, § 10.

40. *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 662 (1936). See especially *id.* at 421-22, 60 P.2d at 660-62.

41. *Id.* at 420, 60 P.2d at 660.

42. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 136 (1949).

Despite the Dean's assertion, the constitutional grant of supervisory powers to our State Supreme Court in Louisiana cannot reasonably, it seems to the writer, be claimed as intended to confer exclusive rule-making powers in that tribunal. The consistent course of contemporaneous construction by the Louisiana courts over the decades has recognized and respected the legislative preemption of the rule-making area, through the Code of Practice, the Code of Civil Procedure, and other procedural statutes.

On the other hand, almost certainly the constitutional supervisory powers of the Louisiana Supreme Court are an adequate constitutional basis to sustain the promulgation of court-adopted rules of practice and procedure, if, as in several states, the legislature should by specific enactment withdraw from the field and confirm in the Supreme Court the right to promulgate such rules.<sup>43</sup>

#### 5. WANLESS AND JEFFERSON: A STUDY IN JUDICIAL FRUSTRATION

The state Constitution, as interpreted by our Supreme Court, provides that the rules of practice pertaining to the Supreme Court apply to the courts of appeal until otherwise provided by the State Constitution, by statute, or by the rules of the courts of appeal themselves.<sup>44</sup> A further constitutional provision states that each court of appeal "shall provide by rule for the giving . . . notice" of judgment.<sup>45</sup>

The latter provision furnished the basis by which the courts of appeal in 1960 claimed the constitutional authority to adopt a court rule providing that the delay within which to apply for a rehearing commenced with the date of *mailing* of the notice of judgment, rather than with the date of *receipt* of it by coun-

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43. See, *e.g.*, the New Mexico enactment quoted at full in *State v. Roy*, 40 N.M. 397, 406-07, 60 P.2d at 652. See also sources cited at note 14 *supra*.

44. LA. CONST. art. VII, § 27, as interpreted by *Cox v. Shreveport Packing Co.*, 212 La. 325, 31 So.2d 815 (1947), *affirming* 28 So.2d 617 (La. App. 2d Cir. 1946) on this procedural point. The case was later affirmed on the merits. 213 La. 53, 34 So.2d 373 (1948).

In the interest of completeness, we should at this time refer to earlier difficulties under prior constitutional provisions experienced by the courts of appeal in adopting valid rehearing rules or practices. See *Smith v. Cumberland*, 126 La. 168, 52 So. 255 (1910); *Hargis v. Ozone Lbr. Co.*, 122 La. 126, 47 So. 432 (1908); *Brooks v. Dolard*, 1 McGloin 279 (La. App. 1880).

45. LA. CONST. art. VII, § 24.

sel.<sup>46</sup> It was this rule which the Supreme Court recently held invalid in *Wanless v. Louisiana Real Estate Board*<sup>47</sup> and *Jefferson v. Jefferson*.<sup>48</sup>

The prior history of the attempts of the courts of appeal to adopt a similar rule may be instructive as to the snares and pitfalls involved in detailed constitutional or statutory regulation of rules of court procedure.

The invalidated rule was essentially based upon construing the constitutional requirement that notice be "given" as intending to provide that term with its broad meaning of "issuance" of notice, *i. e.*, a meaning which does not necessarily require the actual "receipt" of this notice before the delay for rehearing commences.<sup>49</sup> The general purpose of the rule was to have the courts rather than the litigants control the date within which the delay begins to run,<sup>50</sup> a concept reflected by numerous other modern procedural statutes providing that notice is effective as of the date of mailing rather than of receipt.<sup>51</sup> (Litigants otherwise may retard the commencement of the delay by refusing or simply neglecting to accept the notice sent to a post office box.)

Conceding that there are persuasive arguments against such a rule,<sup>52</sup> it nevertheless should be possible for a court system to adopt such a rule, when, as here, in its best judgment, concurred in by bar rules advisory committees, the courts' procedure will be thus improved.

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46. Uniform Rules of the Courts of Appeal of Louisiana, as adopted in 1960 and as revised in 1961, rule XI, § 1. In 1963 the offending rule was amended so as to accord with the Supreme Court's subsequent ruling that it was invalid as originally drafted.

47. 243 La. 801, 147 So. 2d 395 (1962).

48. 244 La. 493, 153 So. 2d 368 (1963).

49. See 38 C.J.S. *verbo give* 926 (1943); FUNK & WAGNALL, HANDBOOK OF SYNONYMS, *verbo give* 220 (rev. ed. 1947); RODALE, THE SYNONYM FINDER, *verbo give* 460 (1961); WEBSTER, UNABRIDGED NEW INTERNATIONAL DICTIONARY, *verbo give* 1060 (2d ed. 1959).

50. See excellent analysis of entire question in Comment, *Delay for Filing Applications for Rehearings in Courts of Appeal*, 23 LA. L. REV. 589 (1963). See also *Lacaze v. Hardee*, 199 La. 566, 574, 6 So. 2d 663, 665 (1942): "[I]f the delay for filing an application for rehearing is held not to begin on the day that the notice of judgment is mailed to the attorney of record but the day after he receives actual notice thereof, it would be confusing and difficult for the court to determine, for all practical purposes, when the delay for filing an application for rehearing had expired."

