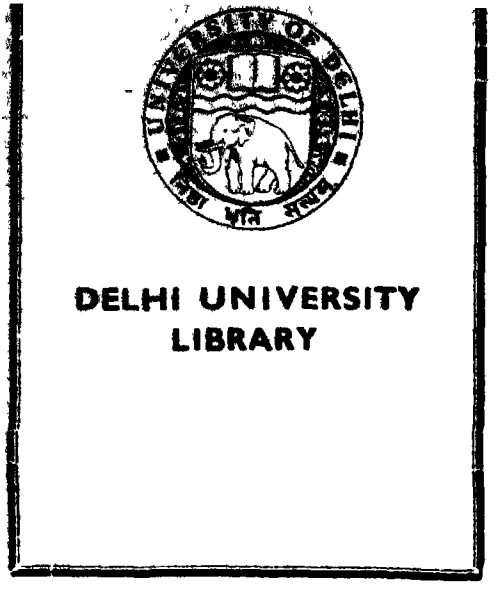

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THE JUDICIAL ADMINISTRATION SERIES

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION

A SURVEY OF THE EXTENT TO WHICH THE STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR IMPROVING THE ADMINISTRATION OF JUSTICE HAVE BEEN ACCEPTED THROUGHOUT THE COUNTRY

EDITED BY
ARTHUR T. VANDERBILT

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THIS VOLUME IS DEDICATED TO

JOHN J. PARKER

CHIEF JUDGE OF THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

IN RECOGNITION OF HIS OUTSTANDING SERVICES
OVER THE YEARS IN THE IMPROVEMENT OF
THE ADMINISTRATION OF JUSTICE
THROUGHOUT THE COUNTRY

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INTRODUCTION

One of the strangest phenomena in the law is the general indifference of the legal profession to the technicalities, the anachronisms, and the delays in our procedural law. While our substantive law, dealing with legal rights, has been developing from year to year, gradually adapting itself to the changing needs of the times as the result of the unstinted efforts of judges, lawyers, legislators, and administrative officials laboring in the workaday world and of law professors reading and reflecting in their libraries, our procedural law, dealing with the means of enforcing our legal rights, has been relatively neglected. Various reasons have been assigned for this singular attitude of judges and lawyers toward the problems of judicial administration such as the selection and tenure of judges, the qualifications of jurors, modern methods of preparing a case for trial, simplified rules of pleading, practice and evidence, for all of which the legal profession is peculiarly responsible. One suggestion is that it is a case of the shoemaker neglecting his barefoot children; lawyers are so preoccupied with the substantive problems of their clients that they have little time to devote to the great problem of ways and means in the law that we call judicial administration and procedural law. Another suggestion, less complimentary to the profession, is that while we are adept at developing the substantive law, which concerns the public generally, we are loath to change our own world of procedure, even in favor of something concededly better.

Whatever the reason may be for our neglect, we cannot escape the unenviable contrast between the streamlined efficiency of the age of the assembly line and of the scientific methods of modern technology and our cumbersome and inefficient methods of utilizing our judicial machinery. In many states modern business has to rely on outmoded procedures,

some medieval in origin, some reminiscent of the horse and buggy age, to enforce its legal rights. It is not remarkable that businessmen have sensed far more vigorously than most lawyers that a legal right is worthless if it cannot be enforced, and therefore that procedural law is as important as substantive law. True, there have been forward steps taken here and there throughout the country in various phases of procedure , but it is chiefly to the federal courts, thanks to the crusade for procedural reform of the American Bar Association for a quarter of a century and the leadership, at a crucial moment, of Homer S. Cummings as Attorney General, that we must look for an example of what can be done for judicial administration by simple modern rules of civil and criminal procedure and an efficient administrative establishment to aid the courts in functioning in a businesslike way. Due to the influence of the American Judicature Society, the judicial councils in some of the states, and occasionally a courageous judge or bar association leader there has been some partial reform in our procedural law in various states, but by and large such achievements—difficult to bring about as they were, working against the current of professional complacence—have been piecemeal and a matter of patchwork rather than a thoroughgoing reorganization to meet the present-day requirements of a complicated civilization. The plain truth is that in most of the states there has been neither sustained impetus for judicial and procedural reform nor the leadership that is indispensable to overcome the inertia or active opposition to judicial and procedural reform.

Even within the American Bar Association the impulse for judicial reform has been of relatively recent origin. We must not forget the extremely frosty reception that its annual meeting at St. Paul in 1906 gave to the brilliant yet matter-of-fact presentation by a young lawyer from Nebraska, Roscoe Pound by name, of "The Causes of Popular Dissatisfaction with the Administration of Justice," an address which has since come to be recognized by a younger generation in the law as a classic. It should be required reading once a year for every judge, lawyer, law professor, and student on the day he re-

turns from his summer vacation and faces his work anew. We must remember, too, that although Thomas W. Shelton, as chairman of an American Bar Association committee, agitated for eighteen years for simplified procedure through judicial rule-making, after his death his successor reported his pessimism as to the possibilities of achievement and two years later his successor, in turn, who happened to be a federal judge, expressed his personal opinion that the rule-making power for the courts was undesirable and the following year on his recommendation the committee was discontinued. The work of a lifetime might have been lost but for the fact that a year later Attorney General Cummings sponsored the same bill that had been so often defeated in Congress and it promptly became law. Manifestly judicial reform is no sport for the short-w nded or for lawyers who are afraid of temporary defeat. Rather must we recall the sound advice given by General Jan Smuts to the students at Oxford: "When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop."

Although at times procedural reform in this country may have seemed to progress with the imperceptible speed of a glacier, it may be well for us to recall that in England the agitation for improving the methods of the courts continued well over a century. It required, for example, a series of campaigns from 1836 to 1907—a period of 71 years—and 28 separate bills and the conviction of more than one innocent man to obtain as fundamental a right as an effective appeal from a judgment of conviction in a criminal trial court! The war in England for procedural reform, moreover, was won, not by judges and members of the bar, though a few of the more farseeing and courageous of them furnished the required leadership, but in the main by laymen. Here again we touch another striking paradox of the law: by and large laymen are not dissatisfied with our substantive law, but merely with the technicalities of outmoded procedure and the interminable and unjustifiable delays of the law and, occasionally and unfortunately, with the shortcomings of conscience or of

mind or the lack of good manners of a judge. Yet in many places, the bench and the bar, which have the greatest stake in public respect for the law as well as the primary responsibility for its well-being, have neglected to care for their birthright, leaving the task to enlightened laymen with sufficient perspective to perceive the importance to the body politic of courts that have the confidence of the public and procedure that commands its respect.

The average lawyer's aversion to all the problems of procedure is in itself an interesting subject of inquiry. It originates generally in his law school work. The courses in procedure are likely to be the most unpopular in the curriculum. From the day he enters law school his interest centers on substantive law, generally private substantive law, or "bread and butter" subjects as he calls them. He learns as much procedure as he must to pass his bar examinations and then he hopes to be through with it as far as it is professionally possible. His law school dislike for procedure seems to cause a fixation against any interest in improving the work of the courts, however clear it may be that such a task is the primary responsibility of his profession and however obvious it may be that the deficiencies of procedure are bringing all the law into disrepute with the public. To his law school aversion to procedure is added, once he is admitted to the bar, the fact that any change in procedure will jeopardize his slight learning in this field. He feels aggrieved at the very thought of having to learn a new system of procedure, even if it is in fact a much better one. Moreover, if the proposed changes involve such fundamental matters as the simplification of the organization of the courts or the method of selecting judges so that by espousing these changes he may find himself in opposition to such judges as may prefer to maintain the existing order, he is almost sure to find reasons, convincing to himself at least, why he is opposed to any change. And so the average lawyer will endure incompetent judges, unfit jurors, technical systems of pleading, needlessly complicated practice, and inexcusable delays in the trial of cases and the disposition of appeals as if these vices were inherent and inescapable in the administra-

tion of justice. Every state borrows freely from other states in each branch of the substantive law, but in the sphere of procedure they have been, for the most part, peculiarly provincial.

In any period of unrest and of conflicting political, economic and social ideas the law and the courts that administer it are peculiarly the target of attacks by enemies both within and without the country. And, as I have just said, these attacks center not on the substantive body of the law but on its defects of procedure or of personnel. In 1937 these considerations combined to induce a group of eminent judges, lawyers and law professors in the Section of Judicial Administration of the American Bar Association under the leadership of Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit to devote themselves to the formulation of recommendations for the standards that were necessary to make our procedure workable and thus save our entire body of law from attack. These recommendations were embodied in seven reports dealing with judicial administration, pretrial practice, trial practice, trial by jury and jury selection, the law of evidence, appellate practice and administrative agencies. The recommendations of these seven reports were supported by a wealth of authority. Basic to these reports was the conviction that the battle for improved judicial procedure had to be fought on a nationwide front if the battle was to be won in time, and this could be done successfully only with the aid of the entire legal profession and of intelligent and public spirited laymen. At that time it was my privilege to write a foreword to these seven reports and in it I characterized each of them as embodying in a few pages a lifetime of study and of the professional, judicial, or professorial experience of the respective committee chairmen aided by distinguished committee members, on topics of which they were the recognized experts. I emphasized the fact that these reports dealt with the *minimum* standards that were needed in a *practical* way to make our court procedure work in the twentieth century and I added:

> Note well the words "minimum" and "practical." The reports

> of these seven committees make no attempt to scale the heights of perfection or to reach out for the idealistic. They are entirely utilitarian in their objective. They were prepared with a realistic consciousness of the very genuine difficulties involved in inducing our judges and our lawyers to change any of their working habits in the field of judicial procedure. Hence the recommendations of the seven committees are limited in number to those matters which are absolutely essential if the administration of justice in America is to be responsive to the needs of our times. The recommendations are confined to matters of *fundamental importance*—I might almost say of rudimentary importance. They are matters on which all who have taken the time to reflect are in substantial agreement. Some day—and, I hope, in the not too distant future—a more enlightened generation will look back on these reports and wonder that it should have been necessary to write them, necessary to agitate for the recommendations set forth in them, and necessary, perhaps, in some states to invoke the aid of enlightened and farseeing laymen to bring about their adoption. These reports, let me make it very clear, are not intended to be all inclusive in scope, nor definitive in objective. They are merely *ad interim* contributions to the solution of practical problems of paramount importance to litigants in this country.

The seven committee reports, as approved by the Section of Judicial Administration, were distributed to every member of the American Bar Association for study well in advance of the annual meeting at Cleveland in 1938, and it was with the full knowledge of its members that in many respects their own states fell short of complying with these minimum requirements of sound judicial administration that the Association unanimously approved the reports with a single exception in appellate practice that was recommitted to committee. A resolution was passed making the advocacy of these recommendations a special program of the Association and directing the constitution of committees of the Association in the several states to press for the adoption of the recommendations.

The problems of judicial selection and tenure were not considered in the seven reports, not because the Section and its committees were oblivious to the fundamental importance of

these topics, but because they were the concern of a special committee of the Association and, even more to the point, the Association had declared its policy the year before, in 1937, in favor of a method of selecting judges that would ameliorate the unfortunate effects of the direct election of judges. In sharp contrast to the appointment of judges to serve during good behavior in the federal courts and in all other countries where the common law prevails, the direct election of judges is still the method pursued in most states. This method has the inevitable effect of involving judges in partisan politics and to the extent that they are so involved their independence in thought and action is always subject to question.

The system of direct election of judges is an unhappy legacy from the popular revolt of a century ago often called the Jacksonian Revolution. A judiciary appointed to serve during good behavior was then supplanted in most states by judges popularly elected through partisan nominations and for short terms out of deference to the "new" political doctrine of rotation in office, which was popularly expressed in the slogan "To the victor belong the spoils." Where Jefferson had wisely proclaimed that all men were created equal, the politicians of the Jacksonian era asserted that all men were in fact equal. Lawyers were despised, ostensibly for assuming to know something ordinary men did not know, but actually because they often appeared for unpopular creditors. Judges were subjected to another and more fatal line of reasoning: if all men are equal, all lawyers, being men, are equal, and so one lawyer was as much entitled to be a judge as any other, if the public so willed. Hence, elections for short terms and rotation in office so that each lawyer has a better chance to be elected a judge and, above all, that every judge should be "kept close to the people," even at the cost of becoming a partisan, participating in frequent campaigns and political manoeuvering at the price of his independence. That an elected judiciary has proved workable at all has been due to such factors as the gradual extension of judicial terms, the movement for nonpartisan judicial nominations, the impartial endorsements of judicial candidates on

the basis of professional standing by bar associations and civic bodies and almost everywhere the appointment by governors of many lawyers of high standing to fill the numerous vacancies in judicial office for which they would never have been willing to campaign. The American Bar Association's plan for judicial selection described in Chapter I takes advantage of all this experience by providing for the filling of judicial vacancies by executive appointment from a professionally selected list, and then allowing the incumbent to be reappointed or to run for reelection on his record with no opposing candidates. This method is the next best system to a judiciary appointed on a nonpartisan basis during good behavior, and in the profession and with the public it is continually gaining support for a nonpartisan and independent judiciary. Perhaps the greatest advantage of the American Bar Association plan for selecting judges is that the transition to it from the method of direct political elections is an easier one to make, psychologically, than to return to the traditional system of appointing judges, desirable though it is.

The year 1938 was marked by another remarkable event in judicial reform. The National Committee on Traffic Law Enforcement, finding itself utterly without accurate data as to what was happening in traffic cases in the police courts and before justices of the peace, other than the continual flood of complaints coming from aggrieved litigants, and fearing that these courts were not doing what they should to retard the rising tide of traffic fatalities and accidents, retained George Warren of the Trenton, New Jersey, bar to make an impartial survey of the work of these local courts. For financial aid in making possible those studies as well as the compilation of this volume, the cooperation of the Automotive Safety Foundation is acknowledged with appreciation. Mr. Warren not only used extensive questionnaires, followed by correspondence with traffic judges and justices of the peace throughout the country, to obtain information about their work, but he conducted field investigations and conferences in forty-nine jurisdictions over a period of a year and a half. His findings and conclusions received the benefit of the criticism

of the members of the National Committee on Traffic Law Enforcement, and in 1940 his report, including fifty-seven recommendations for improving the work of the traffic courts, received the approval of the National Committee on Traffic Law Enforcement, the National Conference of Judicial Councils, the American Bar Association and its Sections of Judicial Administration and of Criminal Law, and later of the International Association of Chiefs of Police.

Not only did the Warren survey pursue a new method in legal research of the law in action through a nationwide investigation in the field, but it aroused for the first time a general interest on the part of lawyers as to what was happening in the police courts and in courts of the justices of the peace with regard to respect for law and government. For the first time it came to be realized that for almost all of our citizens those local courts of first instance are in fact the courts of first and last resort. It is in these courts that most of our citizens gain their ideas of American justice and acquire—or lose—their respect for law.

The year 1940 witnessed two further developments of importance in the field of procedural reform, both of which have had a direct bearing on the preparation of this book. First, the American Bar Association established its Special Committee on Improving the Administration of Justice to promote the program of procedural reform adopted by the Association two years before. Very properly Judge Parker was made chairman of this committee to which associate members from every state were added. The committee has labored faithfully and effectively over the years, its work in the several states being stimulated immeasurably by the remarkable improvements that were being made in federal jurisprudence through the federal rules of civil and criminal procedure and the Administrative Office of the United States Courts. But even the most industrious committee of volunteers, although inspired by the successes in the federal courts, could not hope to wage a successful campaign on many fronts in forty-eight jurisdictions in the face of the lethargy and in some cases the

active opposition of other members of the bench and bar to whom they have a right to look for aid.

Although the American Bar Association may claim a great share of the credit for the remarkable advances in the improvement of the administration of justice in the courts of the United States, the regrettable fact must be recorded that in the several states, with rare exceptions, progress has not stemmed from the bench or bar, but, as in England, from the efforts of intelligent and often irritated laymen. The interest of laymen in our courts has grown as the attacks on our system of courts and government have increased. For years they have been valuable members of some judicial councils and more recently of judicial conferences. Where the bench and bar cannot or will not modernize the judicial structure and methods, what choice has one but to encourage laymen to undertake the task? These considerations led the Committee on Improving the Administration of Justice to urge the publication of a book which would make clear to lawyers and laymen alike the extent to which each state was measuring up to the minimum, practical standards of judicial administration of the American Bar Association.

The decision to make such a factual survey was the second happening of importance in the field of procedural reform in 1940. The task was committed by the Association to the Section of Judicial Administration and the Junior Bar Conference, which called to their aid the National Conference of Judicial Councils. It enlisted the aid of Professor William W. Blume of the University of Michigan Law School in preparing six elaborate questionnaires. A seventh questionnaire on state administrative law was the work of Mr. John W. Willis of the District of Columbia bar, and the eighth one on judicial selection and tenure was prepared by Judge John Perry Wood of California. The Junior Bar Conference undertook to provide state reporters to answer the several questionnaires, this work being under the direction successively of Paul B. De Witt of the New York bar, Philip H. Lewis of the Kansas bar, John E. Buddington of the Massachusetts bar, Wendell B. Gibson of the Iowa bar, John S. Howland

of the Iowa bar, William N. Ethridge, Jr. of the faculty of the University of Mississippi Law School, and Miss Rosemary Scott of the Michigan bar. The war retarded some of the answers to the questionnaires, which accounts in some measure for the delay in the publication of this book, but much more time was lost through the obvious failure of some of the state reporters to comprehend some of the questions submitted to them. Our ineptitude for dealing with problems of procedure was demonstrated even among those who obviously desired to be useful, and the consequent necessity of seeking substitutes caused further delay. Another great difficulty arose from the fact that seemingly simple legal terms used in the questionnaires often turned out to mean one thing in one state and something quite different in another. We may well envy the physicians and engineers their scientific terminology. Theirs may sound like a strange jargon to nonprofessional people, but they at least know what they mean when they use professional terms.

The onerous task of tabulating the returns to the questionnaires from the forty-eight states and of preparing summaries thereof by topics was performed by Samuel Allcorn, Jr., of the New Jersey bar, Jerome J. Doherty of the District of Columbia bar, James P. Economos of the Illinois bar, Mrs. Edith S. Levin, Research Fellow of the School of Law of New York University, Bernard Schwartz of the faculty of the same institution, and Willard G. Woelper, Administrative Director of the Courts of New Jersey. At least two persons from each state, generally a judge or a practitioner and a law school professor, checked the summaries. No effort has been spared in the attempt to obtain accuracy in the presentation of all of the available facts, but it is inescapable in a work of this nature that is the product of so many hands that occasional errors of fact or of interpretation should occur, despite every precaution to avoid them.

After the summaries had been completely checked, and in many instances rechecked, the several chapters of this book were prepared. In this phase of the work I am particularly indebted to Mr. Economos for his assistance on Chapter VII,

and to Professor Schwartz for his aid on Chapter X; these two chapters respectively are essentially their work. I am under especial obligation to Mrs. Edith S. Levin for her painstaking work on the successive drafts of the other chapters and for the preparation of the maps, which I regard as a most important feature of this book, and to Mrs. Elsie Vine for her skill in preparing the manuscript for the printers, and to both of them for seeing the work through the press; without their effective aid the publication of this book, attempted in the midst of unusually arduous judicial labors and only because of my inability to secure another editor, would not have been possible. To all the friends I have named, to the many judges, lawyers and law school professors who have at considerable inconvenience to themselves supplied essential information for compiling this volume—a company so numerous that it would not be possible to mention each of them here by name—I am truly grateful.

So much for the origin of this volume; now for a few words on the effective use of it. In writing these lines I have in mind that it will probably be as much used by laymen as by lawyers.

Aside from inertia the greatest obstacle to the modernization of judicial administration has been the lack of complete detailed knowledge of what should be done in each state to give it a reasonably effective procedural system. Such knowledge the present volume supplies. The approved standards, originating as the recommendations of distinguished committees, obtained the unanimous approval of the American Bar Association, which has been urging their adoption in the several states for over a decade. These standards are thus supported by expert opinion and by the rank and file of the profession throughout the country. Thus, in urging their acceptance in any state one is not sponsoring something new and untried, but measures which have proved themselves effective in actual practice in forward-looking jurisdictions. It is important always to recall that the recommendations deal with *minimum* standards of *practical* application and not with something academic or utopian.

The comments on the state of the law in each jurisdiction

as to each recommendation are purely factual. The book simply records whether or not—or in what degree—each state is complying with the standards of judicial and procedural reform accepted by the American Bar Association. Anyone desiring to know, as all intelligent readers will, the reasoning that led to the adoption of the several recommendations has merely to turn to the appropriate sections of the seven committee reports printed in the appendix. The main part of this volume, with a single group of exceptions that I shall mention later, attempts merely to record the facts as to the degree of acceptance of each recommendation in each state as reported to us by our representatives in each state. While the committee reports in the appendix are often critical, the record of the recommendation in the main part of the volume is, for the most part, strictly objective. Whatever is, is. It is for the bench and bar or the public to translate whatever is into what ought to be.

To aid in a quick perception of where each state stands on each recommendation in relation to every other state, and also to indicate the degree of acceptance or nonacceptance of each of these minimum, practical standards on a nation-wide basis sixty-two maps have been inserted in the volume. A mere glance at the relatively small area of white space on these maps will disclose the extent of the battles yet to be won before the war for judicial and procedural reform will be over. It is expected that within the coming year a series of articles, accompanied by similar maps, showing the procedural status of each state may be published in the law reviews and bar association journals in an effort to bring home to the bench and bar the procedural problems confronting them. It is hoped that the law schools will see fit to bring these local articles and maps to the attention of their students so that they, unlike so many who have gone before them, may become "procedure-conscious" and so unwilling to tolerate less than minimum standards in the courts in which they will soon be practicing. It is hoped, too, that influential laymen in many states—editors, educators, public officials and other leaders of public opinion—will sense the significance of a

nationwide campaign for improving the administration of justice on the promotion of the ideals of American life and be drawn to lend their aid to the cause and, if need be, to accept leadership in it as laymen have done in England for over a century. The task is one, everybody has come to realize, that can only be achieved state by state, and in each state by the people of that state. All that the American Bar Association or the National Conference of Judicial Councils or any other interested national body can do is, as here, to furnish the standards and give the necessary data. The battle against inertia or ignorance or misguided self-interest must be fought locally, although each statewide battle will be won the easier when it is known that similar campaigns are being fought elsewhere and sometimes won. It would be unfair not to warn anyone who is at all concerned about the courts that it is futile and against general experience to expect early and easy victories in this field, unless, of course, the bench, the bar and the public unite to promote judicial and procedural reform as a professional or patriotic duty.

It may well be asked, what is there about these recommendations that has made it so difficult to win acceptance for them? The men who made these recommendations are practical men, numbered among the leaders of their practical profession, and the organizations that have sponsored them are made up of practitioners, not theorists. There is nothing radical or experimental about any of these recommendations. I cannot take the space here to summarize all of them, but the key ideas are so simple as to be almost axiomatic. For example:

> Practice and procedure in the courts should be regulated by rules of court; and to this end the courts should be given full rule-making power. . . .
>
> To have effective judicial machinery within the state, it is not sufficient that each judge shall discharge his functions efficiently in the trial of a case. Some judge or judges within the judicial system in the state must be charged with the responsibility of the efficiency of the system in the state as a whole. . . .
>
> Courts in the metropolitan areas should make provision for pretrial hearings, and other courts should give consideration to the procedure with a view of adopting it if justified by local conditions. . . .

> Jury service today is the chief remaining governmental function in which lay citizens take a direct and active part, and trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community. It is highly important that everything be done which can be done to insure the most efficient methods of jury selection and trial procedure. Jurors should be selected by commissioners appointed by the courts. . . .
>
> The common-law concept of the function and the authority of the trial judge should be uniformly restored in the states which have departed therefrom. . . .

Surely these ideas are not revolutionary. On the contrary some of the recommendations involve a return to common-law concepts that were unwisely abandoned a century or so ago by various states; others represent the gradual advance in simple, common-sense methods of judicial administration, as, for example, the pretrial conference as a device for giving the judge a preview of the trial, simplifying the trial and thus making it a more intelligent proceeding, and often producing a settlement. Again, the administrative director of the courts is a logical development that has evolved from the idea of an administrative judge since the seven reports were drafted eleven years ago, for judicial administration as a science and an art is not static but like the law itself is constantly growing. These recent developments constitute the group of exceptions I referred to earlier in saying that the contents of the book, as distinguished from the appendix, are mere reporting; in presenting the ideas which have developed and found acceptance since the original reports were drafted, it has been necessary first to explain and then to justify them, just as the reports in the appendix did for the original recommendations.