51. See, *e.g.*, LA. CODE OF CIVIL PROCEDURE arts. 1914 (rendition of interlocutory judgment), 1974 (delay to apply for a new trial), 2087 (delay to take devolutive appeal), 2123 (delay to take a suspensive appeal) (1960).

52. See Comment, 23 LA. L. REV. 589 (1963).

Indeed, the Louisiana Second Circuit had earlier adopted a similar rule, which the Supreme Court invalidated in 1942<sup>53</sup> on the ground that it offended a constitutional provision that "no delay shall run until such notice shall have been given."<sup>54</sup> Likewise, for the same constitutional reason, in 1955 the Supreme Court invalidated a 1954 statute providing for the delay for rehearings in the courts of appeal to commence with the "rendition" of judgment.<sup>55</sup>

In connection with the 1958 constitutional revision of the appellate court structure, the courts of appeal therefore secured a 1958 constitutional amendment striking out the former constitutional provision that the delay could not run until the notice was given to counsel.<sup>56</sup>

In reliance upon removal of the previous constitutional bar to the validity of such a rule, the new Uniform Rules of the Courts of Appeal of 1960 provided that notice should be deemed given by deposit in the certified or registered mail, for purposes of commencing the delay within which to apply for rehearing.<sup>57</sup>

In striking down this court rule as invalid in *Wanless* and *Jefferson*, the Supreme Court adhered to a previous interpretation by it that the "giving" of notice was intended to require the actual receipt of this notice rather than merely the issuance or mailing of it. Essentially, however, the Supreme Court also held that the court of appeal rule was invalid as in conflict with procedural statutes adopted in 1960 providing that rehearings must be filed in the courts of appeal within fourteen days after notice is "given" (*i. e.*, "received," according to the meaning ascribed by the Supreme Court to the term.)<sup>58</sup>

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53. *Lacaze v. Hardec*, 199 La. 566, 6 So.2d 663 (1942).

54. LA. CONST. art. VII, § 24, prior to its amendment in 1958.

55. LA. R.S. 13:4446, as amended and reenacted by La. Acts 1954, No. 51 (Supp. 1963) held invalid as to the First and Second Circuits by *Reeves v. Department of Highways*, 228 La. 653, 83 So.2d 889 (1955); *Mid-State Tile Co. v. Chaudoir*, 228 La. 634, 83 So.2d 654 (1955). It is to be remembered that, prior to the 1958 constitutional revision, the delay in the other intermediate appellate courts — the Court of Appeal for Orleans — commenced with the rendition of the judgment, as it still does in the case of the Supreme Court. See *Official Revision Comments*, in LA. CODE OF CIVIL PROCEDURE art. 2166 (1960). See also, *e.g.*, *Antoine v. Consolidated-Vultee Aircraft Corp.*, 217 La. 251, 46 So.2d 260 (1950).

56. LA. CONST. art. VII, § 24, as amended by La. Acts 1958, No. 561. See *Tate, Proceedings in Appellate Courts*, 35 TUL. L. REV. 585, 593-95 (1961).

57. See note 46 *supra*.

58. LA. CODE OF CIVIL PROCEDURE art. 2166 (1960); LA. R.S. 13:4446B (1950), as amended, La. Acts 1960, No. 38.

To recapitulate: in 1954 the courts had secured enactment of a procedural statute which provided that the delay for rehearing in the courts of appeal should commence with the rendition of judgment. In 1960, however, the provisions of the 1954 statute were repealed—in reliance upon the 1955 Supreme Court decision invalidating it because of the pre-1958 constitutional provision.

The situation thus was that, while in 1958 the Constitution was amended so as to remove the bar to the validity of the 1954 statute, the 1954 statute was subsequently amended in 1960 so as to comply with the constitutional requirement as it existed before the 1958 amendment!

At the present time, further efforts have been abandoned to accomplish the desired rules change, which a Law Institute study indicates might require amendment both of the State Constitution as well as of the procedural statutes relating to the matter.

The enormous amount of effort required of the various consultative bodies, and of various organs of the state government, to effect this minor procedural change, and the uncertainties and delays experienced in the meanwhile by the litigants in the process of securing interpretation of the various legislative and judicial attempts to meet the problem — certainly seem to illustrate the assertion of those who claim that detailed statutory regulation of court procedure is generically cumbersome and ineffective.

A better system, it might seem, should permit the tailoring of the court rule, in advance of its promulgation, to meet constitutional or other objections—and non-adoption of the rule if this is not possible. This approach is possible if the court rule is drafted and promulgated by the same court system which will administer and interpret it. The present system, to the contrary, requires the litigants to suffer while *ex post facto* interpretations are being sought at the possible expense of substantive rights and with certain delay in the enforcement thereof.

## 6. CONCLUSION

The national and state bar associations have recommended that the rule-making power be conferred upon the State Su-

preme Court. The intended purpose is that needed procedural improvements may be made by the court system itself, instead of going through the sometimes wasteful, piecemeal, and sporadic process of amending procedural statutes, often productive of litigation and delay and confusion.