Finally it remains to be said that these minimum, practical recommendations for improving the administration of justice do not cover all the matters that are essential to a modern judicial system. They do not deal, for example, with the education and character of the members of the bar, certainly an important matter in administering justice, nor with the vital question of how far the judges live up to the Canons of Judicial Ethics, a matter which varies widely from state to state or even from county to county within a single state. Here will be found

no standards stating the qualifications of members of administrative tribunals, whose work is akin to that of judges. These other matters are all of vital importance to litigants and to the public, and they were so regarded by the draftsmen of the seven reports. The draftsmen, however, wisely concentrated on the fundamental problems of judicial administration, knowing that if the minimum standards they advocated were achieved, all the other desirable advances in improving the administration of justice would inevitably follow.

The minimum, practical standards of judicial administration of the American Bar Association present a definite challenge to all who understand the importance in our system of government of respect for law, for respect for law is impossible without respect for the work and the working methods of the men, both judges and lawyers, who help administer the law. It is in the courts, and not at the hands of the chief executive or the legislature, that men and women feel the keen, cutting edge of the law, and they therefore judge the law by what they see and hear in courts, and by the character and manners of judges and lawyers quite as much as by the law itself. Viewed in this light what seems at first blush to be a mere matter of judicial and procedural machinery suddenly is seen to be of prime importance, when we recall that it is this very matter of machinery—the anachronisms, the technicalities and the absurdities of procedure, and the inexcusable delays in getting to the disposition of the merits of controversies —along with occasional maladjustments of judicial temperament or character that has in many places been creating disrespect for law at a time when everyone should be continually conscious of the fundamental principle that it is the law alone and its adequate enforcement that make individual liberty possible. What more important cause can there be to engage the support of any intelligent citizen, be he lawyer or layman? To such patriotic citizens as may be interested in these vital matters in a time of unrest and doubt, this volume is tendered not as a literary effort but as an arsenal of facts.

August 31, 1949 ARTHUR T. VANDERBILT

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION

CHAPTER I

JUDICIAL SELECTION, CONDUCT AND TENURE

Recommendation Adopted by the American Bar Association in 1937

. . . in its judgment the following plan offers the most acceptable substitute available for direct election of judges:

(a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.

(b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.

(c) The appointee after a period of service should be eligible for reappointment periodically thereafter, or periodically go before the people upon his record, with no opposing candidate, the people voting upon the question "Shall Judge Blank be retained in office?" [1]

INTRODUCTION

Although ours is a "government of laws and not of men," the character, intelligence and experience of those persons holding judicial office are of paramount importance. There is a fundamental relation between the quality of judges and the proper administration of justice. The problems of the mode of selection and of tenure of office are basic to securing qualified persons to hold judicial office. The need for an independent judiciary secure in tenure received early recognition in the discussions of the federal constitution.[2] The mode of selection of the judiciary therefore is a basic problem of judicial administration. The original mode of the selection of judges, ap-

[1] 62 A.B.A. Rep. 893-897 (1937).

[2] The Federalist Papers, No. 78. See also Hyde, "Judges, Their Selection and Tenure," 22 N.Y.U.L.Q.Rev. 389 (1947); Pound, "Introduction" to Haynes, The Selection and Tenure of Judges ix-xix (1944).

pointment by the executive, began to be abandoned in many states a century ago when the impact of the Jacksonian democracy provoked a conflict "over what was variously called the 'independence' or 'irresponsibility' of the judiciary," and resulted in most states in a shift to popular, partisan election of judges.[3] In recent years a growing recognition that the standards of judicial character and conduct were not what they should be, has led to many studies and a variety of attempted solutions of these problems.[4]

In 1937 the House of Delegates of the American Bar Association approved a plan of judicial selection as a substitute for the direct election of the judiciary, and since that date its Special Committee on Judicial Selection and Tenure and the Section of Judicial Administration have continued to promote the plan.[5] This plan, advocated for adoption in all states not having an appointed judiciary, provides for the appointment to vacancies on the bench by the governor or another elected official or officials, such appointment being restricted to a list proposed by a specially constituted commission or board. The appointee at the end of a certain term, and all other incumbents at the expiration of their terms, must then stand for election on a ballot in which the only vote possible is in the affirmative or negative in answer to the question of whether the judge should be retained in office.[6] Thus, while appointment to judicial office rests with the executive originally, his discretion is

[3] Schlesinger, The Age of Jackson 15-16 (1946). See also Haynes, op. cit. supra n.2, at 80 et seq.; Hyde, op. cit. supra n.2, at 391.

[4] Haynes, op. cit. supra n.2, at ix; 23 A.B.A.J. 102-108 (1937); 62 A.B.A. Rep. 893 (1937); "Present Status of Judicial Selection Plans," 22 J. Am. Jud. Soc'y 121 (1938). Cf. 63 A.B.A. Rep. 147-148, 406 et seq. (1938).

[5] "Report of the Special Committee on Judicial Selection and Tenure," A.B.A. Advance Program, 71st Annual Meeting 91-92 (1948); A.B.A. Handbook, The Improvement of the Administration of Justice, 75-83 (1949).

[6] As approved by the House of Delegates. This plan, as indicated at the head of this chapter, permitted alternatively confirmation by the senate or legislative body and either reappointment or election on the appointee's record. However, the scheme as originated and as proposed by the Committee on Judicial Selection did not provide for reappointment, but was limited to election on the record. The plan so conceived is the one popularly known as the approved American Bar Association and Missouri Plan. See A.B.A. Handbook, op. cit. supra n.5 at 78.

limited, and the appointee at the end of a certain term may be retained or discharged by the people. Although final control rests with the people, the difficulties interposed by party politics and inherent in direct nomination and popular election are obviated.

In *California* an early version of a similar plan has been in operation since 1934. There only one candidate's name appears on the ballot for appellate judicial office. A judge after his first term may declare himself a candidate for election, and in that event his is the name appearing on the ballot. In the event a judge does not do so, or in the event of the need of an *ad interim* appointment, the governor, with the requisite approval of a special Commission on Qualification, makes the necessary appointment or nomination. Thus appellate court judges are elected on their records, *i.e.*, a nonpartisan ballot is used and the electorate decides whether or not the incumbent judge is to be retained in office.[7]

The plan approved by American Bar Association has been adopted only in *Missouri*. Despite efforts to have it repealed, the plan has been in force since 1940 and was retained in the constitution adopted in 1945. As adopted the plan applies to the Missouri Supreme Court, the three courts of appeals, and the circuit and probate courts of the two largest cities, as well as the courts of criminal correction of St. Louis.[8]

[7] Calif. Const. Art. VI, § 26 as added 1934. See 63 A.B.A. Rep. 420-421 (1938). The special commission entitled the Commission on Qualifications is comprised of the chief justice, the presiding justice of the District Court of Appeal, and the attorney general of the state. The procedure is also available upon adoption by the electorate for the selection of superior court judges in any county but has not yet been so adopted.

[8] Mo. Const. (1945) Art. 5, §§ 29(a)-29(g). The appellate judicial commission, whose duty it is to submit names to the governor for appointment to the appellate courts, is comprised of the chief justice of the Supreme Court, three persons chosen by members of the bar and three persons chosen by the governor, one from each court of appeal district. For comments on the Missouri Plan see: Bundschu, "The Missouri Non-Partisan Court Plan—Selection and Tenure of Judges," 16 Kan. CityL.Rev. 55 (1948); Douglas, "Judicial Selection and Tenure," 33 A.B.A.J. 1169 (1947); Hyde, "The Missouri Plan for Selection and Tenure of Judges," 39 J. Crim. L. & Criminology 277 (1948).

JUDICIAL SELECTION [9]

(A) Appointment by the executive.

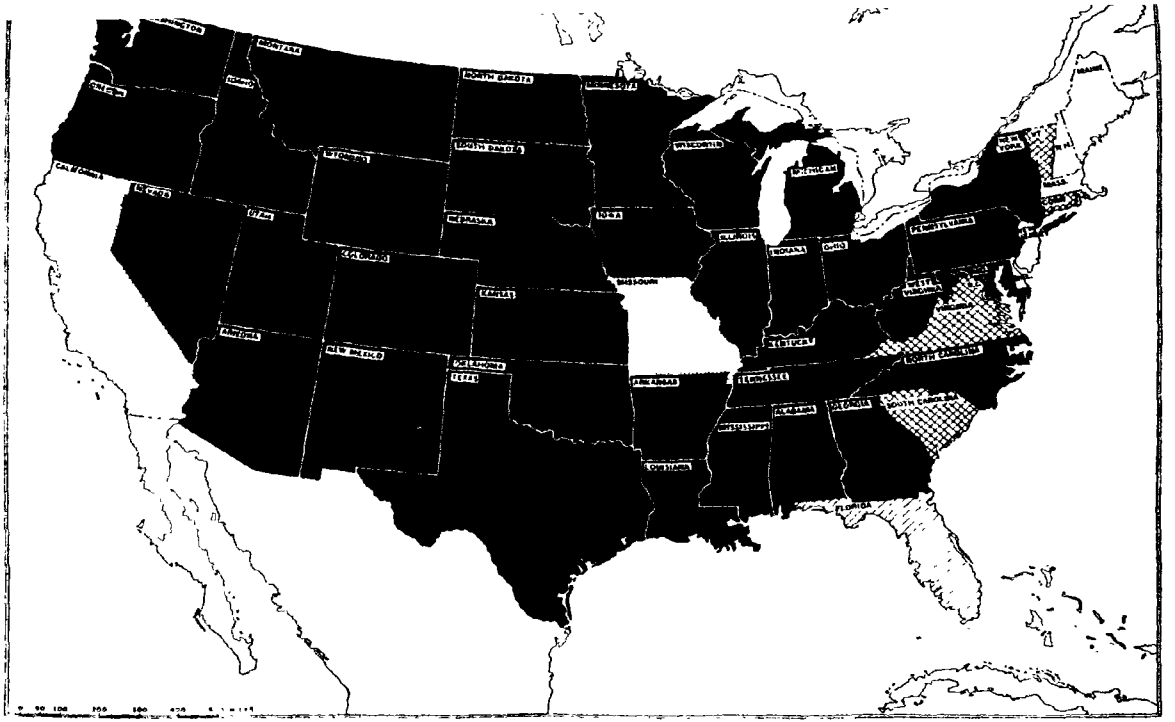
At present all judges are appointed by the executive, subject to confirmation by some body such as the senate or governor's council, in the *District of Columbia* (as is the case with all federal judges), *Massachusetts,* and *New Hampshire.*[10] Such is the case with only minor exceptions [11] in *Delaware, Maine,* and *New Jersey,* while in *Rhode Island* trial court judges alone are so appointed. In *California* and *Missouri,* as discussed previously, modified appointment plans are in use, which apply to appellate judges and certain others, while the remaining judges are elected.

In several other states various classes of judges, some of great importance, are appointed. Outstanding examples of appointment of judges to particular courts can be cited. In *Florida* circuit judges and judges of criminal courts of record are appointed by the governor, subject to confirmation by the senate. The governor appoints some city court judges in *Georgia,* the judges of the *Municipal Court of Indianapolis,* the city judges, magistrates and some county judges in *South Carolina* and municipal court judges in *Vermont.* In *Louisiana* some municipal court judges are named by city councils, and in *New York City* judges of certain local courts are appointed by the mayor. The governor appoints members of the Court of Claims in *New York,* and the special superior court judges in *North Carolina.* In *Missouri* the Supreme Court and two of the courts of appeals appoint commissioners who act as additional appellate judges in these courts. There are ten of these commissioners, six serving with the Supreme Court and four with

[9] For a comprehensive state by state survey made some years ago, see Haynes, op. cit. supra n.2, at 30-50; cf. "Judicial Selection Roundup," 31 J. Am. Jud. Soc'y 112 (1947).

[10] D.C., subject to confirmation by the Senate; Mass., and N.H., subject to confirmation by the governor's council.

[11] Exceptions: Del., vice chancellor, who is appointed by the chancellor, all appointees subject to confirmation by the senate; Me., probate judges, who are elected, all appointees subject to confirmation by the governor's council; N.J., surrogates, who are elected, all appointees subject to confirmation by the senate; R.I., all appointees subject to confirmation by the senate.



SELECTION OF JUDGES—PRINCIPAL MODES

- Appointment by executive subject to confirmation, some minor exceptions in some states
- Modified appointment plans, applicable to appellate judiciary, others elected
- Elected by popular vote, with minor exceptions in some states
- Trial judges appointed by executive, others selected by popular or legislative vote
- Selection by legislature

courts of appeals. In *Texas* the three-judge elected Court of Criminal Appeals may appoint a two-man commission of criminal appeals to assist it in its judicial business.

In many states in which judges do not receive their permanent commissions to office by appointment, the power of appointment is exercised nevertheless in a significant manner. These are states in which judges are customarily elected but where the governor exerts a powerful influence over the judiciary through *ad interim* appointments to fill vacancies caused by resignation or death. In fact, it is generally conceded that the elective system would long since have proved unworkable in practice had it not been for the ameliorating influence of *ad interim* appointments by the governor, because such *ad interim* appointees are customarily elected by the people for a full term. Examples of such states are *Alabama, California* (as to trial courts), *North Carolina, Tennessee, Vermont,* and *Virginia,* where over half of the judicial offices are filled by such *ad interim* appointments and subsequent election for a full term.[12] *Maryland* has an unusual practice embodied in a constitutional amendment adopted in 1944.[13] There the governor is empowered to appoint a person to fill any judicial office which has become vacant in any manner, by death, resignation or expiration of a term, such appointee to hold office until the first biennial election for congressional representative after the expiration of the term, or the first such general election one year after the occurrence of the vacancy in any other way. The practical effect of this is to make the judicial office appointive although there is an election later in the customary manner, since in Maryland incumbents customarily are not opposed and are reelected.

(B) Selection by the legislature.

In the following states judges are elected by the legislature: *Connecticut,* upon nomination by the governor, all the judges

[12] See text (B) below. Cf. Martin, "Alabama Judges Under Elective System," 10 Ala. Lawyer 5 (1949).

[13] Md. Const. Art. IV, § 5, ratified in 1946.

except probate judges and justices of the peace; *Rhode Island,* all appellate court justices; *South Carolina,* all circuit judges (trial) and supreme court justices; *Vermont,* judges of the supreme and superior courts; *Virginia,* circuit and appellate court judges.

(C) The basis of selection: in those jurisdictions where the principal mode of selection of judges is by some method other than popular election.

The basis of selection is usually partisan in *Connecticut,* the *District of Columbia* (most courts), *Maryland, Massachusetts,* and *South Carolina.* In contrast to this in *Delaware* the constitution requires that not more than the majority of judges be from one political party.[14] In *New Jersey* the unwritten tradition dictating bipartisan selection of the courts started nearly a hundred years ago with the Supreme Court and has since spread to all other courts.[15] In *New Hampshire* vacancies are filled so as to maintain both the political and geographical balance of the court. Standing at the bar, the personal preferences of the appointing power, as well as political reasons are all important in *California, Connecticut, Delaware, Maine, Massachusetts, Missouri, New Hampshire, New Jersey, South Carolina,* and *Vermont.*

The bar is consulted informally in *California, Connecticut, Delaware, Maryland* (*ad interim* appointments), *Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island* (sometimes), and *Virginia.* The novel constitutional requirement in *New Jersey* that the governor give seven days' public notice of his intention to submit the name of a nominee for judicial office to the senate, gives the bar as well as the public generally an opportunity to be heard.[16] The bar is consulted formally in *Vermont.*

[14] The basis of selection in the lesser courts of the District of Columbia and in all courts of Connecticut sometimes is nonpartisan.

[15] This is a matter of practice as to appointments to the Supreme and superior courts but is required by statute as to appointment of some county judges. N.J. Laws (1948) c. 365, § 4.

[16] N.J. Const. (1947) Art. VI, § 6, par. 1.

(D) Selection by popular vote.

All judges are selected by popular vote, with some minor exceptions,[17] in *Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin,* and *Wyoming.*

In *California* and *Missouri* most trial court judges are elected by popular vote. Other important instances of selection of some judges by popular vote are as follows: *Connecticut,* probate judges and justices of the peace; *Florida,* the justices of the Supreme Court, county judges, and justices of the peace; *Maine,* probate judges; *New Jersey,* surrogates, who are chief clerks of the probate division of the county court, but who do have some slight judicial jurisdiction; *South Carolina,* probate judges and some county judges; *Vermont,* probate court judges and the two lay members of each county court.

(E) The basis of selection: if judges are selected by popular election.

Candidates for judicial positions are nominated in a party primary in twenty-five jurisdictions as follows: *Alabama, Arizona, Arkansas, Colorado,*[18] *Florida, Georgia, Idaho* (*justices of the peace and probate judges*), *Kansas, Kentucky, Louisiana, Maine* (*probate judges*), *Maryland,*[19] *Mississippi, Missouri* (*trial court judges*), *New Jersey* (*surrogates*), *New*

[17] Exceptions: Ga., judges of county courts and some city courts; Ill., members of appellate courts selected by state Supreme Court from elected circuit and superior court judges; Ind., Municipal Court of Indianapolis; La., some municipal court judges; Md., *ad interim* appointing power of the governor; N.Y., Court of Claims and some inferior court judges appointed by the governor and others; N.C., special superior court judges; Tex., commission of criminal appeals.

[18] Designation in convention subject to a primary.

[19] Candidates may file certificates of candidacy in both primaries.

Mexico, North Carolina, Ohio (*some*[20]), *Oklahoma*,[21] *Pennsylvania, Tennessee* (*customary*), *Texas*,[22] *Utah*,[23] *Vermont* (*probate judges*), and *West Virginia*.[24]

Nominations are made in party conventions in five jurisdictions: *Illinois, Indiana*,[25] *Iowa, Michigan*,[26] and *New York*.

In *Ohio* most judges seek election on a nonpartisan basis by filing nominating petitions, and in *Wisconsin* the only nomination of judges authorized is a nonpartisan nominating paper. In six states judges frequently receive bipartisan endorsement: *Idaho, Kansas* (*district courts*), *Louisiana*,[27] *Maryland, New York*, and *Vermont* (*probate judges*); and this is done at times in twelve states: *Colorado, Illinois, Indiana, Iowa, Kansas* (*other than district courts*), *Kentucky, Minnesota, Missouri, Ohio, Pennsylvania, Utah*, and *Wyoming;* in the remaining states the practice does not prevail.

Judges are elected at a general election in all but the following instances: *Illinois*,[28] *Michigan, Oregon*, and *Wisconsin*. In these four states however, and in eleven other jurisdictions separate special judicial sections of the ballot, or nonpolitical, nonpartisan ballots are used: *Arizona*,[29] *California, Idaho*,[30] *Maryland*,[31] *Montana, Nebraska*,[32] *North Dakota*,[33] *Ohio, South Dakota, Washington*, and *Wyoming*.

[20] Nonpartisan petition used frequently.

[21] The Democratic Party, dominant in the state, uses a party primary, while Republican and other parties designate their candidates in conventions.

[22] Tex., similar to Okla., see supra n.21.

[23] Two persons receiving highest vote in convention are voted on in the primary.

[24] All judges are so nominated except judges of the circuit courts and inferior courts in the first circuit, who are nominated in party convention.

[25] Inferior judges are nominated in party primary.

[26] Justices of the peace and some municipal judges are nominated in a party primary.

[27] In that Republicans participate in Democratic primaries.

[28] Exceptions: county judges and justices of the peace and judges of the Municipal Court of Chicago.

[29] A general ballot is used, but judicial candidates are placed in a nonpartisan position without party designation.

[30] Candidates for Supreme Court and district court.

[31] The general ballot is used, but no party designation permitted, opposition is rare.

[32] Separate nonpolitical ballot includes candidates for Regents of the University and members of the legislature.

[33] Candidates for judgeships of the Supreme, district and county courts appear with candidates for county offi-

Except for some sections of Illinois and New York, the bar is not consulted formally as to the nomination and selection of judges in any of the states in which judges are selected by popular election. In twenty states, however, the bar is consulted informally, or the bar makes its opinion known through the publication of the results of polls of members of the profession, or bar association resolutions: *Arizona, Arkansas, California, Florida, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas* and *Washington.*[34]

JUDICIAL CONDUCT

(A) Appraisal of judicial conduct in those jurisdictions in which judges are selected by some mode other than by popular election: *California (appellate bench), Connecticut, Delaware, District of Columbia, Maine, Massachusetts, Missouri (appellate bench, etc.), New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont,* and *Virginia.*

The appraisals reported below are the opinions of a representative group of judges, lawyers, and law school professors whose views were solicited for the purposes of this survey. In the eleven jurisdictions in which the chief mode of judicial selection is other than by popular election, at least two thirds of the trial bench are generally satisfactory to the bar and to the public.[35] In only *Delaware* and *New Hampshire* are so few as two thirds and three quarters respectively of the appellate bench deemed satisfactory. According to the reports sent in, the entire appellate bench is acceptable in seven states:

cials and state tax commissioner on a no-party special ballot.

[34] This is also done infrequently in West Virginia. In Missouri a campaign is under way to conduct bar opinion polls on the qualifications of candidates for judicial office, and to publicize the results of such polls with a view to inducing voters to vote in accordance therewith. See 32 J. Am. Jud. Soc'y 23 (1948).

[35] Percentage acceptable: Conn. 85%; Del. 66%; D.C. 90%; Me. 70%; Mass. Superior Court 100%, inferior trial courts 50%; N.H. 75%; N.J. 90%, R.I. 75%; S.C. 90%; Vt. 90%; Va. 95%.

Connecticut, Maine, Massachusetts, New Jersey, Rhode Island, South Carolina, and *Vermont;* and 80% or more are so in the *District of Columbia* and *Virginia,*[36] and also in *California* and *Missouri,*[37] where the appellate bench is not selected chiefly by direct election. Moreover, in these thirteen jurisdictions,[38] generally judicial decisions are considered just; judges are considered fair, independent, impartial, are not thought to be customarily arbitrary, subject to political or personal influence or timid in their judgments. The only criticism regarding the judiciary in several of these jurisdictions related to a lack of learning or of an insufficiently high standard of learning on the part of some judges.[39] In none of these jurisdictions is a change to the method of direct popular election of judges favored.

(B) Appraisal of judicial conduct in those jurisdictions in which judges are chiefly selected by popular election: *Alabama, Arizona, Arkansas, California (trial courts), Colorado, Florida (Supreme Court justices, county judges, justices of the peace), Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri (trial courts), Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin,* and *Wyoming.*

At least one half of the personnel of the trial bench were reported as generally satisfactory to the bar and to the public in all of these states in which judges are chiefly selected by popular election, and in fifteen of these 85% or more as adequate.[40] While in *Alabama, Illinois, Minnesota, Nevada, New*

[36] D.C. 80%; Va. 86%.

[37] Calif. 80%; Mo. 90%.

[38] Those eleven jurisdictions enumerated supra n.35 and Calif. and Mo., remarks as to the latter being limited to personnel of the appellate bench.

[39] Conn., Me., Vt., and Va.

[40] Ala. 50%; Ariz. 60%; Ark. 80%; Calif. large %; Colo. 90%; Fla. 90%; Ga. 75%; Idaho 75%; Ill. 75%; Ind. 75%; Iowa 85%; Kan. 100%; Ky. 90%; La. 90%; Md. 90%; Mich. 85%; Minn. 50%; Miss. 60%; Mo. 75%, Neb. 85%; Nev. 62%; N.M. 60%; N.Y. 90%; N.D. 95%; Ohio 65%;

Mexico, and Oklahoma less than 60% of the members of the appellate courts are considered satisfactory to the bar and to the public,[41] *more than 80%* are so considered in eighteen states, in seven of which the entire appellate bench is adequate.[42] In the remaining nine jurisdictions from 62% to 75% of the members of the appellate courts are said to be satisfactory to the bar and public.[43]

Among the states in which judges are selected by popular election, various notable exceptions to the usual rule that judicial decisions are just and that judges are fair, independent and impartial were reported. In many of these states it was noted that a few judges were arbitrary and to some extent subject to political or personal influence, while on occasion the decisions of some judges indicate timidity. In contrast to the generally satisfactory opinion of judicial character as illustrated by the qualities of fairness, independence and impartiality found in most judges in all but a few jurisdictions where judges are elected by popular vote, opinion as to the mental capacity of judges in such states is more critical. In some states several judges and in other states many judges are considered not as learned as they might be, or as exhibiting a want of legal ability.

In spite of the fact that neither public nor professional opinion of members of the bench is particularly low—in fact, in many instances is quite remarkably high—and although there appear to be only a few exceptions to the general rule that judges are considered fair, independent and impartial, in

Okla. 62%; Ore. 90%; Pa. 70%; S.D. 100%; Tenn. 65%; Tex. 50%; Utah 82%; Vt. probate judges 60%; Wash. 75%; W.Va. 90%; Wis. 90% and Wyo. 75%. As to seven of these states there was a difference of opinion, which has been averaged herein—Nev., N.M., Okla., Ohio, Pa., Utah and Wyo. No estimates were attempted as to the quality of the trial bench in Montana and North Carolina, since it was considered that the bench differed radically in many parts of these states, and there was a wide divergence of public and professional opinion on this question.

[41] Exact percentages: Ala. 50%; Ill. 50%; Minn. majority; Nev. 56%; N.M. 55%; and Okla. 55%.

[42] Fla. 90%; Kan. 100%; Ky. 95%; Idaho 100%; La. 90%; Md. 90%; Mich. 85%; Neb. 100%; N.Y. 100%; N.D. 100%; Ohio 90%; Ore. 95%; Pa. 85%; S.D. 100%; Tenn. 80%; Utah 82%; W.Va. 95%; and Wis. 100%.

[43] Ariz. 70%; Colo. 75%; Ga. 75%; Ind. 75%; Iowa 62%; Miss. 75%; Tex. 75%; Wash. 66⅔%; and Wyo. 75%.

twenty-three of the states in which judges are elected there is popular professional sentiment favoring abandonment of the present mode of selection of judges in favor of the American Bar Association plan, as exemplified in Missouri. In about half these states, however, the sentiment is still that of a minority group.[44] There are active movements in *Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Nebraska, Pennsylvania, Texas, Utah,*[45] *Washington,* and *Wisconsin* for a change to the Missouri plan or some modification of it. These movements are led primarily by members of the bar, and in particular the organized bar, although in *Arkansas* and *Indiana* some laymen are interested, and in *Alabama* a state bar committee composed of laymen and lawyers is working on this problem.

(C) Political activities of judges.

The Canons of Judicial Ethics of the American Bar Association prohibit judges from engaging in partisan politics or from running for office other than a judicial office, without resigning as a judge.[46] In only two states *Georgia* and *Indiana,* has it been reported that judges customarily engage in partisan politics. Both of these are states in which judges are primarily selected by popular election, as are *Michigan, Minnesota, Montana, Tennessee,* and *Utah* in which some judges are reported to engage in politics. In none of the states in which judges are selected by some method other than direct election do judges customarily engage in partisan politics, although in *Maine,*[47] *Massachusetts,* and *South Carolina* some judges have done so.

[44] Ala., Ariz., Ark., Colo., Ga., Ind., Iowa (to a limited extent), Kan., La. (State Bar endorsed Missouri Plan), Mont., Minn. (to a limited extent only), Mo. (growing sentiment to include all judges under this plan); Neb. (minority sentiment), Nev., N.M. (earlier movement defeated), N.C. (to a limited extent), Ohio (but a proposed constitutional amendment to authorize such a plan failed of adoption recently), Okla. (some sentiment), Pa., Tex., Utah, Wash. (strong minority opposition), and Wyo. (some sentiment).

[45] In 1947 in Utah an amendment was enacted at the instance of the state bar to authorize the legislature to change the mode of judicial selection.

[46] Canons 28 and 30.

[47] Judges of the inferior courts.

In *Georgia* and *Indiana* the judges generally make political speeches and hold membership in partisan political committees despite the Canons of Judicial Ethics, while in *Arizona* and *New Mexico* this is done only to the extent deemed necessary in their own campaign for election. In others of the states in which selection is by popular election, some but not all of the judges make political speeches and hold membership in partisan political committees. These states are: *California* (*trial court judges*), *Colorado, Illinois, Iowa, Kansas, Montana, Missouri* (*trial court judges*), *Ohio, Oklahoma, Pennsylvania, Utah,* and *Vermont* (*probate judges*).

Judges use patronage to a limited extent only to aid them politically in: *California* (*trial courts*), *Colorado, Illinois, Indiana, Iowa, New York* (*surrogate*), *Oklahoma, and Pennsylvania,* all of which are states in which judges are elected to office.

When it is not prohibited by constitution or statute, judges have been known to campaign for nonjudicial office without resigning from the bench, notwithstanding the Canons of Judicial Ethics. Such instances have occurred in *Arizona, Arkansas, California* (*trial courts*), *Colorado, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Montana, Nebraska* (*only two instances in the past twenty-five years*), *Oklahoma, Pennsylvania, Tennessee, Texas, Utah,* and *Wisconsin,*[48] in all of which the chief mode of the selection of judges is by popular election.

The participation of judges in partisan politics, such activities as making political speeches, using patronage for political purposes and running for nonjudicial office without resignation from the bench, are condemned by the profession in many states. Despite the Canons of Judicial Ethics, such activities are apparently condoned in fourteen states.[49] The lay public for the most part seems to be indifferent[50] to the participation

[48] In Wisconsin Senator McCarthy, who did not resign his judicial office while running for the United States Senate, is now defending a state bar disciplinary proceeding.

[49] Ark., Calif., Colo., Ill., Ind. (opinion is divided), Ky., La., Mich., Miss., N.M., Ohio, Okla., Tenn. and Tex.

[50] Ariz., Ark., Calif., Colo., Idaho,

of judges in political activities, although this is condemned in ten states, a few of which are ones where such action has occurred.[51]

Tenure of Judges

(A) Terms of office.

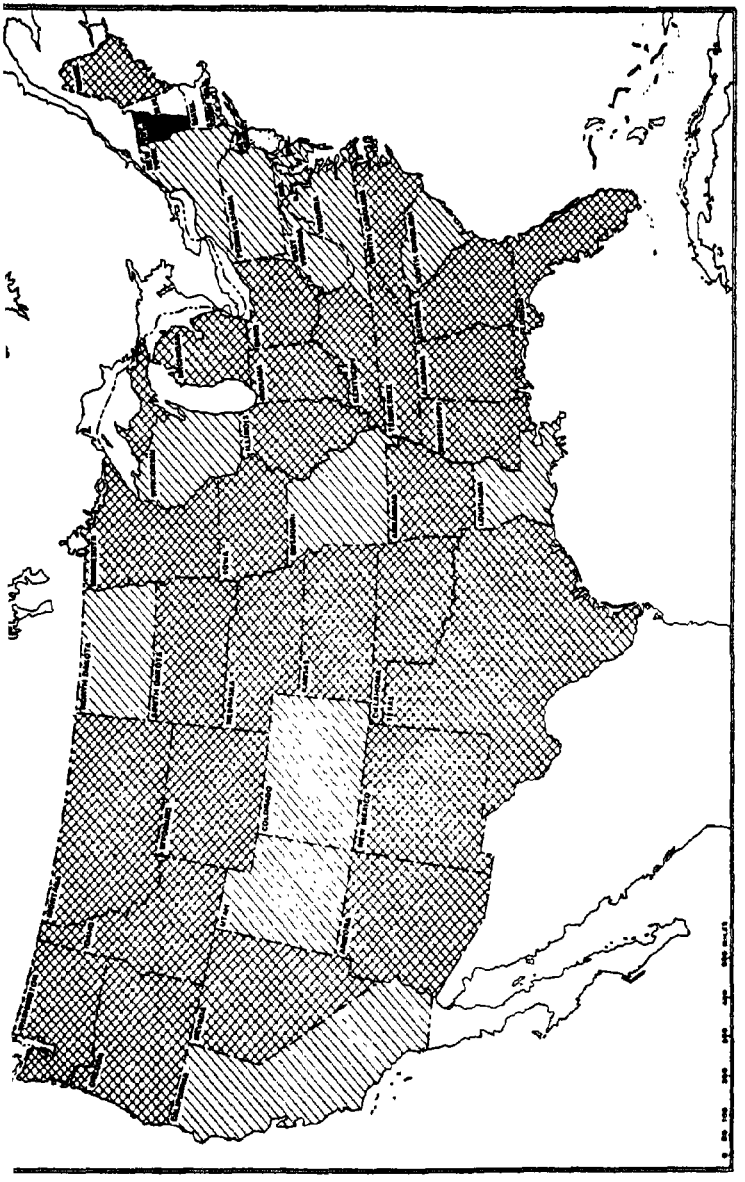
Judges hold office for life during good behavior in only a few jurisdictions, none of which are ones in which the judiciary are elected by popular vote. This is true in the federal courts of the *District of Columbia* (as is the case of all federal judges), in *Massachusetts* and *New Hampshire*, all of which are jurisdictions in which judges are appointed by the executive. In *New Jersey*, following their reappointment by the executive after an initial term of seven years, judges of the Supreme Court, and of the superior court hold office for life during good behavior. In *Rhode Island*, superior court (trial court) judges, who are appointed by the executive, hold office for life, while appellate court judges, who are elected by the legislature, hold office during good behavior but subject to the right of the legislature to declare the place vacant.

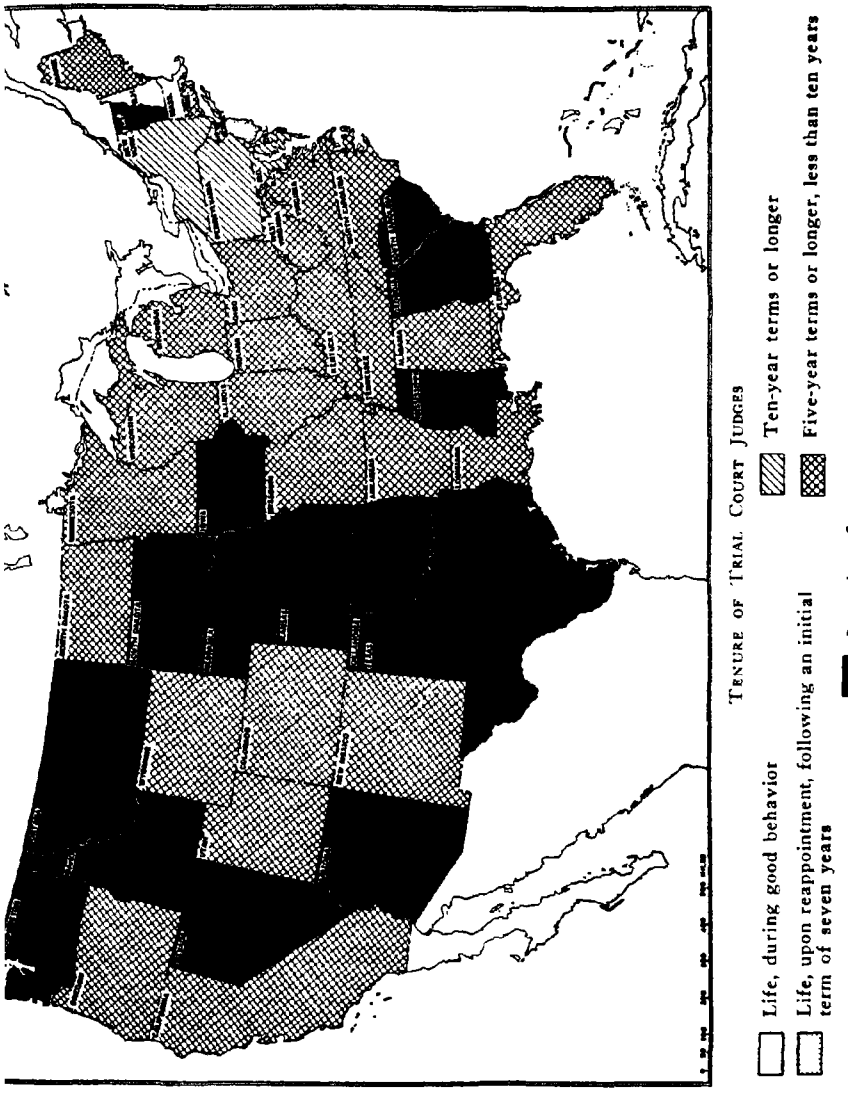
In other courts of those jurisdictions in which judges are not chosen for office by popular vote, the terms of the judiciary vary as follows: *California*, appellate court judges, 12 years; *Connecticut*, trial court judges, 8 years, appellate court judges, 8 years; *Delaware*, trial court judges, 12 years, appellate court judges, 12 years; *District of Columbia*, Municipal Court, 10 years; *Florida*, trial court judges, 6 years; *Maine*, trial court judges, 7 years, appellate court judges, 7 years; *Missouri*, appellate court judges, 12 years; *New Jersey*, county court judges, 5 years; *South Carolina*, trial court judges, 4 years, appellate court judges, 10 years; *Vermont*, trial court judges,

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Ill., Ind., Iowa, Kan., Ky., La. (electorate refused constitutional amendment to this effect), Me., Mass., Mont., N.M., Ohio, Pa., Tenn., Utah, Vt., and Wis.

[51] Fla., Ga., Md., Mich., Miss., Neb., Okla., Ore., S.C. and S.D. Such political activities of judges do occur in Mich., Neb., and Okla.


TENURE OF APPELLATE COURT JUDGES
Life, during good behavior
Life, during good behavior, upon reappointment, after initial term of seven years
Ten-year terms or longer
Five-year terms or longer, less than ten years
Less than five-year terms


TENURE OF TRIAL COURT JUDGES
Life, during good behavior
Life, upon reappointment, following an initial term of seven years
Ten-year terms or longer
Five-year terms or longer, less than ten years
Less than five-year terms

2 years, appellate court judges, 2 years; *Virginia,* trial court judges, 8 years, appellate court judges, 12 years.

In none of the states in which judges are selected by popular vote do they hold office during good behavior in either the trial or appellate courts. In nine of such states, however, the terms of office of appellate judges are ten years or more: *Colorado,* 10 years; *Louisiana,* Court of Appeals, 12 years, Supreme Court, 14 years; *Maryland,* 15 years; *New York,* 14 years; *North Dakota,* 10 years; *Pennsylvania,* Supreme Court, 21 years, Superior Court, which has appellate jurisdiction, 10 years; *Utah,* 10 years; *West Virginia,* 12 years; *Wisconsin,* 10 years. The terms of office of trial court judges are ten years or more in *Louisiana* (courts in parish of New Orleans); *Maryland, New York* and *Pennsylvania.*

In the majority of those states in which judges are elected, the terms of office of judges of both the appellate and trial courts range from five to ten years. In twenty-two states trial court judges' terms are of this length,[52] while in twenty-seven states appellate court judges serve for such periods.[53] None of the elected appellate court judges hold office for less than five years, but in a number of states some trial court judges hold office for such limited periods, while in other states all trial court judges do so.[54]

(B) Continuance in office of judges once elected or appointed.

In the overwhelming majority of jurisdictions (forty-one) judges once elected or appointed, either *ad interim* or to a

[52] Ala., Ark., Calif. (superior courts), Colo., Ill., Ind. (circuit court), Ky., La. Mich., Minn. (district court), Mo. (circuit court), N.J. (surrogates), N.M., N.C., N.D. (district court), Ohio, Ore., Tenn., Utah, W.Va., Wis., and Wyo.

[53] Ala. 6; Ariz. 6; Ark. 8; Fla. 6; Ga. 6; Idaho Supreme Court, 6; Ill. Supreme Court, 9; Ind. Supreme Court, 6; Iowa, 6; Kan. 6; Ky. 8; Mich. 8; Minn. 6; Miss. 8, Mont. 6; Neb. 6, Nev. 6; N.M. 8; N.C. 8; Ohio 6; Okla. 6; Ore. 6; S.D. 6; Tenn. 8; Tex. 6; Wash. 6 and Wyo. 8.

[54] Ariz., Ark. (circuit judge), Colo. (county court), Ga., Idaho, Ill. (county and probate and justice of the peace), Ind. (superior and probate court), Iowa, Kan., Me., (probate), Mont., Mich. (probate and justice of the peace), Minn. (probate court), Miss., Mo. (magistrate and probate court), Neb., Nev., N.D. (county court), Ohio (probate), Okla., S.D., Tex., Wash. and Wis. (county court).

regular term, are customarily reelected or reappointed.[55] Some exceptions to this general rule can be noted. In *Arkansas,* while reelection of an incumbent is customary, an *ad interim* appointee is constitutionally ineligible to be elected. In *Delaware,* while reappointment is customary, such is not always the case and there have been recent exceptions. In *Indiana* and *Utah* the matter of party is important, and the ways of the political tide determine the question of reelection. In *Mississippi* and *Pennsylvania* incumbents of the trial bench are reelected only about half the time and in the latter state judges of the Supreme Court cannot be reelected after their twenty-one-year term.

(C) Removal of unfit judges from office.

In only one state, *Colorado,* is no provision made for the removal of judges from office. In twenty-two jurisdictions the sole means of removal of judges found unfit for office is by impeachment.[56] In *Arizona, California, Connecticut, Florida, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Texas, Utah, Virginia, Washington,* and *Wisconsin* alternatives to impeachment for the removal of unfit judges are provided, such as independent executive action, or executive action initiated by resolution of a two-thirds or three-quarters vote of both houses of the legislature, or recall upon petition of a percentage of the voters.[57]

[55] Ala., Ariz., Ark., Calif., Colo., Conn., D.C., Fla., Idaho, Ill., Iowa, Kan., Ky., La., Me., Md., Mich., Minn., Miss. (Supreme Court), Mo., Mont., Neb., Nev., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla. (except when landslide to one party), Ore., Pa. (appellate courts other than Supreme Court), S.C., S.D., Tenn., Tex. (some exceptions), Vt., Va., Wash., Wis. and Wyo

[56] Ala., Ark., Del., D.C., Ga., Idaho, Ind., Iowa, Kan. Me., Minn., Mont., Neb., N.M., Okla., Pa., R.I., S.C., S.D., Tenn., Vt. and Wyo.

[57] Ariz., recall; Calif., recall by petition or resolution by two-thirds vote of the legislature; Conn., resolution by two-thirds vote of the legislature; Fla., recall upon petition, or by governor; Ill., resolution of three quarters of the legislature, Ky., resolution of two thirds of the legislature; Md., resolution of legislature; Mass., by the governor with consent of council or on address of both houses of legislature; Mich., resolution of two thirds of legislature, Miss., two-thirds vote of legislature; Nev., recall; N.H., governor with consent of council; N.C., concurrent resolution of two thirds of both

In several states removal proceedings of all or some judges other than by impeachment are conducted before a regular or specially constituted court. In *Louisiana* proceedings to remove a Supreme Court justice are held before a specially constituted court of seven judges composed of members of the Supreme Court not connected with the case and a sufficient number of judges of the Court of Appeals, taken in order of seniority, while proceedings to remove other judges are tried in the Supreme Court.[58] The *Maryland* constitution provides for removal from office by the governor of any judge on conviction in a court of law [59] of incompetency, willful neglect of duty, or misbehavior. In *Missouri* the House of Representatives has sole power of impeachment, but trial is by the Supreme Court except that a member of the Supreme Court shall be tried before a special commission of seven eminent jurists elected by the Senate. In addition, the 1945 constitution provides for retirement of judges for reasons of physical or mental infirmity, by order of a special tribunal consisting of three judges of the Supreme Court, one judge of each of the three courts of appeals and three circuit court judges.[60] The 1947 *New Jersey* constitution provides that judges of the superior and county courts are subject to removal from office by the Supreme Court for such causes as provided by law.[61] In an amendment to the *New York* constitution, effective in 1948, provision is made for a court on the judiciary to be convened by the chief justice of the Court of Appeals on his own motion, or on request of the governor, or of the presiding justice of any appellate division, or of a majority of the judicial council, or of a majority of a committee of the New York State Bar Association duly authorized to make such a request. The court

houses of legislature for mental or physical disability; N.D., recall; Ohio, concurrent resolution of two thirds of both houses; Ore., recall; Tex., resolution of two-thirds vote of legislature; Utah, resolution of legislature; Va., joint resolution of legislature; Wash., joint resolution of three quarters of both houses of legislature; and Wis., resolution of legislature, superior court judges by governor for cause.

[58] La. Const. Art. IX, §§ 4 and 5.

[59] Md. Const. Art. IV, § 4.

[60] Mo. Const. (1945) Art. 7, §§ 1, 2, Art. 5, § 27.

[61] N.J. Const. (1947) Art. VI, § 4. No statute has been enacted as yet to implement this.

on the judiciary, consisting of the chief justice of the Court of Appeals, the senior associate justice of that court, and one justice from the appellate division of each department, is empowered after due trial to remove any judge "for cause." [62] In *Ohio* a statute providing for the removal of any state official who exercises power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty, after trial in the appropriate common pleas court upon a complaint brought by a number of voters equivalent to fifteen percent of the total vote in the last election, applies to judges.[63] *Texas* district court judges may be removed from office by Supreme Court judges when incompetent to discharge their duties or guilty of partiality or oppression or unfit conduct.[64]

(D) Provisions for retirement of judges because of age, illness, etc.

In twelve states, all but one of which are states in which judges are elected to office by popular vote, no provision at all is made for retirement of judges because of age, illness, or incapacity of some sort.[65] In North and South Dakota the only pertinent provisions relate to retirement of judges in the event of incapacity to fulfill judicial duties (either physical or mental illness).[66]

A statutory fixed age, ranging from 65 years to 72 years, often combined with a minimum period of service, is set for the retirement of judges in thirty-one jurisdictions.[67] Retire-

[62] N.Y. Const. Art. 6, § 9a, effective 1948.

[63] Ohio Const. Art. II, § 38, Ohio Gen. Code (1938) §§ 10-1, 10-2, 10-3 and 10-4.

[64] Tex. Const. Art. IV, § 6.

[65] Del., Ind., Iowa, Kan., Mich., Miss., Neb., Ohio, Okla., Tex. (constitutional amendment enacted in 1948 to authorize legislature to enact retirement plan for judges), Utah, and Wis.

[66] In North Dakota this applies only to district judges. In South Dakota any supreme court or circuit court judge who becomes incapacitated may retire or be retired and receive $200 per month for the remainder of the term for which he is elected.

[67] Ala., at 70 years of age, 15 years of service, may retire as a supernumerary judge subject to call; Ark., supreme court justices may retire at 70 after 10 years service, circuit and chancery judges at 70 after 20 years service, either after 24 years service regardless of age; Calif., at 70 after 10 years service, at 65 if 20 years service, etc.; Colo., various named judges may retire at 65 after 10 years ser-

ment for reasons of physical or mental incapacity of a permanent nature is regulated in seventeen states.[68] Thirty-two of the states provide pension payments upon retirement on reaching a certain age, or serving the requisite number of years, or payments for the duration of the term in cases of retirement for reasons of health.[69] In a number of these states such pensions

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vice; Conn., judges of supreme court, superior court and court of common pleas retire at 70 and become state referees; Fla., supreme court justices at 65 years of age and 20 years service, circuit court judges at 60 after 12 years service, or after 20 years service regardless of age; Ga., at 70 after 20 years continuous service; Idaho, at 70, or term's expiration thereafter, ten years service; Ill., may retire at 60 after 12 years service, retirement system optional; La., compulsory at 80, may retire at 65 after 20 years service, at 70 after 15 years service; Me. 70 and 7 years of service; Md., permissive after 60, mandatory at 70; Mass., 70 and 10 years of service; Minn., 70 years and/or 25 years service; Mo., 75 years, mandatory; Mont., by election may become member of public employees retirement system; Nev., may retire at 65 after 16 years service; N.H., 70, N.J., 70 years and 10 years service; N.M., 64 years and 10 years service, 60 and 18 years service; N.Y., permissive at 60, mandatory at 70 years; N C., may retire at 65 years after 12 to 15 years service; Ohio, 60 years; Pa., 60, R.I., at 70 years after 15 years service, or after 25 years service regardless of age; S.C., must retire at 72 with 10 years service, may retire at 65 after 20 years service, at 70 after 15 years service; Tenn., at 65 and 24 years service, at 70 after 20 years service; Vt., 70; Va., at 70 after 10 years service; Wash., may retire after 18 years service or may retire at 70 after 10 years service; and Wyo. supreme court judges after 24 years service and over 70 years age. Cf. as to Kentucky, provision for appointment of any judge of Court of Appeals as a commissioner of that court after at least eight years continuous service. Ky. Rev. Stat. (1948) § 21.150.