The writer is not convinced that such a transfer of rule-making powers is necessarily desirable at this time. On the whole, with the able ministrations of the Law Institute and Judicial Council and the respect shown by the legislature for these law-improvement agencies, statutory rule-making has worked well in Louisiana. However, the *Wanless* and *Jefferson* saga did bring home to some observers the validity of the bar association criticism that there may be much waste motion and inefficient judicial administration inherent in legislative rule-making for the judicial system.

If serious consideration is to be given to the bar association recommendations, we should also consider briefly certain practical questions that may arise in connection with the proposals.

If adopted, the transfer of the rule-making authority from the legislature to the Supreme Court could possibly be by an express constitutional amendment. However, consideration also can be given to effecting such a transfer through simple enabling legislation based upon the supervisory power already granted to our State Supreme Court by our Constitution.

By whatever means any such transfer of rule-making authority may be accomplished, the legislature should, in the writer's opinion, retain general supervisory powers over the rule-making process. In the future, a less progressive court system might take too parochial a view of the regulation of judicial procedure, a matter which is after all the concern of our entire people, not just of the bench and bar.

Professor Levin of Pennsylvania, in his excellent article on legislative control over judicial rule-making, surveys the problem and makes some excellent suggestions for retaining general legislative control.<sup>59</sup> Again, as in the case of the Federal Rules

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59. Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitution Revision*, 107 U. PA. L. REV. 1, 107 (1958): "[A] balance of powers might be established, we believe, by a constitutional provision essentially as follows:

"1. The supreme court shall make rules governing the administration, practice and procedure, including evidence, of all courts in the state.

"2. Such rules, or any statute enacted under this paragraph, may be re-

of Civil Procedure, the rule-making and rule-amendment functions might be exercised primarily by the courts with, however, a provision that rules must be submitted to the legislature for a period in advance of their effective date, so that they will become operative only if not disapproved by the legislature during this waiting period.<sup>60</sup> Or perhaps the legislature could delegate the rule-making function to the courts with certain subject matters excepted, retaining general veto powers still over matters not excepted.

For those who treasure our magnificent Code of Civil Procedure and who fear any disturbance of its integrity should the rule-making power be transferred from the legislature to the courts, a common provision in the enactments by which the legislature withdraws from the rule-making field is to the effect that existing procedural statutes remain in force and have effect as rules only until modified or suspended by the judicial rule-making authority.<sup>61</sup>

If this transfer of the rule-making function should take place in Louisiana, modifications in the Code and other procedural regulations from time to time would most probably take place in approximately the same manner as they do now. That is, any recommended change would be made only after careful study by the Louisiana State Law Institute and consultation with bar and judicial advisory bodies.

The chief difference would be that the changes would be promulgated by court rule, instead of being enacted as legislation through formal legislative procedures at the next legislative session.

Any Supreme Court regulation of court rules will still provide, subject only to the general provisions which that tribunal adopts, for the courts of appeal and other inferior tribunals to adopt, as now, their own rules to regulate practice before

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pealed, amended or supplemented by the legislature by two-thirds vote of the members elected to each house, and any such enactment shall have the force and effect of statute during the six years next following the date of its taking effect and shall thereafter have effect as rule of court until repealed or amended by the supreme court or by the legislature.

"In consideration of any bill proposing an enactment under this section, the chief justice of the state shall be given opportunity to be heard."

60. 64 Stat. 158 (1950), 28 U.S.C.A. § 2072 (1959). See BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 6, at 24 *et seq.* (1960).

61. See New Mexico enactment to which reference is made at note 43 *supra*. See also THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 830 (N.Y. Legis. Docket 1959:17, 1959).

them. A general procedural provision governing the entire judicial system may prevent the adoption by a court of a desired rules change, such as that described above sought by the courts of appeal. If so, amendment of the general provision should be easier to accomplish—if genuinely in the public interest as attested by the Law Institute and Judicial Council study and recommendations.

If accompanied by study and consultation as above outlined, procedural changes should be in the public interest when made. A procedural change will be adopted by the same court system which administers it, so therefore its application and interpretation should be less productive of the litigation and confusion which has sometimes resulted from procedural legislation in the past.

These, then, are the advantages which invite our consideration of a transfer of the rule-making authority from the legislature to the courts.

Against change in rule-making function, on the contrary, is the undoubted success that Louisiana has on the whole experienced with legislative rule-making. This success has been produced largely by the confidence the legislature has shown in the judgment of the Law Institute and of the Judicial Council, as well as by the great ability and vision shown to date by these official organs for the continuous improvement of law and of judicial administration.

Further, although the necessity for legislation approving a rules-change has to some extent been a cumbersome procedure inevitably involving subsequent litigation during which the courts interpret the procedural enactment, this bilateral exercise of the rule-making function has also provided a safeguard against possible arbitrary abuse through the unchecked unilateral exercise of such function by the courts alone.

At any rate, the recent developments in modern procedural thought concerning the rule-making powers deserve the attention of the entire legal profession in Louisiana.