[68] Calif., Colo. (after 10 years service), Ill., La., Md. (on two-thirds vote of legislature), Minn., Mo., Mont., N.H., N.J., N.Y., N.C., N.D., Pa., R.I. (retirement for illness by special legislative act only), S.C. (after 7 years service), S.D., and Tenn. See for example of procedure in this regard Mo. Const. (1945) Art. V, § 27, which provides that any judge or magistrate who is unable to discharge his duties with efficiency by reason of continued sickness or physical or mental infirmity shall be retired by order of a committee composed of three judges of the Supreme Court, one judge of each of the three courts of appeals, and three circuit judges, after a hearing, and on a finding of two thirds of the committee that the disability is permanent

[69] Ala., $4000 salary as supernumerary judge subject to call; Ark., one-half pay; Calif., 50% of salary; Colo., percentage of salary; Conn., salary as state referee, $7100-$8000; Fla., full or two-thirds pay depending on length of service; Ga., two-thirds salary; Idaho, one-half salary; Ill., state retirement system optional, maximum retirement pay 50% of salary; La., two-thirds of salary for age or health; Me., three-quarters pay; Md., $300 for each year of service up to $6000; Mass., three-quarters salary; Minn., one-half pay; Mo., retired for mental or physical infirmity, one-half pay until end of term; Mont., member of state retirement fund by election; Nev., two-thirds salary; N.H., state retirement

are paid as a part of the retirement scheme applying to all state employees. Judicial pensions vary from fixed sums, ranging from $3,000 to $9,000, to proportionate amounts of the salary last received, ranging from one third to three fourths in some of the states, to full pay for the federal judiciary.

Conclusion

The appointive system and its alternative, the Missouri Plan advocated by the American Bar Association, to which all studies point as being best directed for the proper selection of the judiciary, are utilized only in nine jurisdictions; in three all judges are so appointed, in three others there are some exceptions, in two only appellate judges are so selected, and in one only trial court judges are so appointed.[70] The most criticized mode of selection is by popular vote. This usually involves the selection of candidates by party convention or party primaries. It is utilized in more than two thirds of the states, and in two others only as to trial court judges.[71] While partisanship is not altogether absent in the selection of judges in those jurisdictions in which the principal mode of selection of judges is by some method other than by popular election, other factors are influential there. In those states, however, in which judges are

fund, half pay if retired before 70 for disability; N.J., three-quarters salary after 10 years service or for disability at any time; N.M., retirement pay proportionate to years of service; N.Y., state employees retirement fund up to one-half salary, also retirement for illness with pay; N.C., two-thirds salary if retired for age or disabled; Ore., voluntary participation in state retirement fund; Pa., up to one-half pay; R.I., appellate court chief justice $9000, associate court justice $8000, trial court chief justice $8500, associate judge $7500; S.C., only after certain service $3000; S.D., if disabled $200 per month for remainder of term; Tenn., one third to one half of salary depending on years of service; Vt., state retirement system; Va., two-thirds pay; Wash., one-half salary; and Wyo. $4000.

[70] See text (A) supra p. 6. This summary does not include Florida, which is an anomaly since judges of the supreme court and certain inferior courts are selected by popular election, but judges of the circuit courts and civil and criminal courts of record are appointed by the governor with the consent of the senate.

[71] This list is made up of thirty-five states, to which are added California and Missouri, in which trial judges are so selected, and with which Florida also should be included since judges of the supreme court, county judges and justices of the peace are so selected. See text (D) supra p. 10.

elected by popular vote, the importance of party considerations is illustrated by the fact that in thirty of these states candidates for the judiciary are nominated in party primary or convention, although in four of these judges are not elected at the general election, and in this latter group and in eleven others a nonpartisan section of the regular ballot or a separate nonpartisan ballot is utilized.[72] Activities of a political or partisan nature are engaged in by some judges in other states, all of which are states in which the chief mode of selection of judges is by popular election.[73]

While particular criticism of the judiciary in those states in which judges are elected by popular vote, except in regard to lack of learning or legal ability, is not forthcoming in great volume, the dissatisfaction of the bar in these states is shown by the sentiment in about two thirds of them for a change to the Missouri Plan, as advocated by the American Bar Association. In contrast to this there is no sentiment favoring a change to popular election of judges in those jurisdictions in which judges are selected otherwise, and there is general approval of the courts.

The facts as to involvement in politics, the comparative appraisal of judicial conduct, and the judgment of the bar favoring a change from the elective system substantiate the belief that some other system than selection by popular election must be utilized for the choice of persons best suited to sit on the bench. In particular, the role played by *ad interim* appointments and the custom in many states of reelecting and reappointing incumbents illustrate the basic approval of the electorate for a system in which party consideration ought not to enter. As was said earlier by Professor Haynes in his volume on *The Selection and Tenure of Judges:*

> The wide difference of opinion concerning the technique of judicial selection and tenure arises out of disagreement in this country (it can almost be said *only* in this country) over the question, how far, how immediately, and in what way, should judges

[72] See text (E) supra p. 10.

[73] See text (C) supra p. 15.

> be subject to popular control? That is without doubt the vital question so far as we are concerned . . .[74]

The changes wrought in the mode of judicial selection by the Jacksonian Revolution also left their imprint on the length of the term of judicial office.[75] Thus, only in three jurisdictions other than the federal do judges today hold office during good behavior.[76] The evidence is mounting, however, of the growing sentiment on the bench, and of the bar and the public for the abandonment of the Jacksonian philosophy of rotation in office and popular elections in favor of a return to the earlier concepts of judicial independence, and this inevitably calls for the establishment of judicial tenure during good behavior. As was said in *The Federalist* in explaining the tenure of the federal judiciary under the Constitution:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other be fatal to their necessary independence.[77]

Further evidence of the reaction from the Jacksonian doctrine of short terms and frequent elections is to be found in the lengthening of the term of office, particularly in the appellate courts, and in minimizing the evils of frequent election through the process of executive *ad interim* appointments to fill vacancies, followed by the popular election of the incumbent judge.

The problem of financial security is of importance in obtaining fit persons for judicial office, and an attempt is being made to provide salaries commensurate with the importance of the office.[78] Since judicial salaries do not, however, in reality approach the amount of financial reward that can be secured by

[74] Op. cit. supra n.2, at 8.

[75] Hyde, op. cit. supra n.2, at 390-391.

[76] Mass., N.H., and R.I. Note that this is really only absolutely true in Rhode Island as to trial judges. See text (A) supra p. 17.

[77] The Federalist No. 78.

[78] The Book of the States 1948-1949, at 497-498, 504-505. E.g. Colo. Spec. Sess. (1948) H.B. 3.

an outstanding lawyer in ordinary professional life, provision for retirement in case of illness or because of age is essential if the judicial position is to attract the most eligible lawyers. Thus, the present trend appears to be away from that which developed between 1830 to 1850, of popular elections, short terms, low salaries, and no retirement compensation, and toward methods of selection, tenure, and recompense which will result in higher qualifications for judicial office.

CHAPTER II

MANAGING THE BUSINESS OF THE COURTS

Recommendations Adopted by the American Bar Association, July, 1938

(1) That provision should be made in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage.

(2) That Judicial Councils should be strengthened with representation accorded the Bar and the Judiciary Committees of the Legislative Department.

(3) That quarterly judicial statistics should be required.[1]

INTRODUCTION

These recommendations originated in the obvious necessity for improving the business methods of the courts in order to enhance their efficiency in performing their judicial functions. The first recommendation herein is paramount to the others: it contains a proposal for the management of court business in a systematic manner, under the direction of one judge whose power and responsibility it would be to utilize available judicial man power most effectively. This proposal for centralized management and entrusting supervision of the business of the courts to an administrative judge necessitates providing the judge so empowered with assistance in carrying out his administrative duties. The Administrative Office of the United States Courts,

[1] These recommendations, as adopted by the Section of Judicial Administration and approved by the House of Delegates of the American Bar Association, followed closely those originally suggested by the Section's Committee on Judicial Administration which studied these problems intensively. See Appendix A at 513. Compare also Recommendation (13) therein under the heading "Trial Practice," which is of the same general import as the first two recommendations heading this chapter and reads as follows: "That as aids in securing promptness of judicial decision, the 'administrative judge' and requirement as to periodic statistical reports should be provided for rather than rigid statutory requirements as to withholding of salaries or requiring affidavit from judicial officers." Id. at 507.

established the year after these proposals were approved, points the way for one possible mode for performance of this vital court management function.[2]

The business and management of the federal courts had been entrusted to the Department of Justice from the time of the organization of the Federal Government. The concept of an administrative director for all the federal courts, designated as the Office of the Proctor,[3] received professional and public approval [4] when originally proposed as part of the otherwise much criticized court reorganization plan of 1937. After the defeat of that legislation, a bill for an administrative office of the federal courts was introduced in 1938, at the instigation of Attorney General Cummings, who recognized the inappropriateness of having an executive department administer the business affairs of the courts. While no positive action was taken by Congress at that time, the Judicial Conference approved the idea and Chief Justice Hughes appointed a special committee to collaborate with one appointed by the Attorney General to rewrite the bill. This joint committee drafted the statute presently in force, which was enacted in 1939.[5]

The Administrative Office of the United States Courts is supervised and directed by the Judicial Conference; [6] its director is in charge of the administrative and clerical personnel of the lower federal courts, the collection of judicial statistics, the presentation of the budget for the federal courts to Con-

[2] 53 Stat. 1223 (1939), 28 U.S.C. §§ 601-610 (1948).

[3] S. 1392, 75th Cong., 1st Sess. (1937) § 3, gave to the Supreme Court power to appoint a proctor to investigate volume, character, status of litigation, etc. in federal courts.

[4] 23 A.B.A.J. 343, 381 et seq. (1937). It is to be noted that members and nonmembers of the American Bar Association polled by that organization approved the creation of the Office of Proctor by a vote of 39,990 to 28,341. Id. at 387. Contrasting to this is the vote on the recommendation to increase the membership of the Supreme Court, in which members and nonmembers disapproved the proposal by a vote of 56,153 to 14,333. Id. at 385. For other material on the proposed court reorganization plan see id. at 233, 278, 315, 347, 491, 575.

[5] Chandler, "The Administration of the Federal Court," 13 Law & Contemp. Prob. 182 et seq. (1948); Murphy, "Administration of United States Courts," 28 Geo.L.J. 383 (1939); 21 J. Am. Jud. Soc'y 142 (1938); 22 id. 160 (1938).

[6] 53 Stat. 1223 (1939), 28 U.S.C. §§ 601-610 (1948); creation of Judicial Conference, 42 Stat. 837 (1922), 28 U.S.C. § 331 (1940).

gress, the disbursement of moneys for the operation of the courts, the furnishing of equipment and supplies to the courts, the auditing of the accounts of court officials, and the making of reports and recommendations concerning judicial business as directed to the Judicial Conference of Senior Circuit Judges.[7] Thus, for the federal courts one agency, acting in close relation to the Judicial Conference, which in turn is presided over by the chief justice of the United States, is attending to the necessary business activities and "housekeeping" functions that must be performed for every court, and at the same time is scrutinizing the work of the courts in order to disclose more efficient means for directing the administration of justice.

A Committee of the Section of Judicial Administration of the American Bar Association on an Administrative Office of State Courts was established in 1942 [8] and reestablished in 1946.[9] Its function is to serve as a clearing house of information in this field. Through its encouragement a Model Act to Provide for an Administrator for the State Courts was prepared and approved by the Conference of Commissioners on Uniform State Laws in 1948. The Section of Judicial Administration has now recommended the adoption by the states of this Model Act.[10] The Model Act provides for the appointment of an administrator for the courts who, with assistants appointed by him, shall under the supervision of the court of last resort perform investigatory and management functions such as examining the state of the docket and recommending assignment of judges where courts need assistance, collect and compile statistics, prepare and submit budget estimates, obtain reports from the various courts on the state of the business of the courts, and attend to any other matters assigned by the

[7] Ibid. See Chandler, "The Administration of the Federal Courts," 13 Law & Contemp. Prob. 182 (1948), "Making the Judicial Machinery Function Efficiently," 22 N.Y.U.L.Q.Rev. 445 (1947); Shafroth, "Improving Judicial Administration in the State Courts," 8 Mo. L. Rev. 5, 12-19 (1943).

[8] 67 A.B.A.Rep. 50 (1942).

[9] 71 id. 56 (1946).

[10] See A.B.A. Handbook, The Improvement of the Administration of Justice, at 22-28 (1949); Report of Section of Judicial Administration, Advance Program, 70th Annual Meeting, A.B.A. at 134-135 (1947); Report of Committee on An Administrative Office of State Courts, Section of Judicial Administration, A.B.A., Sept. 22-23, 1947, at 11-13.

court of last resort. In 1938, when the recommendations which head this chapter were approved, an administrative office for the courts and its potentialities as demonstrated by the federal example were not foreseen. Its establishment, however, is not only consistent with the recommendations, but in view of the experience of the last decade, an administrative office for the courts may be said to be a corollary thereto.

Effective Judicial Administration

(1) That provision should be made in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage.

The recommendation under consideration here calls, first of all, for a unified judicial system. This section of the chapter accordingly deals with the extent to which elements of unification exist in the courts in each state for the management of the business of the courts so as to relieve the congestion of the dockets and to utilize the available judicial man power to the best advantage. Such power is in no sense an encroachment on the independence of any judge in the performance of his individual judicial functions: its exercise is confined to the allocation and administration of the business of the various courts. Constitutional and statutory provisions which give a judge, an official or an agency authority as to these matters, coupled with administrative discretion as to action, are pertinent here.

In studying the elements of judicial unification in the court system of each state, it is necessary to observe both the elements of *external* control and the elements of *internal* control. Of these, *external* control is by far the more important. It is the control exercised over the business of a court by an official or an agency or a judge not sitting as a member of the court or division which is so managed. It relates to the distribution of judges among courts, or of business among courts, by a power outside such courts. The action of a chief justice of a

state supreme court in assigning a judge of a trial court to a court or a district other than his regular court is an example of an exercise of *external* control. When, however, the same chief justice assigns a case to one of the members of his court for the writing of an opinion, he is exercising *internal* control. *Internal* control can be exercised, of course, only when a court is sitting *en banc,* and is manifested as administrative control of such court (or division of a court) by one of the judges of the court (or of the division). When a single judge is holding court, no question of *internal* control, of course, can arise.

Four specific forms of *internal* control may be enumerated. These are: first, the power to preside at the open sessions of the court sitting *en banc* and announce its conclusions; second, to preside at the closed conferences or consultations of the court; third, to designate the member of the court to commence the discussion of a case after argument; and, fourth, to assign opinions to be written by the various judges of the court.

With regard to the control exercised over a court by one of the members of the court, there is much less formal diversity among the states than is the case with *external* control. Almost every state reported that the chief justice of any court sitting *en banc* in the state presided over and controlled to some extent the court's business. In the majority of jurisdictions the presiding judges of the courts sitting *en banc* exercised more than formal control; that is, they not only presided over the sessions of the court but also may do such things as assigning opinions among its members.[11] In the remaining states the court acting by a majority vote shared the control with the chief justice. In courts operating under this system, opinions are simply rotated among the justices rather than assigned.[12]

[11] Ariz., Colo., Del., D.C., Fla., Ga., Ind., Kan., Ky., Me., Mass., Miss., Mo., Nev., N.J., N.Y., N.C., Okla. (subject to veto or reversal by a majority of the court), Ore., Pa., R.I., S.C., S.D., Tenn., Utah, Va., Vt., and Wash. In Oregon also whenever the Supreme Court business is congested and any judge is unable to sit for good reason, the Supreme Court may designate any circuit court judge to sit temporarily as a member of the Supreme Court. Ore. Comp. Laws Ann. (1940) § 93-108.

[12] Ark., Calif., Conn., Idaho, Ill., Iowa, La., Mich., Minn., Mont., Neb., N.H., N.M., N.D., Ohio, W.Va., and Wis. Cf. Ala., cases are assigned by the clerk of the court; Tex., no set cus-

An important form of *internal* control possessed by courts sitting *en banc* in eighteen states is the authority to sit in divisions when the business of the court warrants.[13]

The term for which the chief justice of a court sitting *en banc* holds office is of extreme significance for the exercise of *internal* control. In eight states the chief justice of the court of last resort is the judge having the shortest term left to serve,[14] and in eleven states the chief justiceship is determined by seniority, the oldest member of the court in point of service is the chief justice.[15] While in the majority of the states the chief justice holds office until the expiration of his term on the court, in twelve states the term of the chief justiceship is a special limited term, ranging from six months to four years.[16] Effective administration of any sort cannot result when the administrative office is held for short terms and there is rotation of that office.[17]

In the classification of the degrees to which the various states exhibit elements of *external* control of judicial business, eight specific forms of such control are used as criteria. These are: first, the power to assign a judge to specialized duties such

tom, practice varies from court to court. See chapter on Appellate Procedure at 438 et seq.

[13] Ala. Code (1940) tit. 13, § 11; Ark. Const. Amend. 9; Colo. Const. Art. VI, § 5, R.Civ.P. 119; Fla. Const. Art. V, § 4; Ga. Code Ann. (1933) § 24-4011; Iowa Rules Regulating Practice of Supreme Court, Rule No. 2; Kan. Const. Art. III, § 2; Ky. Const. § 118; La. Const. Art. VII, § 5; Miss. Const. Art. 6, § 149A; Mo. Const. (1945) Art. 5, § 7; Neb. Const. Art. V, § 2; N.C. Const. Art. IV, § 6; Okla. Stat. (1937) tit. 20, § 13; Ore. Comp. Laws Ann. (1940) § 93-114; Tenn. Code (1934) §§ 10606-10616; Wash. Const. Art. IV, § 2.

[14] Colo., Idaho, N.M., N.D., Ore., Utah, Wash., and Wyo.

[15] Ariz., Ill., Ind., Kan., Ky., La., Md., Miss., Nev., Va., and Wis. Of this group the judge who is oldest in service is always chief justice in Ariz., Kan., La., Miss., Va., and Wis.; while in Ill., Ind., Ky., Mich., and Nev. the chief justiceship is rotated among the members of the court, but each time going to the one among the remaining members who is next highest in point of seniority.

[16] Fla. 2 yrs., Ill. 1 yr., Ind. 6 mo., Iowa, 6 mo., Ky. 1 yr., Mich. 1 yr., Mo. 4 yrs., Nev. 2 yrs., N.M. 2 yrs., N.D. 2 yrs., S.D. 1 yr., and Wash. 2 yrs.

[17] "If the chief justice is to be in any sense a leader it must be recognized that not all judges have equal talent for leadership, and those plans would seem to be best which give the electors, the appointing authority, or the judges themselves an opportunity to pick someone with leadership qualities in mind and then give him a long enough term to establish leadership and make it effective." The Book of the States, 1948-1949, at 496.

as domestic relations, juvenile offenders, small claims, and the like; second, to assign a judge to another court than his own to equalize work; third, to assign a judge's cases to some other judge to equalize the dockets; fourth, to prescribe the character and manner in which the judge shall keep his records; fifth, to require the judge to make periodical reports on the work of his court; sixth, to appoint the personnel of the judge's court (jury commissioners, clerk, bailiffs, and the like); seventh, to direct how the personnel of the judge's court shall do their work; and, eighth, to centralize and delegate the administrative and business management of the financial affairs of the judicial department.

A form of control intermediate between *external* control and *internal* control, as the two terms have been defined, is that arising where, for example, there are six circuit judges for one busy judicial district in a state. Each holds his own court, but together they select, or there may be appointed from among their numbers, a presiding judge. This presiding judge, in addition to holding his own court as the other judges do, also exercises a certain degree of administrative control over the other judges. Thus, he may assign one of the other judges to sit in a congested court in a district other than the one in which he regularly sits. Such management of courts, although not strictly so, will be classified with the forms of *external* control.

The several states may be classified into four groups according to the degree in which there are elements of control in the court systems. In the first group are those states that have substantially no element of *external* control in their judicial system. In such states the spirit of independence and love of decentralization prevail, there are no unifying elements, and reliance is placed entirely on voluntary efforts on the part of the judges to manage the shifts that are required by changes in the judicial case load. Or failing this, legislative action results. In the second group are those states having a minimum number of elements of *external* control. For example, the supreme court may be empowered to require of the courts of

UNIFIED JUDICIAL SYSTEM
Many elements of unity, a substantial degree of control is exercised over all or almost all courts
Some effective control of one or more sets of courts, no real unity
States having a minimum of elements of external control
Substantially no measure of external control exercised over any part of judicial system

general jurisdiction periodic reports as to the state of their dockets. States in the third grouping are those in which a substantial degree of control is exercised over one or two of the sets of courts in the state system. In this classification are states in which the supreme court exercises over the lower courts of general jurisdiction the power to assign judges from place to place, to assign them to specialized work and to assign to one judge part of the work of another. Quite frequently in states in this group a fairly large measure of control is exercised over the courts having general, original jurisdiction, but little or no power is vested in anyone to control the inferior courts, such as the justice courts. Finally, in the fourth group are those few jurisdictions wherein a substantial degree of control and management is exercised over almost all the different sets of courts which comprise the state judicial system.

Group 1

Included in the first group are eleven states in which substantially no measure of external control is exercised over any part of the state judicial system. These states are: *Arizona, Arkansas, Colorado, Delaware, Georgia, Indiana, Mississippi, Nevada, Vermont, Wisconsin,* and *Wyoming.* In most of these states whatever problems of congestion do arise are treated largely on a voluntary basis, *i.e.*, an overburdened judge may ask a judge whose docket is less heavily loaded to assist him temporarily.[18] An evaluation of the existing system by the local bench and bar in all but a few of these states indicates that there are few delays, little congestion and general satisfaction. While in Delaware there have been delays, these difficulties have resulted mainly from the former inadequate and

[18] Arizona, superior court judges freely exchange benches with each other, often going to various distant parts of the state to hold court for other judges, and in case of congestion of court work in the four larger counties are of material help in relieving any congested docket. Superior court judges likewise sit with the Supreme Court when for any reason a Supreme Court judge is unable to act. Mississippi, a judge of a circuit court may hold office in a district other than his own with the consent of the judge thereof when in the opinion of both judges the public interest so requires. Miss. Code (1942) § 1414. See Ga. provisions n.23.

nonuniform procedure in certain of the courts rather than from deficiencies in the state judicial system,[19] and a more unified judicial system has not been sought by the bench or bar.

In four of these states, however, *Arkansas, Georgia, Indiana,* and *Mississippi,* the desirability of some measure of judicial unification has been recognized because of deficiencies of a kind which would be at least partially remedied were there some measure of judicial unification. The difficulty of a congested docket in *Indiana,* for example, results from the creation of separate courts, each having concurrent civil jurisdiction, with the result that one judge may be overloaded with work while another may have considerable free time.[20] In several of these states comprehensive reorganization of the judicial system is being considered by bar associations and other interested bodies.[21]

In concluding the discussion of this group, it might be noted that in *Delaware* the governor may commission a judge *ad litem* in order to make a quorum in any constitutional court;[22] in *Georgia* the governor may assign a substitute judge to take

[19] Art. IV of the Delaware Constitution sets forth existing controls over the state judicial system, controls which are for the most part internal. The chief justice and four associate judges, constituting the Supreme Court, designate from among their number the judges who shall sit from time to time as trial judges in civil and criminal cases in the several counties. In appeals from chancery the chief justice presides in the Supreme Court and assigns the writing of the opinion. On writ of error to the superior court the chancellor presides in the Supreme Court and assigns the opinions. The chief justice presides over the court en banc. As to recent changes on procedural rules, see chapter on Rule-making—The Judicial Regulation of Procedure at 105.

[20] Important as contributing to the overburdening of judges in Indiana is the fact that the legislature has provided for automatic change of venue from the county, and, or from the regular judge upon the affidavit of either party that a fair trial cannot be had. The regular judge has no capacity to inquire into the truth of this affidavit. The statute providing for change of venue to an adjoining county is employed quite generally, and indeed consecutively, the principal motive being that the device serves as a dilatory tactic. In the larger cities, in which there are three courts of concurrent jurisdiction, changes of venue from the county are taken frequently. Since the adjoining counties are comparatively rural, with only one court of general jurisdiction, the result is a congested docket while many, if not most, of the cases will have been transferred from an adjoining large-city county.

[21] Ark., Colo., and Ga. As to Arkansas see 2 Ark.L.Rev. 174 et. seq. (1948).

[22] Del. Const. Art. IV, § 18.

the place of a superior court judge who is disabled;[23] and in *Nevada* the governor is empowered to designate a district court judge to sit in the place of a disqualified or disabled supreme court judge.[24] Such provisions do not qualify as a type of administrative control, since the activating cause here is not the state of a court's dockets but rather simply a need to fill an existing vacancy. Consequently, despite the presence of these provisions in their laws, Delaware, Georgia, and Nevada have been classified with Group 1.

Group 2

Seventeen states comprise the second group, those having a minimum number of elements of external control. They are: *Florida, Iowa, Kansas, Kentucky, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah,* and *Washington.* Generally, on the basis of the dominant element of unification in each state's judicial system these seventeen states seem to fall into three subgroups.

States in subgroup (a), *Iowa, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma,* and *South Dakota,* each have either a constitutional mandate or a statutory enactment providing that the Supreme Court shall have general superintendence of all courts of inferior jurisdiction.[25] Singularly enough, in none of these jurisdictions does this provision appear to have been extensively used to accomplish a measure of administrative control.[26] In addition the chief

[23] Ga. Code Ann. (1933) § 24-2610. Cf. also id. § 24-2442, authorizing judge of juvenile court or judge of superior court to request that the Ordinary, the judge of the city court, "or any person appointed *pro tempore* as the judge of the juvenile court" to preside as judge of the juvenile court in case of disqualification, illness or absence of that judge; id. § 24-2623, requiring a disqualified judge of the superior court to procure services of another judge.

[24] Nev. Const. § 112.

[25] Iowa Const. Art. V, § 4, Iowa R.Civ.P. Rule 347a; Mont. Const. Art. VIII, § 2; N.H. Rev. Laws (1942) c. 369, § 2; N.M. Const. Art. VI, § 3; N.D. Const. § 86; Okla. Const. Art. VII, § 2; S.D. Const. Art. V, § 2.

[26] In Montana a unique writ of supervisory control has been developed.

justice of the Supreme Court in several of these states has authority to assign district court judges to sit in other districts.[27] The extent of the use of such power varies from state to state. In *Iowa* there is some but not widespread public dissatisfaction over court delays which might be alleviated by an improvement in court management [28] through the use of existing constitutional power. In *Oklahoma* there is a reported need for a specialized court,[29] and in the remaining states of this subgroup no problems arising from court delays or deficiencies of management have occurred, according to the bench and bar of the state.

The states in subgroup (b) are: *Florida, Nebraska, Rhode Island, Utah,* and *Washington.* The elements of judicial management common to each is that form of control, mentioned earlier, falling between strict external control and strict internal control. The superior court in *Rhode Island* well exemplifies this.[30] It consists of a presiding justice and ten associate justices. Any justice sitting for the time being in a county constitutes the superior court for that county. At the beginning of each term the presiding justice assigns the various

Morris, "The Writ of Supervisory Control," 8 Mont.L.Rev. 14 (1947).

[27] In Iowa the chief justice has ample power to assign district judges as between counties in their own district, or to a county in another district if business in that district cannot be disposed of in a reasonable time. This power is used frequently when a judge is disqualified or incapacitated because of illness or otherwise. Iowa Code (1946) §§ 604.24, 604.25. Similarly, see, N.H. Rev. Laws (1942), c. 370, § 2, where the business of the superior court requires it, and upon request of the chief justice of that court, the chief justice of the Supreme Court may assign himself or some other justice of the Supreme Court to serve in the superior court; also N.M. Const. Art. VI, § 15; Okla. Const. Art. VII, § 9 (used frequently). In South Dakota, where there is more than one circuit judge, the work is apportioned by agreement between the judges, or by order of the presiding judge of the Supreme Court. S.D. Code (1939) § 33.1204; the Supreme Court is authorized on request of a circuit judge to require another circuit court judge to hold court or to act for him. Id. § 33.1201. Cf. Mont. Rev. Code (1935) §§ 8821-8823; N.D. Rev. Code (1943) §§ 27-0225, 27-0525, power in Supreme Court to designate special terms of district courts and regulate business of district courts.

[28] I.e., the court has failed to use its power to appoint a supervisory agent for courts in the larger cities.

[29] In this instance a juvenile court. Legislative action in addition to administrative action would be needed because of the limited means of external control.

[30] R.I. Gen. Laws (1938) c. 496, §§ 1-5

associates to the different sittings. Each associate is supposed, however, to report to the presiding justice when his calendar is finished, and he may then be assigned to another calendar. The presiding justice in addition may require periodic reports from each associate as to the state of his calendar. A similar arrangement prevails in the District Court of Providence where the justice administers the business of the court, consisting of himself, an associate justice and a clerk.

In *Utah,* although the Supreme Court on its own initiative has called on the district judges to assist in alleviating crowded calendars in other districts, and by voluntary action the various district courts assist each other,[31] there is primarily the presiding-judge type of control to be found in Rhode Island. In *Florida,*[32] *Nebraska,*[33] and *Washington* similar functions are

[31] In the Third Judicial District, in which there are six divisions, the six judges sitting as a conference assign themselves to specialized work. A presiding judge is chosen whose duty it is to equalize the dockets. In the Second, Fourth, and Seventh Districts, each having but two judges, there is likewise a presiding judge with power to assign cases of one judge to another to facilitate handling of the load. A similar arrangement exists in the Salt Lake City court, where there are four divisions. See Utah Code Ann. (1943) § 20-4-11. As provided by statute, the judges of the district courts fix the times of holding terms of court in each of the counties composing their respective districts for each calendar year. Id. § 20-3-9. In case of disagreement among the district court judges as to the manner and time of holding terms of court, or as to the counties in which they shall severally sit, the matter is referred to the chief justice of the Supreme Court for his determination. Id. § 20-3-12. Any district judge may hold a district court in any county at the request of the judge of the district, and upon a request of the governor it is his duty to do so. Utah Const. Art. VIII, § 5; Utah Code Ann. (1943) § 20-3-13.

[32] By virtue of a Florida constitutional provision (Fla. Const. Art. V, § 43) and a rule of court (Comp. Law Rules, Rule 2, effective Oct. 1, 1936), where there is more than one judge in a circuit and, more generally, where there is more than one judge of a trial court, the judge holding the earliest commission may exercise certain administrative powers, among them the superintendence of the distribution of business among the judges. As a matter of practice this control consists largely of periodically making up schedules showing which judge is assigned to a particular county in the circuit, which judge will sit in chambers, and which judge will try cases. In addition, the Florida Constitution, Art. V, § 8, confers on the governor authority to order a temporary exchange of circuits by the respective circuit judges. Similarly, Fla. Stat. Ann. (1944) § 26.43.

[33] Nebraska statutes authorize judges of the district courts to set their own terms in various counties, and authorizes interchanging by judges of district courts when necessary to continue the work of the court. Neb. Rev. Stat. (1943) §§ 24-303, 24-312.

performed by judges presiding over conferences of district or superior court judges in districts having more than one district judge. In Florida also, while no rule or statute requires it, the Supreme Court customarily makes a statistical study of court business at the end of each term of court. Of these states only in Florida is there any reported sentiment of the bench or bar to the effect that a more unified judicial administration of court business might be in order.

Comprising the final subgroup of Group 2, the states having a minimum number of elements of judicial control, are *Kansas, Kentucky, Minnesota, South Carolina,* and *Tennessee.* In these states a variety of provisions giving unity to the courts exists. Thus, in *Kansas* in certain districts where there is more than one division, the judge senior in service is the presiding judge. His control, however, seems to be largely formal, since rules promulgated under statutes provide that residuary powers of management are vested in all the judges. In addition, the courts are required to give requested information to the judicial council, and the Supreme Court is empowered to prescribe the manner in which district courts keep their records.[34] *Kentucky* statutes provide that every circuit court judge shall call a special term of his court when there are ten or more cases undisposed of at the end of the term. When he fails to do so, the chief justice of the Court of Appeals may call a special term.[35] In addition, in circuit courts having more than one circuit judge there is a statutory provision for equalization of dockets among different divisions.[36] In *Minnesota* "when the convenience or interest of the public or the interest of any litigant shall require," a district judge may request a judge of another district for assistance, and such request permits the latter at his option to act in such district.[37] *South Caro-*

[34] Kan. Gen. Stat. (1935) tit. 20, §§ 502, 2205.

[35] Ky. Rev. Stat. (1946) § 23.120.

[36] Id., § 24.120.

[37] Minn. Const. Art. VI, § 5; Minn. Stat. Ann. (1945) § 484.05. This statute formerly had a provision analogous to that in Minn. Laws, 1923, c. 199, § 3, authorizing the governor to designate a judge of another district to discharge the duties of a district judge, but such provision was held unconstitutional as an invalid delegation of judicial power to the executive. State ex rel. Thompson v. Day, 206 Minn. 77, 273 N.W. 684 (1937). The effect of this decision on Minn. Laws, 1923, c. 199, § 3, which applies only to a single district and

lina statutes fix the regular sessions of the common pleas and general sessions terms of the circuit court, but special terms or holdovers may be ordered when the public interest requires, or in the event of an overcrowded docket.[38] The chief justice of *Tennessee* is authorized to designate any retired judge or any regular trial judge to hold court in any county, judicial district or chancery division to relieve a congested docket or where the trial judge is sick or incompetent.[39]

Of these states only in Minnesota and Tennessee is the desirability of a more unified system admitted. In Minnesota a judiciary committee of a legislative commission has recommended a plan of reorganization which possesses many features of a unified court organization without specifically incorporating the concept of a unified court. In South Carolina the feeling prevails that the state's major problems in regard to judicial administration lie in the need to improve procedure rather than court management.

Group 3

Group 3 consists of those jurisdictions which make provision in their judicial systems for some effective external control of one or more sets of courts, but not for all of them. In this group are: *Alabama, Connecticut, Idaho, Illinois, Louisiana,*

authorizes the judge of that district to relieve or assist other judges for six months of the year as directed by the governor, has not yet been determined. See 22 Minn.L.Rev. 729 (1938).

[38] S.C. Code (1942) § 69. South Carolina statutes also provide that if a circuit judge is ill, the chief justice of the Supreme Court may assign any disengaged circuit judge to hold a special session, and if no disengaged circuit judge is available, the governor is authorized to commission a special judge, while in event of an overcrowded docket such disengaged or special judge may be assigned by the chief justice to hold over until the docket is clear. Id. § 44, cf. also §§ 21, 30.

[39] Tenn. Code Ann. (Supp.) § 9911.11 as added L. 1939, c.20, § 2. The chief justice also can assign another judge of the circuit, chancery, criminal or county court to serve whenever the regular judge is unable to try the docket. Tenn. Code Ann. (1934) § 9929. Apparently under this statute some equalization of dockets is achieved. There is statutory authority for judges interchanging. Id. §§ 9894-9900. In addition the judicial council is given power over every court to require them to make periodic reports on the state of their dockets, and to collect, compile, and analyze statistics pertaining to the judicial system. Tenn. Code Ann. (Supp.) §§ 738.9, 738.10 as added L. 1943, c. 130.

Maine, Massachusetts, Michigan, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Virginia, and *West Virginia.*

Of these sixteen jurisdictions *Connecticut, Louisiana, Maine, Oregon, Texas,* and *Virginia* are generally similar. The pivotal element in the system of control in each is the highest appellate court or the chief justice of such court. In this group Connecticut is outstanding because it has a special aid to the courts in the form of an executive secretary of the judicial department in charge primarily of fiscal matters. With the exception of Texas, which will be considered subsequently, in each state the courts so controlled are the principal courts of general original jurisdiction.

Illustrating generally the system of control typical of this group is the arrangement in *Maine.* In that state the highest appellate court is the Supreme Judicial Court. By statute the chief justice of this court assigns the justices of the superior court, the court of general jurisdiction, to preside over the regular trial terms, which are fixed by law.[40] He is given authority to designate a justice of the Supreme Judicial Court or an "active retired justice" of either the Supreme Judicial Court or the superior court to hold such terms;[41] and whenever he determines that there is need for two or more simultaneous sessions of the superior court to be held in the same county or that special sessions be held, he may designate a regular or active retired justice of either the Supreme Judicial or the superior court to hold such terms.[42] The chief justice also takes part in selecting the personnel of the superior court through his power to appoint stenographers [43] and jury commissioners.[44] In the discharge of these duties the chief justice is aided by a provision in the statutes permitting him to call together the justices of the superior court for conferences on the dispatch of judicial business.[45] In Maine most courts have a relatively light docket; there is rarely any congestion; cases

[40] Me. Rev. Stat. (1944) c. 94, § 1.
[41] Ibid.
[42] Id. c. 94, §§ 1, 12.
[43] Id. c. 100, § 185 as amended L. 1945, c. 308.
[44] Id. c. 103, § 1.
[45] Id. c. 94, § 7.

are heard almost immediately except for a wait in counties having only two or three short terms a year. None of the courts in the state is required to report judicial statistics to any other judge, officer or agency, with the possible exception of the judicial council, but the chief justice is authorized to inquire into such matters in his conferences with the justices of the superior court.[46] With minor variations this is the picture presented by the judicial systems of the other states in this group,[47] excepting Texas.

[46] Id. c. 100, § 192, c. 94, § 7. Criminal statistics are reported by county attorneys to the attorney general. An attempt to have the court clerks report was not successful.

[47] In Connecticut assignment of judges of the superior court to the several terms is made by the judges at their annual meeting; in practice the meeting approves as a matter of form the assignments drawn up by a committee of the three senior judges of the superior court. The chief justice of the Supreme Court of Errors has authority to vary these assignments according to the work load. Conn. Gen. Stat (1949) § 7624. In addition, Connecticut's judicial council has the power to require information of the clerks of the various courts. Id. §§ 7659, 7660 In Louisiana the Supreme Court is authorized to assign judges of one district court to another district court and can interchange the judges of the district courts in order to secure the prompt and efficient administration of justice. By virtue of the same provision it can assign district judges to the courts of appeal whenever the judges of the courts of appeal are called to sit with the Supreme Court. Finally, again under the same provision it has the power to require all inferior courts to make reports of the work and business before them and to direct such investigation into the business and affairs of such courts as it may deem proper. The Supreme Court has not made full use of this grant of power and no administrative organization for the courts as a whole has been established. With regard to the Juvenile Court of the Parish of New Orleans the Supreme Court may appoint a lawyer to sit as judge of this court when necessary to secure the prompt and efficient administration of justice. La. Const. Art. VII, § 12, as amended Acts 1936, No. 330, § 1. The chief justice of the Supreme Court of Oregon may direct any circuit judge to hold court in any county of any district to promote the more speedy transaction of business of the various circuit courts, and the Supreme Court may designate any circuit court judge to sit temporarily as a member of the Supreme Court. Ore. Comp. Laws Ann (1940) §§ 93-245, 93-108. Under Ore. Const. Art. VII, § 9, the circuit courts have supervisory power over the county courts and all other inferior courts. There is no record indicating that this power has ever been exercised. In the fourth district the circuit court has nine departments. There is a presiding judge who assigns cases for trial to the different departments. Rules of the Circuit Court in and for the 4th Judicial District, Rule 6. Finally, in the district court for Multnomah County, where there are four judges, including a presiding judge, the presiding judge for the purpose of expediting business may transfer any action or proceeding from one department to another with the consent of the judge to whom it is assigned. Rules of the District Court

Connecticut, one of this group of states having a pattern of judicial control similar to that pictured for Maine, has one particular feature which is worthy of mention. Since 1937 the office of the executive secretary of the judicial department has been in existence.[48] His principal duties are concerned with the five independent, state maintained courts, and the purpose of the office is the integration of the administration of the non-judicial business of these courts, relieving the chief justice of a heavy burden of details of business administration, performing the duties of administrative and business management of the financial affairs of the judicial department. The main tasks of the executive secretary are acting as auditor of the bills of costs and expenses submitted to any judge for taxation, maintaining accounting records for the courts, budgeting for the courts, purchasing supplies, preparation of payrolls, and the classification of court personnel.[49] The functions are similar to those performed by the Division of Business Administration of the Administrative Office of the United States Courts and resemble in part those of the administrator for state courts embodied in the Model Act. Thus, Connecticut has taken a forward step in the conservation of judicial man power by relieving judges of the burden of dealing with the multitudinous details of business management and delegating such tasks to others acting under judicial supervision.

In *Texas* the control exercised by the Supreme Court extends

of the State of Oregon for the County of Multnomah, Rule 3. In Virginia the chief justice of the Supreme Court of Appeals may designate any corporation or circuit court judge, whether active or retired, to assist another such judge when there is need for such assistance because of congestion in the work of the latter's court. Va. Code (Supp.) § 5898. Also under id. § 5889a, when a vacancy occurs in the office of the judge of any judicial circuit, under certain conditions the governor defers filling the vacancy until the Supreme Court certifies the necessity for filling such vacancy in the light of the needs of the volume of business in and around that court. Lastly, the clerks of the circuit and corporation courts are required to make reports on the business of their court to the Supreme Court, and the latter may prescribe the forms upon which such reports shall be made. Id. § 3405.

[48] Conn. Gen. Stat. (1949) § 7661.

[49] See Appendix A, Report of the Committee on An Administrative Office of State Courts, Section of Judicial Administration, A. B. A., Sept. 22-23, 1947.

to the courts of civil appeals, the intermediate courts for civil cases, rather than to the district courts, the courts of original jurisdiction. By statute the Supreme Court is empowered as early as practicable after January 1st and June 1st of each year to equalize the amount of business on the dockets of the different courts of civil appeals by transferring cases from court to court.[50] To implement this power the chief justice receives periodically from the clerk of each court of civil appeals a list of the cases pending in his court.[51]

Texas district courts, the principal courts of original jurisdiction, are likewise subject to a form of external control, but not by the Supreme Court. The state is divided by statute [52] into nine administrative judicial districts. From among the district judges within each administrative judicial district a presiding judge is appointed by the governor, acting with the advice and consent of the senate. At least once a year the presiding judge calls a meeting of the judges within his district. This conference has power to prescribe rules regulating the keeping of records by the district courts and to facilitate the dispatch of cases. The presiding judge is authorized to assign any of the judges of his administrative judicial district to hold regular or special terms of court in another county within such district under such rules as the conference may have laid down; and he may assign a judge to sit for another judge where the latter is busy trying other cases. Finally, the presiding judge may call for additional judicial man power from the presiding judge of another district. Despite the elaborate statutory machinery to equalize the load among judges in an administrative judicial district, in practice initiation of the process rests largely with each individual judge and the whole affair is carried out largely as a voluntary, invitational matter.

Where, however, in certain large cities two or more district

[50] Tex. Civ. Stat. (Vernon, 1925) art. 1738.

[51] Ibid. By virtue of the same statute the Supreme Court may order cases transferred from one court of civil appeals to another "when in the opinion of the Supreme Court, there is good cause for such transfer."

[52] Tex. Civ. Stat. (Supp.) art. 200a.

courts have civil jurisdiction, the Texas Rules of Civil Procedure [53] provide that twice a year the judges of such courts shall select one of their number as presiding judge. This presiding judge is authorized to assign any case in any court for trial in any other district court in the county. As a result of the rule, the Dallas county courts appear to function as if there were only one court with six judges. Completing the picture of control for Texas is a provision authorizing the judicial council to require all courts, including those not of record, to furnish judicial statistics.[54]

In contrast with these six states, in *North Carolina* the governor is the chief figure exercising external control of courts. The General Assembly of North Carolina fixes the regular terms for the superior courts, the courts of general *nisi prius* jurisdiction, but the governor is authorized by statute to cancel the terms of court which have been designated by the legislature, upon a finding that the terms are not necessary because of lack of sufficient business.[55] Special terms for the superior courts, moreover, may be ordered by the governor because of congested dockets upon the certification "of any judge, or a majority of the Board of County Commissioners, or otherwise" (which seems to permit the governor to order a special term upon his own motion or upon the request of the members of the local bar association).[56] And he may appoint the regular judge or any other judge, regular or emergency, to hold the special term. An alternative form of control in North Carolina, rarely used, is that provided in a statute giving the Court Calendar Commission power to increase or decrease the number of court terms designated for the superior courts by the legislature.[57] In spite of these various elaborate provisions in North Carolina, much time and effort are consumed wastefully, particularly in putting court machinery in motion for one-day sessions while crowded dockets

[53] Tex. R.Civ.P. (Supp.) Rule 330.
[54] Tex. Civ. Stat. (Supp.) art. 2328a.
[55] N.C. Gen. Stat. (1943) § 7-71.1.
[56] Id. § 7-78. See also N.C. Const. Art IV, § 11; N.C. Gen. Stat. (1943) §§ 7-77 through 7-81.
[57] N.C. Gen. Stat. (1943) §§ 7-77 through 7-81.

prevail elsewhere.[58] In the interest of improving the efficiency of North Carolina courts, the Special Commission on the Improvement of the Administration of Justice has proposed among other things that the authority of the governor to assign judges be transferred to the Supreme Court and that the present requirement for the rotation of judges be eliminated.[59]

Alabama and *Idaho*[60] present a combination of the features discussed above, for the chief justice of the Supreme Court and the governor exercise coordinate control in each state. In Alabama both the chief justice[61] and the governor[62] may designate extra sessions for any court. The chief justice may order judges to hold court out of their circuits whenever the public good requires, and he may order an adjourned or special session of court for any county.[63] It is his duty to see that the business of the court is attended to with dispatch, and he may prescribe the form in which the judges shall keep their records and may require from them periodic reports and statistics.[64] The governor is authorized to direct any judge of the circuit court, the court of general jurisdiction, to hold a special session of the circuit court for any county in "said judge's circuit."[65]

[58] Even during the war, when the volume of new litigation was less than normal, civil cases were on the dockets which had been pending for four or five years. See "A Survey of Statutory Changes in North Carolina in 1943," 21 N.C.L.Rev. 323, 336-343 (1943).

[59] See 15 Popular Government 2-5 (1949). Constitutional amendments have been proposed to transfer to the chief justice of the Supreme Court the authority now exercised by the governor in the assignment of judges and to empower the legislature to define the jurisdiction of the special judges, and to permit the election of more than one superior court judge in any district. Proposed Amendments to N.C. Const. Art. IV, §§ 11, 10, H.B. No. 154, No. 161 (1949).

[60] In Idaho the governor may order any district judge to hold court in another district than his own. Idaho Code (1947) § 1-704. This power is not effective to meet the problems of court management, as it does not aid in distributing the business of the courts more equally among the incumbents of the different judicial offices, although id. § 1-703 provides that where there is more than one judge in any district, the senior judge shall apportion the business of the district among the judges as equally as may be.

[61] Ala. Code (1940) tit. 13, § 39.

[62] Id. § 121.

[63] Id. §§ 42, 39 respectively.

[64] Id. §§ 38, 37, 201. The justices of the peace report to the circuit courts.

[65] Id. § 121. In counties having more than one circuit judge a presiding judge is either elected or appointed by the chief justice. The presiding judge may direct what duties the others are to perform.

Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, and *West Virginia* present special examples of judicial control because of unique features in the structure of their judiciaries.

Illinois provides an interesting example of a jurisdiction in which the pressure of business in one geographical area within the state—Cook County and Chicago—has forced the adoption of certain techniques of court administration to facilitate the handling of the load. In other sections of the state there is little if any external administrative control over the courts, but in Cook County and Chicago a rather highly developed system of localized control has evolved.

The circuit courts in Illinois are the courts of general original jurisdiction. The Circuit Court of Cook County is so organized as to sit in two divisions, law and equity, and one judge from each of these divisions, selected annually by a majority of all the judges, forms with the chief justice of the entire court, the executive committee of the circuit court for Cook County.[66] The representative of each division supervises the work of his division subject to the approval of the executive committee and in conformity with its orders. By a two-thirds vote of all the judges or, with the consent of the judge in question, by a vote of the executive committee, any judge may be transferred from either division to the criminal court of Cook County or from the criminal court to either division of the circuit court. By the same process a case may be transferred from one judge to another judge of the circuit court, if an emergency requires it or the due administration of justice renders it advisable. The assignment of cases is under the direction of the executive committee.[67] Generally the executive committee has the power to regulate the administration of the court "in such manner, not inconsistent with these rules or organization or with the rules of this court, or in derogation of the authority remaining vested in the individual judges, as it deems requisite or proper for the more effective dispatch

[66] See Ill. Const. Art. VI, §§ 23, 24; Rules of Organization of the Circuit Court of Cook County, Rule 1.

[67] Id. at Rule 3.

of business. . . ." [68] It may also exercise supervision over the office of the clerk of the court and investigate complaints pertaining to the administration of the court and report the results of such investigation with recommendations to the judges of the courts.[69]

The superior court of Cook County, exercising a jurisdiction concurrent with the circuit court for Cook County, has an administrative organization similar in many ways to that of the circuit court. It is divided into a chancery and law division and has an executive committee created as that in the circuit court but exercising less extensive powers.[70] In the criminal court of Cook County the assignment of cases to the various judges for disposition is handled by the chief justice.[71]

The municipal court of Chicago consists of a chief justice and thirty-six associate judges. The chief justice has the general superintendence of the judges and assigns them to duty in the branch courts as he deems necessary for the prompt disposition of the business of the courts. The chief justice also superintends the preparation of the calendars of cases for trial. Regular monthly meetings are prescribed for all justices, and at these meetings they investigate or cause to be investigated complaints pertaining to the administration of justice. Finally, these meetings can adopt such regulations as they deem expedient for the proper administration of justice of this court.[72]

In evaluating the Illinois system it is to be noted that outside of Chicago, that is, where there is little external control, the system is generally deemed satisfactory by the bench and bar. This appears, however, to be due to the comparative lack of business in those courts. In Cook County because of the pressure of the great number of cases, despite the elaborate provisions enumerated there is much congestion and delay extending over long periods. One reason seems to be the complication

[68] Ibid.

[69] Ibid.

[70] Rules of Organization of the Superior Court of Cook County.

[71] Rules of the Criminal Court of Cook County, Rule 12.

[72] Ill. Rev. Stat. (Smith-Hurd, 1947) c. 37, § 363.

of having two large courts (circuit and superior), each with concurrent jurisdiction with separate judges and staffs. The creation of the executive committees of these courts, a recent development in the attempt to better matters, has been well received. Since these committees have broad powers of administration, with added experience in their exercise, such problems as management can solve should be further minimized. It is to be noted, however, that the state judiciary as a whole is not well organized and as a result a large number of down-state judges spend a portion of their time sitting in Cook County, while nine of the circuit and superior court judges of Cook County are assigned to full service in the appellate court within that county.

The problem of administrative control in *Massachusetts* is colored by its "statutory omelet of overlapping jurisdictions." The early autonomy of its district courts, courts of original jurisdiction having power over law matters in civil cases and over minor criminal cases, resulted in practices that varied from court to court. To meet the needs of these courts there was established an administrative committee for the district courts, consisting of five justices of these courts appointed by the chief justice of the Supreme Judicial Court. This committee now has general supervision over all the district courts and their clerks and officers. Among its powers are the following: it regulates the assignment of special justices, determines the number of simultaneous sessions to be held by any district court, and may at any time call conferences of any or all of the justices, including those of the Boston Municipal Court, in order to promote coordination in the work of the courts. In addition, the administrative committee may require of the several district courts reports on the state of their dockets.[73]

A similar administrative committee, consisting of three

[73] Mass. Gen. Laws (1932) c. 218, § 43A as amended L. 1941, c. 682, and L. 1943, c. 101. The statute has real teeth, for it provides that the committee shall report any noncompliance by a justice or officer to the chief justice of the Supreme Judicial Court, who after hearing and finding of noncompliance may make an appropriate order.

probate judges designated by the chief justice of the Supreme Judicial Court, has been set up for the Massachusetts probate courts. While its powers are less extensive than those of the committee for the district courts, it may call conferences of the probate court judges to promote coordination in the work of the courts and it may prescribe forms for annual reports of the courts and the registers of probate.[74] A different form of control is exercised by the chief justices of the superior, Boston municipal and Boston juvenile courts over the single-justice sittings of their courts. They determine among other things the time of sitting of each judge in his court.[75]

In *Michigan* by statute the circuit courts, the courts of general original jurisdiction, are organized into a circuit court judges association which meets annually to elect a presiding circuit judge.[76] This presiding judge has power to assign any circuit judge to another circuit court when the docket is overcrowded.[77] He may also appoint a circuit judge to serve as judge of the Court of Claims.[78] In circuits having more than one judge a presiding judge is chosen and he apportions the business of the court among the various judges.[79]

A similar plan is followed in other courts having more than one judge, such as the Detroit Recorder's Court and the Detroit Common Pleas Court.[80] In addition, the probate judge, or in counties where there are several, the senior probate judge is specifically given power by statute to appoint and remove court personnel.[81] In the courts in the cities having divisions for specialized work, such as the Detroit Common Pleas Court,

[74] Mass. Gen. Laws (1932) c. 215, § 30A as amended L. 1934, c. 330. While the Administrative Committee of the Probate Courts does not have power to assign judges to relieve congestion, there is statutory authority for any judge to request the assistance of a judge of a probate court in any other county if the business of his court requires it. Mass. Gen. Laws (1932) c. 217, § 8 as amended L. 1937, c. 408, § 5.

[75] Superior court, Mass. Gen Laws (1932) c. 212, § 2; Boston Municipal Court, id. c. 218, § 52; Boston Juvenile Court, id. c. 218, §§ 58-60. The Supreme Judicial Court appoints assistant court clerks in certain counties. Id. c. 221, § 4 as revised L. 1946, c. 248.

[76] Mich. Comp. Laws (1948) §§ 691.201-691.204.

[77] Id. § 691.202.

[78] Id. § 691.102.

[79] Id. §§ 602.51-602.53.

[80] Id. §§ 725.2, 726.2, 728.8.

[81] Id. §§ 701.6, 701.12, 701.13.

where there is a conciliation division, and the municipal courts having conciliation and traffic and ordinance divisions, the presiding judge may assign one judge to handle all the cases in such division.[82] Finally, Michigan's judicial council is empowered by statute to require reports from all courts.[83]

New York with a very complex, multi-court structure as a practical matter has achieved a considerable measure of efficiency since the advent of its judicial council in 1934. The council has the power to require from every court judicial statistics on its work. Actual administrative control, however, exists in only a few, albeit very important, elements in the judicial system.[84] The appellate terms of the Supreme Court are established by the appellate divisions of the same court for each department. The appellate division has control over the appellate term and the special and trial terms of the Supreme Court, extending to the assignment of justices and to some extent to the appointment of their personnel.[85]

In addition to these elements of strict external control in New York's judicial system, there are also several systems of courts subject to a control intermediate between strict external control and strict internal control. These courts are held almost invariably by a single judge as one of a group of similar courts or as divisions of a court. In each case the president or presiding judge of the group of courts, whatever his title, exercises some control over the individual judges, such as assignment to divisions. The courts where this form of control is found are the City Court of the City of New York,[86] the Municipal Court of the City of New York, the Court of Claims, the Domestic Relations Court of New York, the Buffalo City Court, the Court of Special Sessions of the City of New York, and the city magistrate courts of the City of New York.

In *Ohio* the chief justice of the Supreme Court has the power to assign justices of the Court of Appeals, the inter-

[82] Id. § 728.8.
[83] Id. § 691.31.
[84] N.Y. Jud. Law (1948) § 46 as added L. 1934, c. 28, § 1.
[85] Id. §§ 71, 72, 79, 85, 86, 88, 93-106; N.Y. Const. Art. VI, §§ 2, 3, 148; N.Y. Civil Practice Act, § 623.
[86] N.Y. Const. Art. VI, § 15.

mediate appellate court, to sit in counties other than those to which they have been elected.[87] The chief justice of the Court of Appeals has concurrent power with the chief justice of the Supreme Court to make assignment of judges of the courts of appeal to other than their regular sittings.[88]

In providing for administrative control of the common pleas courts, the courts of general original jurisdiction, Ohio has a rather unusual statutory provision empowering the chief justice of the Supreme Court to ascertain the number of cases pending in the court of common pleas of any county and to shift judges when necessary to aid in the disposition of the business of such courts.[89] In practice, assignments under this statute are rarely made except at the request of the judge of a busy district. Most of the common pleas courts are composed of only one judge, but in those counties having more than one judge, by statute the common pleas courts may select a chief justice, who has the general superintendence of the business of the court and classifies and distributes it among the judges.[90] Only two common pleas courts have been reported to be attempting to make use of their powers under this statute. The municipal courts having more than one judge usually have a somewhat similar arrangement. The clerks of the various courts in Ohio and other officials are required by law to make

[87] Ohio Const. Art. IV, § 6, amendment effective Jan. 1, 1945. See also Ohio Gen. Code (1938) §§ 1526-1527.

[88] Ohio Gen. Code (1938) § 1528. The details of these assignments place a considerable burden upon the chief justice. For the first ten months of 1946 approximately 175 assignments were made.

[89] Id. § 1469. ". . . when an unusual number of cases have accumulated in the court of common pleas of any county, the chief justice may, without request, assign a judge or judges from another county, or counties, in the state to aid in the disposition of such business; when the number of cases pending in the court of common pleas of any county at any time exceeds seventy-five percent of the number of cases filed during the preceding year, the chief justice, without request, shall assign a judge or judges from another county or counties to aid in the disposition of such business, and the chief justice shall, at such times as he may desire, and not less than once a year, ascertain the number of cases pending in the court of common pleas in any county."

[90] Id. at § 1558. In some of the counties there is a Division of Domestic Relations; where this is the case, the presiding judge of the court of common pleas may designate another judge in that court to assist in that work.

reports to the judicial council of Ohio on such matters as the council may prescribe.[91]

Pennsylvania has a unique system of courts and control. All single-judge courts are either part of a court which also sits *en banc* or are divisions of a court. Consequently all courts held by a single judge are subject to the control of the president judge of the court to which the judge belongs. The president judge may assign any judge in his court to hear certain types of cases, to hear certain cases of other judges to equalize the dockets, and may require records of the work done by each judge.[92] Inferior courts sitting *en banc* are subject to some control by the chief justice of the Supreme Court. This control consists of the power to request reports and advise and supervise courts that become lax in performing their duties.[93]

In *West Virginia* a device almost unknown among state courts and patterned on the federal example has been adopted, adding to the minimum elements of a unified judicial system which this state formerly had.[94] The legislature in 1945 provided for the establishment of an Administrative Office of the Supreme Court of Appeals, whose director is to be the administrative officer of the Supreme Court of Appeals with power of supervision over all administrative matters relating to the offices of the clerks of the circuit and intermediate courts and of the justices of the peace, and over all other clerical and administrative personnel of these courts.[95] In addition, the

[91] Ohio Gen. Code (Supp.) § 1697-3.

[92] See Pa. Stat. (Supp.) tit. 17, §§ 223-229.

[93] Id. §§ 64, 65. Under this act of 1937 the Supreme Court is authorized to inquire of judges and clerks as to the state of their business, and it is the duty of the judges and clerks to report requested statistical and other information as requested. Under this statute a rule was adopted requiring the prothonotaries to report cases undecided for 30 days or more, and requiring judges to report to the chief justice of the Supreme Court as to causes of delay when cases are undecided for 90 days or more. See also Commonwealth ex rel. Duff v. Keenan, 347 Pa. 574, 33 A. (2d) 244 (1943), a case involving failure of a judge to report on his arrearages as required.

[94] Cf. discussion of New Jersey at 61; see Session, "An Administrator for the State Courts," 19 State Gov't 157 (1946).

[95] W.Va. Code (Supp.) § 5194, enacted as W. Va. Acts, 1945, c. 41. In addition the West Virginia judicial

director is to check on the state of the dockets of the various courts and secure information on their needs for assistance. Under the terms of the statute the functioning of the administrative office is dependent upon action by the Supreme Court of Appeals, since the director's activity is to be initiated by its requests. Until 1947 the court had not acted and no appropriation had been made for its purposes, but at that time the executive secretary of the judicial council was made *ex officio* director of the administrative office, with the powers and duties prescribed by the law of 1945; some funds for activities were provided, and the director was required to report annually on the state of the business of the courts.[96] Thus, in West Virginia while provision for a unified judicial system has not been made, the foundation for efficient management of court business has been established.

Group 4

Group 4 is comprised of those jurisdictions where a substantial degree of control is exercised over all or almost all the courts: *California, District of Columbia, Maryland, Missouri,* and *New Jersey*.

First to be treated in this group is *California,* which has incorporated many elements of unity into its judicial system. Quite simply the judicial council through its chairman has power over every type of court in the state, including the Supreme Court, to shift judges from one district to another as the needs of court business require.[97] As the essential handmaiden of this regulatory power it also has the power to require from every court in the state periodic reports on the condition of their dockets.[98] Developments in that state since 1926, the year of the constitutional amendment creating the judicial council and endowing it with administrative power

council has power to require from all courts periodic reports on their dockets. W.Va. Code (1943) § 5707(4).

[96] W.Va. Code (Supp.) §§ 5707(8)-5707(10); §§ 5194(1), 5199(2) as amended W. Va. Acts, 1947, c. 54.

[97] Calif. Const. Art. VI, § 1a. See 8 Calif. Jud. Coun. Rep 6 (1940) for statement as to activity on relieving congestion in Los Angeles County.

[98] Calif. Pol. Code (1943) § 727.

over the entire state judicial system, furnish clear support for the thesis of the recommendations heading this chapter. Improvement in the administration of the judicial system has resulted from such unification of the courts, while it is upon the basis of the statistical reports which it may require of every court in the state, that the judicial council has been able to make assignments of additional judges in order to clear up congested calendars in particular areas.

Judicial control in the *District of Columbia* is of course conditioned by the fact that it has a dual and somewhat overlapping system of courts. So far as its courts are federal courts, they are subject to the provisions for court management of the federal system and also are part of a unified judicial system to which few are comparable. Thus, the chief justice of the United States Circuit Court of Appeals can and does on occasion designate justices from the United States District Court to sit as appellate justices, and on the other hand, he may designate justices of his court to sit in the District Court. Justices may also be called in from other circuits by requesting the chief justice of the United States Supreme Court to designate such visiting judges.[99] In the District Court when the docket drops behind, visiting judges from other federal districts are designated by the chief justice of the United States to sit with the United States District Court for the District of Columbia,[100] on the request of the chief judge or circuit justice of the circuit wherein the need arises. Probate matters in the District Court are handled by a single justice assigned either by the court or by its chief justice.[101]

The Municipal Court of Appeals for the District of Columbia may be said to be a District of Columbia rather than a federal court. Its chief judge has the power to designate judges of the municipal court, also a court of the District of Columbia, to sit with it when necessary, and to designate or direct that judges of his court sit in the municipal court.[102] The

[99] 28 U.S.C. (1948) §§ 291, 292, 295, 296. See also D.C. Code (1940) tit. 11, § 205.

[100] 28 U.S.C. (1948) §§ 291, 292, 295, 296.

[101] D.C. Code (1940) tit. 11, § 501.

[102] D.C. Code (Supp.) tit. 11, § 771.

municipal court consists of ten judges. The chief judge is responsible for assignment of judges to different divisions and allotment of cases.[103]

In *Maryland* recent changes have added many elements of external control to its judicial system. Since 1944 the chief judge of the Court of Appeals of Maryland has been designated as the administrative head of the judicial system of the state.[104] As such he is empowered to require from the judges of the circuit courts and the Supreme Bench of Baltimore reports as to the judicial work and business of each of the judges and their respective courts. He also may, in case of vacancy, illness, disqualification or absence of any sort of any of the judges of the Court of Appeals designate any circuit court judge or judge of the Supreme Bench of Baltimore to sit on the Court of Appeals, and also may in any case or for a specified period designate any judge of the Court of Appeals, or of any circuit court, or of the Supreme Bench of Baltimore to sit as a judge of any circuit court or of any court or courts of Baltimore.

In Baltimore there is the intermediate type of control falling between strict external and strict internal control. In that city there are seven courts [105] and the constitution requires that the Supreme Bench of the city (a court consisting of those judges who preside over the law, equity and criminal courts) provide for the holding of each of these seven courts by assignment of one or more of their members to each court; that it change such assignments as circumstances require and make all needful rules and regulations for the conduct of business in each of those courts.[106] Moreover, the officers of the courts in Baltimore are appointed by the judges of the Supreme Bench, and the clerk of court is so appointed, when there is a vacancy, until the next general election.[107]

[103] Id. §§ 751-754.

[104] Md. Const. Art. IV, § 18A as added 1944.

[105] The Supreme Bench of Baltimore City (consisting of judges who preside over law, equity, and criminal courts); the Superior Court of Baltimore City; the Court of Common Pleas; the Baltimore City Court; the Criminal Court of Baltimore City; the Circuit Court of Baltimore; and Circuit Court No. 2 of Baltimore.

[106] Md. Const. Art. IV, §§ 32, 33.

[107] Id. §§ 9, 26, 37.

In terms of potentialities for control, the system in *Missouri,* established as the result of the adoption of a new constitution by the people of the state in 1945, is not far behind those of California and Maryland. The Missouri constitution provides that "The Supreme Court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto," [108] and also gives the Supreme Court, courts of appeal and circuit courts general superintending control over all inferior courts and tribunals in their jurisdiction.[109] Under these provisions the Supreme Court has adopted a rule of court [110] providing that the Supreme Court may temporarily transfer a judge from any appellate court [111] or circuit courts,[112] with the consent of such judge, to any other appellate or circuit court, (a) when an appellate court or circuit court requests the transfer of a judge to it; or, (b) when the Supreme Court finds that the administration of justice requires such transfer. Under this constitutional authority the Supreme Court has also transferred judges of the new magistrates courts (taking the place of justice of the peace courts) to other counties in case of death or disability of the county magistrate. This power of transfer is being used increasingly, many assignments having been made in 1947 and 1948.

Missouri has a judicial conference created by statute in 1943, and the clerks of the various courts are required to submit to its executive council such reports as it requires.[113] Statistical data on the work of the courts are collected and filed, separate reports on civil and criminal cases respectively being required of each court. An annual meeting, at which there are open forum discussions of various problems connected with the administration of justice, is held. The execu-

[108] Mo. Const. (1945) Art. V, § 6.

[109] Id. § 4.

[110] Mo. Sup. Ct. Rules, Rule 11.

[111] The appellate courts referred to are the Courts of Appeal, which are the intermediate courts.

[112] The circuit courts are one of the three sets of courts of record of original jurisdiction.

[113] Mo. Rev. Stat. Ann. (Supp.) §§ 2039.1-2039.8 as added L. 1943, p. 514. See Appendix B, Report of Committee on An Administrative Office of State Courts, Section of Judicial Administration, A.B.A., Sept. 22-23, 1947 at 18-19.

tive secretary of the conference keeps the Supreme Court and all judges informed as to the needs and developments of the courts, and also prepares a report to each legislature of any recommendations made by the conference or its executive council for the modification or amelioration of existing conditions.

Of the four states in this group, *New Jersey* provides the clearest example of a unified judicial system together with provision for centralized administration and management of court business. The chief justice of the Supreme Court is administrative head of all of the New Jersey courts under the constitution of 1947, and he appoints an administrative director of the courts to serve at his pleasure.[114] A simple unified system of courts has been established under the constitution with a Supreme Court, a superior court of general original jurisdiction, with law, chancery, and appellate divisions (the law and chancery divisions being empowered to exercise the powers of each other when necessary) and a county court in each county. In addition to these constitutional courts there are in each county a juvenile and domestic relations court (with a separate judge in four counties, the county judge serving elsewhere), a district court with civil jurisdiction up to $1000 and minor criminal jurisdiction, and in each municipality a municipal court with local criminal jurisdiction. Thus, a simple system of courts has replaced the most complicated set of courts in the country with their separate and often overlapping law, equity, and probate jurisdiction. Even the justice of the peace has disappeared. The chief justice of the Supreme Court is authorized to assign judges of the superior court to the divisions and parts thereof, and to transfer judges from one assignment to another as the need appears. He is also administrative head of the county courts, with power to assign any judge thereof to sit temporarily in the superior court or to sit temporarily without the county in another county court.[115]

The administrative director of the courts, subject to the direction of the chief justice, is authorized to examine the

[114] N.J. Const. (1947) Art. VI, § VII, par. 1.

[115] N.J. Rev. Stat. (Supp.) § 2:1B-6 as added L. 1948, c. 365, § 6.

administrative methods and activities of the judges and clerks of all the courts and make recommendations to the chief justice with respect thereto; examine the state of the dockets of the courts; prepare and submit budget estimates of state appropriations necessary for maintenance and operation of the courts; file requests for appropriations; make necessary arrangements for accommodations for the use of the courts; investigate and collect statistical data and make reports relating to expenditure of public moneys; examine the operation of the courts; investigate complaints, etc. All judges, clerks, and reporters are directed to comply with the administrative director's requests for information and statistical data on the state of the docket, expenditure of money, etc.[116] In respect to this, every judge is required to mail to the administrative director a weekly report as to the days on which court was held, the cases and motions heard and disposed of, the cases and motions heard and not disposed of, any appointments made during the week, and such other statistical data as he requests.[117]

In addition to the control exercised by the chief justice of the Supreme Court and that exercised by the administrative director, subject to the supervision of the chief justice, an intermediate form of control exists in New Jersey. In each county there is an assignment judge. He is responsible for assigning cases in the superior court and the county court in the county, and generally for the orderly administration of civil and criminal justice in said courts, subject to the direction of the chief justice.[118]

In addition to the foregoing instances of *external* control, the Supreme Court rules, effective September 15, 1948, provide for a judicial conference to meet as required by the chief justice, to consider the status of judicial business, devise means for relieving congestion of dockets where necessary, improve procedure in the courts and exchange ideas with respect to the administration of justice. The first such conference met Sep-

[116] Id. § 2:16A-2 as added L. 1948, c. 354.

[117] N.J. Rules of Administration, Rule A14.

[118] Id. Rule A.8. See N.J. Rev. Stat. (Supp.) § 1-1-22(i).

tember 13, 1948.[119] Thus, the New Jersey judicial organization, conforming to the first recommendation of the American Bar Association, has all the indicia of a unified judicial system. The chief justice has power and responsibility to supervise and direct the business of all courts, so as to relieve congestion of dockets and utilize the available judges to the best advantage, and receives the requisite assistance of the administrative director in the performance of such duties.

While New Jersey presents the best picture of a unified court system with rather complete powers of management entrusted to the chief justice, and its court organization and administrative office parallel those of the federal courts, California, Maryland, and Missouri present patterns of unification directed at improvement in the over-all administration of court business, each state's system being adapted to the existing organization of courts. Although others of the states, as described herein, have some features that may result in improvement in administration of court business, in none except these four has the recommendation heading this section been so completely implemented.

A word must be added regarding what properly may be called the "housekeeping" of the courts. Recognition that judicial talent and efforts must not be wasted was basic to this first recommendation considered here. This was directed primarily at management and planning for the proper distribution of cases among judges and the assignment of judges from one district to another to equalize the tasks imposed on each. Correlative to it is the policy that judicial time should not be expended on the performance of nonjudicial activities, such as securing facilities for work—quarters, the necessary books, papers, pencils, and clerical and legal assistance. The Administrative Office of the United States Courts, through its Division of Business Administration, performs such tasks for the federal courts, auditing the reports of their expenditures, purchasing equipment and supplies, arranging for telephone

[119] N.J. Rules (1948) Rule 1:7-3. See account of Proceedings of First Judicial Conference, Special Number, Rutgers L. Rev. Nov. 1948.

and telegraph service and quarters, preparing estimates for appropriations and allocating the funds appropriated.[120] The administrative director of the courts of New Jersey acts similarly. In only two other states is there any comparable attempt to relieve the judiciary of the manifold details of office management which constantly distract them and intrude on their judicial duties. These states are Connecticut, where the executive secretary of the judicial department attends to all financial details, subject to court control on policy, and West Virginia, where provision for an administrative office has been made. The proposals contained in the Model Act to Provide for an Administrator for the State Courts, now make available to other states a pattern for an organization for the proper performance of such administrative and housekeeping duties.

Judicial Councils and Judicial Conferences

(2) That Judicial Councils should be strengthened with representation accorded the Bar and the Judiciary Committees of the Legislative Department.

In order that the courts may be most capable of effectively using the rule-making power and powers of management, a judicial council, judicial conference, or some similar agency is essential. These are usually official bodies, as distinguished from committees of bar associations interested in judicial administration. Specifically, their function is to provide a body for research, for the collection of statistical data, and for the drafting of court rules and statutes. More generally, there is an obligation to suggest methods to increase the efficiency of judicial machinery and necessary amendments to substantive and adjective law, since judges do not ordinarily have sufficient time for the research necessary for such work. The movement for the organization of judicial councils in the several states started in the 1920's and today a majority of the states have such organizations or their equivalent, such as a judicial con-

[120] Chandler, "The Administration of the Federal Courts," 13 Law & Contemp. Prob. 182, 187 (1948).

ference. There are many variations in their membership, organization, activities and effectiveness. The second recommendation heading this chapter is predicated on recognition of the importance of judicial councils and their existence in many states as "an official and continuous agency constantly engaged in providing information about the courts, in investigating the possibilities of improvement and in offering concrete proposals based on solid study for improvement in the administration of justice." [121] As Chief Justice Harlan F. Stone stated in 1940:

> Most judicial reforms fail, or are disappointing, because they are not based on adequate study of the particular conditions in which they are expected to operate or because they are adopted without adequate comparison with the experience with similar attempts, or finally because they lack the support of the moral force of the community. I know of no better system to overcome these difficulties than that of local councils, capable of making local studies and gaining the moral support of the Bar and public in their communities, and organized into a national conference for the comparative study of local experience.[122]

Simultaneously with the development of state judicial councils there has been a corresponding development in the federal judicial system. An annual conference of senior judges of the various circuits, called and presided over by the chief justice of the United States Supreme Court, has been functioning since 1922.[123] In 1939 provision was made for a council of circuit judges of each circuit to be held twice a year,[124] as well as an annual conference of circuit and district judges of each circuit modeled on conferences held in the fourth circuit prior to this under the leadership of Judge John J. Parker. Active participation at the conference by members of the bar of such

[121] Pirsig, "Judicial Councils," IV Annual Handbook of the National Conference of Judicial Councils 62, 64 (1942). See Appendix A at 515; Nims, "Four Judicial Councils," 27 Can. B. Rev. 29 (1949).

[122] II Annual Handbook of National Conference of Judicial Councils, letter preceding Foreword (1940).

[123] 42 Stat. 837 (1922), 28 U.S.C. § 331 (1948).

[124] 53 Stat. 1223 (1939), 28 U.S.C. § 332 (1948).

circuit was authorized.[125] These various bodies have been meeting and have utilized special committees for the study of particular problems peculiar to the federal judicial system.[126] The study of the mode of selection of juries in the federal courts, made upon the direction of the Judicial Conference of Senior Circuit Judges, by a committee of district court judges headed by Judge John C. Knox, is typical of their work.[127]

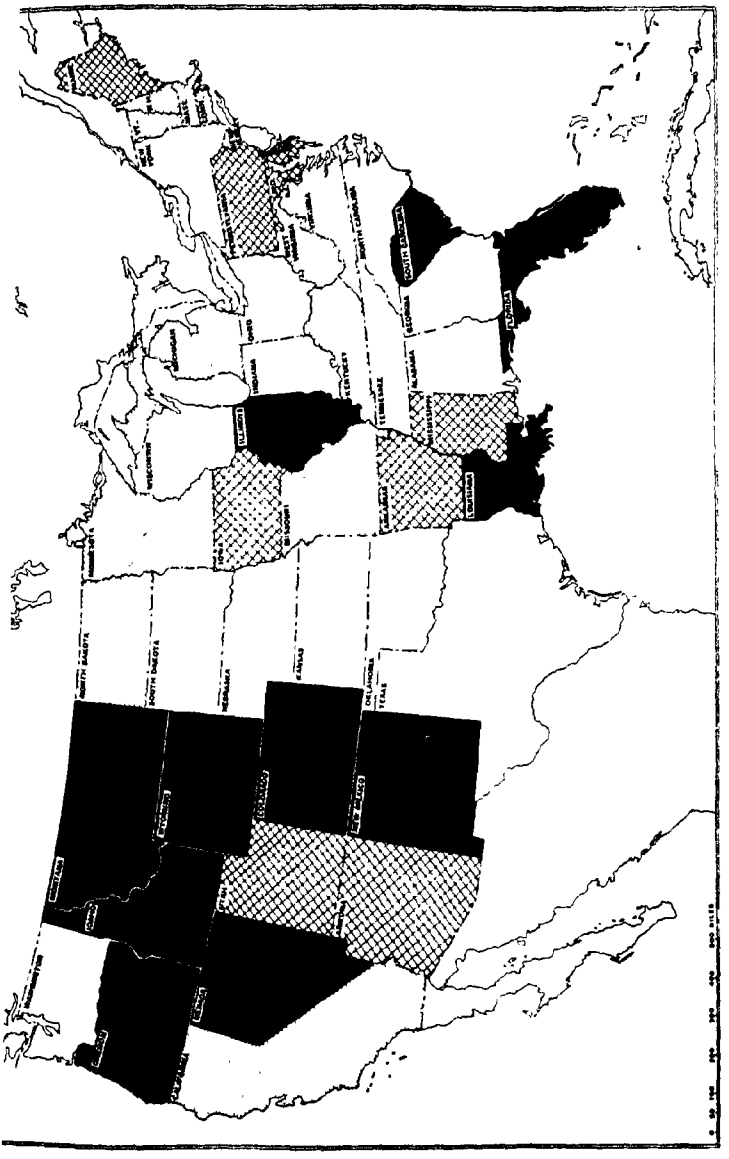
The judicial conferences of the federal courts, as well as those of Missouri and New Jersey, are somewhat different from the judicial councils, although the aims which actuate both types of organization are similar. While the judicial council is primarily a consultative and advisory body, the judicial conference in addition to considering the status of judicial business is usually authorized to devise means for improving judicial administration, in order to relieve congestion of dockets where necessary and to improve court procedure. For the most part the judicial conference lacks the continuity of a judicial council and thus has no permanent research group, but instead makes use of committees of persons with special competence in the field to be studied. In the federal court system, however, in addition to such committees there is a permanent research organization maintained as part of the Administrative Office of the United States Courts. Both the judicial council and the judicial conference may utilize the valuable cooperation of the bar and the public.

In 1949 the Section of Judicial Administration, while recommending the creation of judicial councils with power, authority, and funds adequate to their tasks also recommended that provision be made for the holding of regular meetings of state judicial conferences with compulsory attendance of judges and participation of representative lawyers and laymen. It was recommended that in states where judicial councils already exist, the judicial conference be designed primarily to assist

[125] 53 Stat. 1223 (1939), 28 U.S.C. § 333 (1948).

[126] For a list of committees appointed by the Judicial Conference see Reports of the Judicial Conference of Senior Circuit Judges, 1940 to date.

[127] See chapter on The Selection and Service of Juries at 151.



JUDICIAL COUNCILS AND JUDICIAL CONFERENCES

Jurisdictions having judicial councils, judicial conferences, or like bodies, according representation to the bar and judiciary committees of the legislature

Jurisdictions having judicial councils or like bodies functioning, not having recommended membership

Judicial councils or their equivalent are defunct, inactive, etc.

Jurisdictions having no judicial council or

the judicial council in formulating and activating programs for improvement of the state's judicial system.[128]

This is not the place to balance the respective merits and shortcomings of the judicial council and judicial conference, however, as the recommendations of the Section of Judicial Administration show these agencies may supplement each other or perform interchangeably the same functions. Therefore the judicial conference having the requisite membership may be viewed as a fulfillment of the recommendation heading this section. This recommendation that judicial councils be strengthened by according representation to members of the bar and the legislative judiciary committees was based upon the existence of a number of such agencies and also the recognition of the importance of the factor of the "moral support of the bar and the public." As to this recommendation, the states may be classified into four groups, varying from those having no judicial councils or judicial conferences, or those having inactive agencies, to those having such bodies but which fail to have the requisite membership and those in which the recommendation is in effect.

Group 1

Twelve states still have no judicial council or similar body: *Colorado, Delaware, Florida, Idaho, Illinois, Louisiana,*[129] *Montana, Nevada, New Mexico, Oregon,*[130] *South Carolina,* and *Wyoming.* While some of these states are among those of lesser population and fewer metropolitan centers in which the volume of litigation is not great, so that the problems of judicial administration can be handled quite well on an informal basis, in others those problems are more complex and

[128] A.B.A. Handbook, Improving the Administration of Justice (1949); see generally, Morse, "Federal Judicial Conferences and Councils: Their Creation and Reports," 27 Corn.L.Q. 347 (1942).

[129] In Louisiana the State Law Institute performs somewhat similar functions. The projected new constitution for that state contains a provision for a judicial council. Miller, "'Minimum Judicial Procedural Standards'—How Met in Louisiana," IX, No. 3 La.L.Rev. 388 (1949).

[130] Oregon had a judicial council but in 1931 the act creating it was repealed because nothing had been accomplished.

would seem to require the activity of a judicial council or a judicial conference. In Colorado and South Carolina the view has been expressed that such a body is needed, while in several of the other states in this group there is sufficient indication of deficiencies in judicial administration to warrant the tentative conclusion that a judicial council might well be used.[131]

Group 2

In ten jurisdictions having or formerly having judicial councils or their equivalent, the bodies are either defunct, inactive, or saddled with such structural defects as to be incapable of effectively discharging the usual duties of a judicial council: *Arizona, Arkansas, District of Columbia, Iowa, Maine, Maryland, Mississippi,*[132] *Pennsylvania, Rhode Island,* and *Utah.*

In *Arizona* the council which had been established by the state bar and had aided in the implementation of the grant of rule-making power to the courts was dissolved in 1948 on the ground that there was no work for it to do. *Arkansas* and *Mississippi* have voluntary groups only, which exist solely as a medium for the exchange of ideas; likewise the judicial council of the *District of Columbia,* recently established, is a self-constituted group rather than one created by law with specific duties and powers.[133] The *Iowa* Supreme Court Advisory Committee, originally designated as a judicial council, was established by the Supreme Court in 1937 and was active in submitting recommendations regarding rules of procedure but after the adoption of the Rules of Civil Procedure the committee went out of existence.[134] While the *Maine* judicial

[131] Thus, in Colorado the bar association has prepared a Judicial Administration Code, creating a judicial council, etc. This will require constitutional amendment and legislative action and indicates the trend of activity and interest of the bar.

[132] A judicial conference was organized in Mississippi in 1945 but does not seem to be active.

[133] The council met for the first time in 1946. Judges of the Municipal Court, Municipal Court of Appeal, and Juvenile Court of the District of Columbia also are invited to attend the Circuit Judicial Conference convoked by the chief justice of the United States Court of Appeals for the District.

[134] The committee was composed of judges, practicing lawyers, and the president of the state bar was a member ex officio.

council has almost the rounded membership recommended, insufficient appropriations and lack of leadership have kept it inactive for several years.[135] The *Maryland* judicial council was created by statute in 1924, and cooperated with the then existing Johns Hopkins Institute of Law in making some legal studies. Since 1939 it has not functioned, although the statute requires reports to each session of the General Assembly.[136] The judicial conference of *Pennsylvania,* consisting of all the judges of the state (187 members), has not met for several years.[137] In *Rhode Island* the judicial council has been inactive since 1941, while the council in *Utah,* established under a by-law of the Utah State Bar, apparently has no official status and has not been active.

Group 3

In twelve states judicial councils or bodies functioning as judicial councils exist, but fail to have in full measure the representation of the bar and legislators recommended. Such deficiencies, however, do not necessarily mean that all the judicial councils in this group have failed to effect substantial action. On the contrary, several of the strongest judicial councils in the country fall within this group. The states in this group are: *California, Connecticut, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Dakota, Vermont, Virginia,* and *West Virginia.*

Of these, the *Kentucky*[138] council is composed solely of judges, while the statutes of *North Dakota,*[139] *Virginia,*[140] and

[135] Me. Rev. Stat. (1944) c. 100, §§ 192-193. The Maine judicial council was established in 1935. It is composed of the attorney general, two justices of the Supreme Court, two judges of the municipal courts, one probate judge, one clerk of court, two attorneys, and three laymen. The council is supposed to report to the governor on the work of the judicial system and may also suggest rules for adoption by the judges of the various courts.

[136] Md. Code Ann. (1939) art. 26, §§ 60-64.

[137] It is to be noted that the Procedural Rules Committee of the Supreme Court of Pennsylvania has been active in drafting rules of procedure.

[138] Ky. Rev. Stat. (1946) §§ 22.010-22.040.

[139] N.D. Rev. Code (1943) §§ 27-1501 to 27-1510. This body has power to gather and compile statistics, hold hearings, subpoena witnesses, and recommend changes and reform. Its chief function is to act as a round table for the mutual assistance of those present.

[140] Va. Code (1942) §§ 6371(f)-

West Virginia [141] provide for participation by the bar only and do not accord representation to the judiciary committees of the legislature. In West Virginia, however, as a matter of practice the judicial council frequently is consulted by the judiciary committee of the lower house of the legislature.

Judicial councils or their equivalents have been established very recently in *Missouri, New Hampshire,* and *Vermont.* Missouri's judicial conference, established in 1943, is composed of all the judges and commissioners of the appellate courts and all the judges of the circuit courts and courts of common pleas.[142] An executive council of this very large conference and an executive secretary are provided by whom the work of the conference is supervised, directed and otherwise aided. The Missouri judicial conference has been extremely helpful in obtaining cooperation among the judges of all courts in surveying the work and needs of the judicial department and in increasing efficiency of the courts. Through its executive secretary the conference is informed of legislation affecting the courts, while legislation recommended by it has been adopted in recent sessions of the legislature.

New Hampshire's judicial council, set up by legislative action in 1945, follows a rather standard pattern in its organization, delegated powers and duties. Its membership includes representatives of the bench and the bar, the attorney general, and a maximum of three other members to be selected by the governor, with the advice and consent of his council.[143] The judicial council is charged with the duty of studying procedure, rules, and the like, and of collecting and publishing statistics. The prestige of the council is such that all the changes recommended by it to the legislature in 1947 were enacted. The Vermont judicial council, also created in 1945, consists of the

6371(i). Recently after lack of appropriations had kept the Virginia judicial council inactive, $1200 was appropriated for expenses and the council is now meeting frequently, while a committee of it is engaged in drafting rules of procedure.

[141] W.Va. Code (1943) § 5707(1)

[142] Mo. Rev. Stat. Ann. (Supp.) §§ 2039.1-2039.8 as added L. 1943, p. 514.

[143] N.H. Rev. Laws (1942) c. 381-A as added L. 1945, c. 169. Judges and clerks are required to aid the judicial council when requested.

chief justice of the Supreme Court, or an associate judge designated by him, two attorneys, and two laymen appointed by the governor. It is empowered to obtain reports from court clerks and others, and it is required to report biennially to the assembly on the work of the judicial system with recommendations, if any, for modification of existing conditions.[144]

The judicial councils in *California, Connecticut, Massachusetts, Michigan,* and *Minnesota* provide an interesting study. In Massachusetts the judicial council consists of the presiding judges of a number of the different courts in the state, or their duly appointed representatives, two justices of other courts and not more than four members of the bar.[145] The Massachusetts council does not have for all courts what may seem to be an essential power for a successful judicial council—mandatory authority to compel reports and statistical information from all courts in the state,[146] yet so great has been the voluntary cooperation between the council, the legislature and the courts that the achievements of the Massachusetts judicial council place it among the very best in the country.[147]

California's council has no provision for representation by either the bar or the legislative committees, yet its achievements have likewise been outstanding. Furthermore, it has statutory powers of management possessed by no other judicial council in the country, *i.e.*, the power to shift judges of any court according to the needs of litigation and also the power to promulgate rules of appellate procedure.[148]

Michigan's judicial council, with lay representation and

[144] Vt. Stat. (1947) §§ 1266-1268.

[145] Mass. Gen. Laws (1932) c. 221, § 34A.

[146] The tables of superior court business in each report of the judicial council are made from returns of the county clerks as required by statute. Statistics of other courts are not required but the council has no trouble obtaining them. Before the council was created, the superior court returns were made to the secretary of the commonwealth. The administrative committee of the district courts collects the statistics of those courts and they are printed in the judicial report annually.

[147] It is to be noted, however, that its recommendations sometimes have waited five to ten years or more before being adopted, although at least 60% of them have been followed sooner or later.

[148] Calif. Const. Art. VI, § 1a. See Calif. Jud. Coun. reports for a summary of its activities. See discussion supra p. 57, and discussion of California in chapter on Rule-making—The Judicial Regulation of Procedure at 103.

representation from the faculty of the University of Michigan Law School, has no provision for participation by members of the legislature.[149] Having insufficient public appropriations, it has been forced to rely on private support for most of its studies, but it has published outstanding research reports.

The judicial councils of both Connecticut[150] and Minnesota[151] have minimum powers and no representation accorded legislative committees; nevertheless, both have been and are doing good work.

Group 4

Judicial councils or like bodies in fifteen states do have the rounded representative membership recommended by the American Bar Association. These states are: *Alabama*,[152] *Georgia*,[153] *Indiana*,[154] *Kansas*,[155] *Nebraska*,[156] *New Jersey*,[157] *New York*,[158] *North Carolina*,[159] *Ohio*,[160] *Oklahoma*,[161] *South*

[149] Mich. Comp. Laws (1948) §§ 691.31-691.33. Members of the judicial council serve without compensation, but salaries of clerks, printing, expenses, etc. are paid by the state.

[150] Conn. Gen. Stat. (1949) § 7659

[151] Minn. Stat. Ann. (1945) §§ 483.01-483.04.

[152] Alabama's judicial council, created by resolution of the Alabama Bar Association in 1944, is to make a continuous study of the administration of justice in the state. However, it has no power to require reports of various officials etc., so necessary to its work, and the appropriations of the bar association for its support have been inadequate.

[153] Ga. Code Ann. (Supp.) § 81-1601 as added L. 1945, p. 155.

[154] Ind. Stat. Ann. (1946) sec. 4-3701 as added L. 1935, c. 131.

[155] Kan. Gen. Stat. (1935) tit. 20, § 2201.

[156] The Supreme Court rule establishing the judicial council was amended in 1945 to include the chairman of the legislative judiciary committee as an ex officio member. See 145 Neb. 42.

[157] N.J. Rev. Stat. (1937) §§ 2:17-1 to 2:17-10. The New Jersey judicial council had not been very active since 1940, but New Jersey now has a judicial conference, which also has the representative membership recommended, and of which much can be expected since it is part of the new judicial system of that state and was organized under the rules promulgated by the Supreme Court in 1948. Rules 1:7-3. See text supra p. 62-63.

[158] N.Y. Jud. Law (1948) §§ 40-48.

[159] N.C. Gen. Laws (1949) c. 1052. The council consists of the chief justice of the Supreme Court or some other member of that court designated by him, two judges of the superior court designated by the chief justice, the attorney general, and eight additional members, two of whom are appointed by the governor, one by the president of the Senate, one by the speaker of the House of Representatives, and four by the council of the North Carolina State Bar. All appointive members of the judicial council are selected on the basis of their interest in and competency for the study of law reform. The four members appointed

Dakota,[162] *Tennessee,*[163] *Texas,*[164] *Washington,*[165] and *Wisconsin.*[166] Not only do they have among their members judges, practicing attorneys and representatives from the judiciary committees of the legislature, but in many instances provision is also made for participation by laymen and law school professors. All of these bodies were created by legislative action except those in Alabama and South Dakota, which were created by the state bar organization, and those in Nebraska, New Jersey, and Oklahoma, which were created by action of the respective Supreme Courts. Although the judicial council of Ohio has been quite active in conducting judicial research and compiling judicial statistics, it has been seriously handicapped by failure of the legislature to appropriate adequate funds. The work of the councils of Kansas, New York, South Dakota, and Texas has been outstanding.

Collection of Judicial Statistics

(3) That quarterly judicial statistics should be required.

The final recommendation to be considered in this chapter is that directed at requiring the compilation of judicial statistics quarterly. Much as a judicial council or a judicial conference is an essential aid to a judiciary that is to use effectively the rule-making and administrative powers, judicial statistics are equally necessary for the effective implementation of these powers. Judicial statistics that reveal the actual work of a

by the council of the State Bar are active practitioners in the trial and appellate courts.

[160] Ohio Gen. Code (Supp.) § 1697-1.

[161] Okla. Stat. Ann. (1937) vol. 1 at 468-469, recreated by order of Supreme Court, November 19, 1943.

[162] See 16 S.D.B.J. 103 (1947). The South Dakota judicial council was created by action of the state bar, and thus does not have full statutory authorization. It does have the representative membership recommended and has been active.

[163] Tenn. Code Ann. (1943) § 7385

[164] Tex. Civ. Stat. (Supp.) art. 2328a.

[165] Wash. Rev. Stat. (Remington, 1932) §§ 10959-1 to 10959-8.

[166] Wis. Stat. (1947) §251.18. This body is denominated an advisory committee but appears similar to those organizations called judicial councils in other states, since it was constituted to study the administration of justice and advise the Supreme Court on changes in the rules of procedure.

JUDICIAL STATISTICS
Quite complete judicial statistics compiled regularly
Rather comprehensive judicial statistics collected for some courts
Isolated or sporadic sets of statistics collected, or compilation is of very recent date
No requirement for collection or compilation of judicial statistics

court for a given period enable the court to check on the efficiency of its own work, and provide that information needed by the officer charged with responsibility for problems of judicial administration. More particularly, adequate criminal statistics and statistics regarding the work of penological and like institutions are indispensable for the proper administration of the criminal law, as well as important for the enactment of appropriate legislation. For the most part such criminal statistics are sadly lacking. At present the most comprehensive judicial statistics are those compiled for the federal courts by the Administrative Office of the United States Courts. In view of the fact that statistics are being compiled regularly in only a small group of states, the Section of Judicial Administration in 1949 reiterated its recommendation that "Continued and vigorous effort should be made to secure judicial statistics for all the courts of a state, reported on a regular basis, preferably quarterly." [167] Among the states four groups may be classified, varying from those in which no compilations of judicial statistics are attempted, to those in which rather complete and regular statistics are collected.

Group 1

Seventeen jurisdictions have no provision for, or do not require the collection and compilation of judicial statistics: *Arizona, Colorado, Delaware, Idaho, Indiana, Iowa, Maine, Mississippi, Montana, Nebraska, Nevada, New Mexico, Rhode Island, South Carolina, South Dakota, Vermont,* and *Wyoming.* In this group are some states where courts report certain kinds of statistics, as, for instance, on crime and divorce; but these figures are not collected and collated to show the state of the dockets or the disposition of business of the courts or for any other purpose substantially related to judicial administration. The judicial council in *Maine* is empowered to gather such statistics, but for lack of funds and official atten-

[167] A.B.A. Handbook, The Improvement of the Administration of Justice 31 (1949). See Appendix A at 516; Shafroth, "Federal Judicial Statistics," 13 Law & Contemp. Prob. 200 (1948).

tion has never been active in this field. Similarly, the judicial council of *Indiana* has such power but for several years has not engaged in this activity. In *Iowa* the Supreme Court Advisory Committee did collect judicial statistics for a few years but discontinued the work largely because no funds were available, and since then the committee has ceased to function.

Group 2

Of the states collecting some statistics bearing on the business of the courts, fourteen can be classed as having nothing but isolated or sporadic groups of such statistics, or the attempts at gathering the statistics are of very recent date: *Arkansas*,[168] *Florida*,[169] *Georgia*, *Illinois*, *Louisiana*, *Maryland*, *Missouri*, *New Hampshire*, *Oklahoma*,[170] *Oregon*, *Tennessee*, *Utah*,[171] *West Virginia*, and *Wisconsin*.[172]

Illinois has a constitutional provision calling for reports from all courts of record, but it is generally ignored.[173] The associate judges of the Chicago Municipal Court, however, furnish to the presiding judge of that court a monthly report of their days in attendance at court.[174] The *Louisiana* consti-

[168] In Arkansas simple tabulations are made of the cases handled by the Supreme Court. These records are not mandatory and not published.

[169] In Florida although no statute or rule requires it, the Supreme Court customarily makes a statistical study of its business at the end of each term of court.

[170] The judicial council of Oklahoma has undertaken to collect and compile statistics concerning work of the district courts from 1944 to 1948. Unfortunately, the council has no authority to compel court clerks to furnish information and many will not cooperate.

[171] In two courts in Utah, the Salt Lake City Court and the District Court of the Third Judicial District, where there are several associate judges and a presiding judge, reports are occasionally prepared dealing with the number of cases commenced in the various courts, the number of cases disposed of, and the number still pending. There is no statutory authority for this practice. Also, in its earlier years the Utah state bar and judicial council collected statewide statistics to a limited extent. See for example, Report of the Judicial Council of the Utah State Bar, Utah Bar Bulletin, December, 1932.

[172] In Wisconsin the circuit judges are required to report monthly to the chairman of the Board of Circuit Judges such information respecting judicial business as requested, and the clerks of the court are enjoined to similar action upon request. Wis. Stat. (1947) § 252.08.

[173] Ill. Const. Art. VI, § 31, reading as follows: ". . . and the judges of the several circuit courts shall report to the next General Assembly the number of days they have held court . . ."

[174] Ill. Rev. Stat. (Smith-Hurd, 1948)

tution provides that the Supreme Court may require all inferior courts in the state to furnish quite complete statistics on their business, but no regular reports are required and no special time is set for making such reports.[175] In *Oregon* the county clerks are required to prepare and file with the secretary of state every quarter certain judicial statistics as to the number of cases of different kinds in the courts, etc.[176] *Georgia, Missouri, New Hampshire, Tennessee,*[177] and *West Virginia* [178] have judicial councils empowered to gather statistics. In West Virginia only recently ninety percent of the courts of record have begun to make such reports.[179] In Georgia, Missouri, New Hampshire, and Tennessee, statutory authority to collect statistics is of very recent date, and the extent to which statistics will be compiled has as yet not been determined.[180] Similarly, in *Maryland* [181] a very recent constitutional amendment contains authorization for the collection of statistics, and the results of such activities cannot yet be appraised.

Group 3

Thirteen jurisdictions have provisions for gathering judicial statistics which are fairly comprehensive and under which reports are regularly being made: *Alabama, Connecticut, Kan-*

c. 37, § 363. Cf. id. c. 37, §§ 44 and 51, requiring that the clerk of each appellate court report in writing to the Supreme Court whenever requested the number of cases docketed and pending at that term of court. There is no general practice based on this provision.

[175] La. Const. Art. VII, § 12.

[176] Ore. Comp. Laws Ann. (1940) § 87-109. In addition the clerk of the Supreme Court, although not required to do so, compiles monthly a report of that court's business and this report is available to the public.

[177] Tenn. Code Ann. (1943 Repl.) § 738.9.

[178] W. Va. Code (1943) § 5707(4).

[179] Since 1947. See 6th Rep. W. Va. Jud. Council. Earlier no appropriations were made for the council, which undoubtedly explains its failure to gather statistics. However funds have been made available (W. Va. Acts, 1947, c. 27 at 114) and the council has been more active lately and is compiling statistics for the period from 1944 to date.

[180] See discussion of judicial councils supra p. 71.

[181] Md. Const. Art. IV, §18A. Each of the judges of the various courts are required to forward to the chief judge of the Court of Appeals a report when requested of the business of his office. This report is to cover every type of matter that may come before the judge, and it is received by the chief judge as administrative head of the judicial system.

sas, Kentucky, Michigan, Minnesota, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, Virginia, and *Washington.* Of these thirteen jurisdictions *Connecticut, Kentucky, Minnesota, North Dakota,* and *Washington* are generally alike in their methods of handling judicial statistics. In each state the agency handling the collection of statistics is the judicial council;[182] in each the statistics required are a fairly simple tabulation of the work load handled by one or more systems of courts. In Connecticut, for instance, the judicial council makes up a biennial compilation for the Supreme Court of Errors, the superior court, and the court of common pleas, showing the number of cases carried over from the previous year, the number of cases entered during the year, the number tried, the number otherwise disposed of, the number of cases undisposed of at the end of the year, the days the court sat and the average time between return day and trial both for jury and for judge-tried cases.[183] A somewhat similar breakdown is reported by the judicial council of Kentucky for its circuit courts;[184] a less extensive but more or less similar tabulation by the judicial council of Minnesota for the Supreme Court and the district courts;[185] by the North Dakota judicial council for its district courts;[186] and by Washington's judicial council for its superior courts.[187]

By way of contrast with these five states, *Alabama, North Carolina,* and *Virginia* report judicial statistics to either the governor, or some administrative officer, or the Supreme Court of the state without the intervention of a judicial council. In Alabama reports from courts other than the Supreme Court are made to the chief justice of the Supreme Court, or in particular instances to the Department of Public Welfare, or the

[182] Of course, the usual practice is for the judicial council to report in turn, by statutory requirement, to some other agency, officer, or court of the state.

[183] Conn. Gen. Stat. (1949) § 7659; see 10th Rep. Conn. Jud. Council (Dec. 1946).

[184] Ky. Rev. Stat. (1946) § 22.030.

[185] Minn. Stat. Ann. (1945) § 488.12, 626.47, require filing of criminal statistics by the municipal and county courts. Both the Minneapolis and the Duluth municipal courts report statistics to the judicial council.

[186] N.D. Rev. Code (1943) § 27-1507.

[187] Wash. Rev. Stat. (Remington, 1932) § 10959-6.

grand jury.[188] In North Carolina reports are made to the attorney general by the superior court, general county courts, city courts, county recorders, justices of the peace, mayors courts and county juvenile courts.[189] And lastly, in Virginia all courts of record report to the Supreme Court of Appeals.[190] The information furnished in each of these three states, however, is similar to that provided in the case of the five states discussed above—a simple tabulation of the case load handled.[191]

The remaining five jurisdictions of the group, *Kansas, Michigan, Ohio, Pennsylvania,* and *Texas,* require individual treatment.

In *Kansas* annual reports are made to the judicial council by the Supreme, district, county, city, and probate courts.[192] Originally, besides the figures on case loads handled, statistics were also reported on the cost of operating all the above courts and on the intervals in the district courts between notification of the oldest case on the calendar as ready and the trial date for those cases. In recent years, however, the statistical tables (printed) have been condensed and this is no longer done.

In *Michigan* although the judicial council has the authority to require reports from all courts,[193] it has done so thus far

[188] The circuit and county courts to the chief justice of the Supreme Court, Ala. Code (1940) tit. 13, §§ 37, 201; the probate courts in cases of adoption, nonsupport and desertion, id. at § 288, and the juvenile courts, id. at § 355, to the state department of public welfare; and the justices of the peace, id. at § 418, to the grand jury.

[189] See N.C. Gen. Stat. (1943) §§ 114-10 and 114-11. The justices of the peace and the mayors of cities and towns report also to the superior court and to the treasury. All reports are made monthly, and in addition the aforementioned report to the attorney general before each criminal term. North Carolina judicial statistics are much more complete and detailed for criminal than for civil cases. This undoubtedly reflects the purpose for which these statistics are primarily gathered—not for the purpose of judicial administration but rather to furnish to the attorney general's office information on the state of crime and law enforcement in the state.

[190] Va. Code (Supp.) §§ 3405-3406.

[191] The reports in Virginia courts include in addition figures on the aggregate number of days spent holding court and a classification of the business of the superior trial courts according to the nature of the litigation—law, chancery, justice, court appeals, and the like.

[192] Kan. Gen. Stat. (1935) c. 20, art. 2205. See 20 Kan. Jud. Coun. Bull. 133 et seq. (1946); 21 id. 141 et seq (1947).

[193] Mich. Comp. Laws (1948) § 691.31.

only for the Supreme Court, the circuit courts, the Superior Court of Grand Rapids and the Recorder's Court of Detroit. The Supreme Court makes annual reports on the case load handled; the other courts mentioned make quarterly reports which are very complete, including pretrial figures, case loads, trial load, use of juries, trends in docket position, and statistics on court days spent by judges in circuit courts other than their own.

In *Ohio* annual reports are required from the Supreme Court to the governor and the secretary of state showing the business disposed of by the court.[194] Statistics on cases commenced and cases pending are furnished annually by the courts of appeals to the secretary of state. The chief justice of the common pleas courts is required to report annually as to work disposed of, hours spent in attendance in court by each judge, and the like;[195] and some of the municipal court acts, among which there is no uniformity, require reports to the municipality or some officer thereof.[196] Annual reports on criminal cases are required of all courts.[197] Finally, as of September 21, 1945, the secretary of state is required to furnish the judicial council with such statistical information on the operation of the courts as it may require.[198] Despite all these requirements, however, the reporting of judicial statistics is not very complete.

Pennsylvania publishes very few judicial statistics. The clerks of court of the common pleas courts, however, do tabulate quite complete figures on the work handled by their courts, the days spent by judges and juries in attendance at court, and the number of cases disposed of on pretrial. Somewhat less comprehensive statistics are kept by the clerks of court of the County Court of Allegheny County and of the Municipal Court of Philadelphia.[199]

The judicial council in *Texas*, the last state in this group, is

[194] Ohio Gen. Code (1938) § 2264-1

[195] Id. at § 1558.

[196] E.g., Cleveland, id. at § 1579-21.

[197] Id. at § 2895.

[198] Id. (Supp.) § 174-1. In addition there is another provision requiring that all clerks of various courts report directly to the judicial council such statistics as it may require. Id. § 1697-3.

[199] There are no mandatory requirements for the collection of judicial statistics in Pennsylvania.

empowered to gather statistics from all civil courts.[200] The Supreme Court reports to it on the state of its dockets, the amount of business handled, and its disposition. Reports of a similar nature are furnished by the courts of civil appeals and by the district courts, the figures from the latter being more elaborate with a breakdown into types of cases handled—tax, divorce, criminal, etc. Comparative annual summaries of the case load handled by the district courts are compiled by the judicial council.

In addition to reports made to the judicial council, reports are also required by a provision in the appropriations act asking that income and cost figures on court operation be submitted to the governor and the Board of Control by all courts.[201] And to facilitate the Supreme Court's equalization of the dockets of the courts of civil appeals, the latter biennially furnish statistics on their case load to the Supreme Court.[202] Finally, by statute the district courts are required to furnish to the conference of district judges to which they belong statistics on the state of their dockets.[203] Apparently, despite these mandatory requirements, little of this is done.

Group 4

The last of the jurisdictions to be considered are *California, District of Columbia, Massachusetts, New York,* and *New Jersey.* The District of Columbia occupies a special position as a part of the federal court system, for which comprehensive statistics are regularly compiled by the Administrative Office of the United States Courts. The first three of the states named have long been outstanding for their compilation of statistics, while in New Jersey under the new judicial system and with the establishment of an administrative office of the courts much is being accomplished. In the group of three, California, Massachusetts, and New York, statistics are reported to the judicial council by all the courts of the state, including

[200] Tex. Civ. Stat. (Supp.) art. 23282.

[201] Texas Judiciary Appropriations Act (1945) § 4(d).

[202] And also to the Board of Control.

[203] Tex. Civ. Stat. (Supp.) art. 200a.

police courts and justice of the peace courts, while in New Jersey such reports are made to the administrative office of the courts.

In the United States District Court and the United States Court of Appeals for the *District of Columbia,* reports are made to the Administrative Office of the United States Courts by means of docket cards.[204] In addition to these reports the clerk of the District Court annually makes a report to the chief justice of his court, showing cases pending at the beginning of the year, cases filed, and cases pending at the end of the year. These statistics are broken down into various categories: civil actions, criminal actions, mental health, bankruptcy, and the like. This report is not published but may be viewed in the clerk's office, although not as a matter of right. Statistics on the work of the probate branch of the district court are reported annually to the commissioners of the District of Columbia and the chief justice of the District Court. They show the case load handled with a breakdown into type of cases disposed of, and they also give statistics on the cost of operating the court.

There is no statutory requirement that the Municipal Court of Appeals of the District of Columbia report statistics, and none are published, but the clerk makes an annual report to the chief justice of the court. Not only does it show the case load handled—number of cases docketed, number disposed of, number pending—but it also breaks these figures down into types of cases—contract, tort, small claims—and shows the proportion of affirmances and reversals in the Municipal Court of Appeals. Also shown are the average time lapse between various steps in the appellate procedure for the period covered and the number of appeals taken from the decisions of the court and the fate of each.

The chief judge of the Municipal Court of the District of Columbia by the act creating the court must report quarterly

[204] See 28 U.S.C. § 604 (1948). From these cards, really International Business Machine cards, an extremely detailed breakdown is made by the Administrative Office for the United States Courts.

to the commissioners of the District, to the attorney general and to the United States Jury Commission on the business of the court.[205] In addition, the act requires that the judges sitting in the various branches of the court report to the chief judge monthly as to the number of days and hours spent by them in the various courts. The quarterly report shows the case load broken down as to branches and generally makes a comparison with some similar previous period. Figures are also given showing the number of jury trials demanded, the number of trials held and the number pending at the end of the period. In addition to the above, very detailed monthly reports are made by certain of the branches of the court—landlord and tenant and small claims—and a less detailed report from the criminal side.

California judicial statistics, contained in the report of its judicial council, emphasize comparative annual summaries of filings and dispositions of cases by the different courts.[206] Statistics for the appellate courts contain figures on the types of cases handled—whether by written opinion, interlocutory motion, etc.—and also have cost figures on the operation of the courts. For the lower courts figures show the case load handled, the number of days spent by judges and juries in handling it, delays in reaching cases, and the costs of operating the courts. For the most part these reports are made monthly or weekly, but some of the inferior courts report only semi-annually.

In *Massachusetts* the judicial council, despite its lack of statutory authority for the gathering of statistics, likewise has an excellent set of figures although perhaps not as well organized or as complete as those of New York, discussed later. On the other hand, in its treatment of the case load handled by the district courts the judicial council in its report offers a breakdown by types of cases, *e.g.*, contract, tort, summary process, motor vehicle tort, etc., a feature not emphasized in the New York reports. Likewise, for the different superior

[205] D.C. Code (Supp.) tit. 11, § 754(c).

[206] Calif. Const. Art. VI, § 12; Calif. Pol. Code (1943) §727.

courts a very complete set of tables is provided, with a breakdown by types of case, showing the state of the dockets of the different superior courts and whether the courts have gained or lost in contending with the case load during the year. Comparative annual summaries of the business of the courts are provided, as are figures on dispositions of cases in the different courts. Pretrial disposition figures for the superior courts are provided, as are figures for references to auditors and masters in the same court. And figures for the number of days courts and juries were in attendance are given for some of the courts. Most of the reports are made annually.[207]

Prior to the constitution of 1947 *New Jersey* had had provisions for fairly complete statistical reports by the Supreme, circuit, and common pleas courts to the chief justice of the Supreme Court, by the chancery court to the chancellor, and by all courts to the judicial council.[208] The majority of statistics, however, were not too regularly reported.

In 1948 a new system for the compilation of judicial statistics was inaugurated with the establishment of the new courts under the constitution of 1947. Under the new rules every judge of every court is required to sign and mail to the administrative director of the courts, on forms supplied by him, a weekly report in duplicate as to the days on which court was held, cases and motions heard and disposed of, cases and motions heard and not disposed of, and any other data requested.[209] Since the chief justice of the Supreme Court is the administrative head of the courts and supervises the administrative director, it may be assumed that upon proper enforcement of this rule judicial statistics for each of the various

[207] In addition to the reports made to the judicial council, the administrative committees for the probate and district courts are given statutory authority to require reports from the courts making up their membership. Mass. Gen. Laws (1932) c. 215, § 30A as amended L. 1934, c. 330; id. c. 218, § 43A as amended L. 1941, c. 682 and L. 1943, c. 101.

[208] N.J. Rev. Stat. (1937) § 2:17-9 covers reports to the judicial council. Apparently the other reports were authorized as part of the general superintending power exercised by superior courts over the inferior courts and by the presiding judge over his own courts.

[209] N.J. Rules of Administration, Rule A14.

courts will be available.[210] While the administrative office of the New Jersey courts only came into existence on September 15, 1948, in January it compiled a very conclusive report of statistical data relating to proceedings in all of the New Jersey courts from September 15, 1948 to December 31, 1948. Such matters as the number of days between argument and decision, number of cases disposed of and undisposed of, number of complaints filed, actions of various types in the chancery division, and kinds of matrimonial actions, etc. are listed. Thus, a comprehensive scheme for the collection and compilation of judicial statistics has been established which compares favorably with those of California, Massachusetts, and New York.

In *New York* judicial statistics are plentiful and generally excellent. They give a complete balance sheet of incoming cases, outgoing cases, and cases pending for the judicial year, reported on a uniform basis. They are probably as full as, if not more complete than, any judicial statistics gathered and published by any judicial council in the country, with the possible exception of the Judicial Conference of the United States Senior Circuit Judges, which analyzes its statistics according to types of cases.[211]

The report gives figures on the case load handled by the different courts, number of cases pending, whether the court is gaining or losing in dealing with the case load, with a breakdown on this point into jury, nonjury and equity cases, and summaries of the dispositions of cases. These tables are analyzed and commented on in a section of the judicial council's main report. Most of the reports required are made monthly although some are made on an annual basis. In addition to the reports made to the judicial council, reports—usually copies of the judicial council reports—are also made by the appellate, trial and special terms of the Supreme Court of New York to the Appellate Divisions of the Supreme Court, which exercise external control over the reporting courts.

[210] See account of Proceedings of *First Judicial Conference*, Special Number, Rutgers L. Rev. 29-33 (Nov. 1948).

[211] N.Y. Jud. Law (1948) §§ 46, 48. See Saxe, "Civil Judicial Statistics in New York," 10 St. John L. Rev. 3 (1935); Reports of New York Judicial Council, 1935 to date.

Finally, the courts of criminal jurisdiction make monthly reports to the State Department of Correction, and these are published and tabulated, and to some extent analyzed, in an annual report of the Commissioner of Correction.[212] The judicial council makes use of these reports to complete its overall picture of the courts in New York.

Conclusion

Although the recommendations of the American Bar Association on the management of the business of the courts are fundamental to the successful operation of any judicial system, none of them have as yet met with general acceptance in the states despite the outstanding example set by the federal judicial system on all points here under consideration. Thus, as to the first recommendation there are eleven states which have substantially no elements of *external* control in their judicial systems and seventeen states have merely a minimum of the number of elements of *external* control. Sixteen other jurisdictions exercise a substantial degree of control over one or two of the sets of courts in the judicial system. And finally, there are only five jurisdictions wherein a substantial degree of control is exercised over almost all the different sets of courts comprising the judicial system.

As to the first group of eleven states that have substantially no elements of external control, the desirability of some measure of judicial unification has been indicated in four states. In the second group of seventeen states having a minimum of the elements of judicial control, there is evidence of dissatisfaction with the status of court administration in five states. Since for the most part the states comprising these two groups are primarily rural, with few centers of concentrated population, it is probable that there is not such pressure on the courts as develops in metropolitan areas of voluminous commercial activity, and for that reason the need for court uni-

[212] N.Y. Code Crim. Proc. §§ 947-949.

fication and improvement in the management of the courts' business has not yet made itself felt.

In contrast there are the sixteen jurisdictions where there is substantial external control over some courts. The majority of these states have highly urbanized areas in which industrial and commercial occupations are of great importance and where consequently the amount of judicial business is sizeable, thus requiring care in court management for its proper performance. While many of these jurisdictions have special devices for administrative control and unification, several of them also have dual and overlapping systems of courts that are not well organized, resulting in duplication and waste of judicial effort with consequences detrimental to the administration of justice.

In three of the five jurisdictions where a substantial degree of control is exercised over almost all the courts, the establishment of such systems of management has been very recent. All of these jurisdictions are ones in which the pressure of court business has been increasingly heavy through the years. California, Maryland, and Missouri present rather similar patterns of unification, the aim of which is the over-all management of court business, each state's administration being adapted to its particular system of courts. While the District of Columbia and New Jersey present the best picture of unified court systems combined with rather complete powers of management, in all five of these jurisdictions the first recommendation of this chapter may be said to be realized.

As to the second recommendation of this chapter, twelve states have no judicial councils or judicial conferences and in ten states such agencies are inactive or defunct. Among the twelve jurisdictions having judicial councils or like bodies that are functioning but that fail to have in full measure the recommended membership, there are several which are extremely active and accomplish a good deal. Finally, there are fifteen jurisdictions that have judicial councils or judicial conferences, the membership of which is strengthened by according representation to the bar and legislature. Recognition of the importance of judicial councils and judicial conferences and the

value of their activities is basic to the second recommendation heading this chapter, although it relates specifically to the membership of such bodies. Thus, while only in fifteen states is the recommendation completely an actuality, the existence and work of judicial councils or judicial conferences in a majority of the jurisdictions are in a sense a partial realization of this recommendation.

At this point a very recent development should be noted. This is the formation in 1949, under the auspices of the American Bar Association, of the conference of chief justices of the highest courts of all the states, which is to meet annually.

> The conference will provide not only a medium for the exchange of information and views of the chief officers of the judicial systems of each of the forty-eight states, but it can also do much to promote unanimity of judicial decisions and the adoption throughout the country of uniformly needed improvements in the business practices of the courts and in their administration and procedure. As a counterpart on the state level of the federal conference of chief judges of the United States courts of appeals, it may bring to the state courts a degree of efficiency and a correlation of judicial viewpoints that may well make its organization a memorable milestone in the annals of judicial administration.[213]

The final recommendation of this chapter relates to the regular compilation of judicial statistics quarterly. Seventeen jurisdictions have no requirements for the collection and compilation of judicial statistics, and in fourteen other states only isolated or sporadic sets of statistics are collected. Thirteen more states do have provisions for gathering comprehensive statistics but in only five jurisdictions are rather complete judicial statistics compiled regularly.

This summary presents a rather discouraging picture of the status of management of the business of the courts in the forty-nine jurisdictions. While the federal example has led to emulation only in New Jersey, which appears to be the one state in which all of the recommendations heading this chapter have

[213] A.B.A. Handbook, The Improvement of the Administration of Justice 42 (1949).

been accepted, the picture is not as unhappy as appears on first glance. Although it is true that these recommendations have not met with acceptance in a majority of states, the practice in a substantial minority of jurisdictions does approach conformance to the recommendations, while in others of the states the recommendations, although applicable, are not as vital because conditions of court business have not as yet necessitated such reforms. The federal courts have furnished an outstanding example of what can be done in the direction of managing the business of the courts. The recent widesweeping changes in such states as Maryland and New Jersey, as well as the many minor reforms of the past ten years recorded for the various states, are indicative of a trend in the direction of following the recommendations of the American Bar Association.

CHAPTER III

RULE-MAKING—THE JUDICIAL REGULATION OF PROCEDURE

Recommendation Adopted by the American Bar Association, July, 1938

That practice and procedure in the courts should be regulated by rules of court; and that to this end the courts should be given full rule-making power.[1]

INTRODUCTION

While it has been asserted by no less an authority than Dean Wigmore "that the legislature (federal or state) exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties; and that therefore all legislatively declared rules for procedure, civil or criminal, in the courts are void, except such as are expressly stated in the Constitutions,"[2] since the advent of the Field Code in New York in 1848 the legislatures of many states have completely dominated this field. The recommendation approved by the American Bar Association in 1938, however, for "regulation of procedure by court rule is not an innovation, but a return to fundamental principles."[3] The regulation of procedure by the legislature has had deleterious effects, leading to an unwise division of responsibility for the administration of justice between the legislature and the courts. The harassing inflexibility of legislative-made practice and procedure has resulted not only in a flood of judicial decisions con-

[1] Appendix A at p. 506. This is similar to the recommendation of the Committee on Judicial Administration although couched in slightly different language. Compare also Recommendation (14), under the heading Trial Practice, as approved by the Section of Judicial Administration at this time. This recommendation, relating specifically to the rules of procedure with respect to the actual trial of cases, reads as follows: "That the provisions of the new federal rules of procedure with respect to the actual trial of cases should be uniformly adopted." Id. at p. 508.

[2] Wigmore, "Legislature Has No Power in Procedural Field," 20 J. Am. Jud. Soc'y 159 (1936).

[3] Appendix A at p. 514.

struing procedural statutes, but also in continual legislative tinkering with such statutes. The committee of the Section of Judicial Administration which examined these questions not only recommended the withdrawal of the legislature from the field of procedure and the authorization of rule-making by the courts, but also that the rules so made supersede previous legislative action. The committee recommended that the rule-making function be vested in the court of last resort, with power in other courts to make supplemental rules essential to local needs; and that the court should be aided by expert advice, such as judicial conferences, judicial councils, and committees of the bar, in exercising the rule-making power.[4]

While the word "procedure" admittedly has an uncertain content, throughout this chapter the term will be used to include matters of pleading, practice, evidence,[5] and management. Thus, procedure is defined as everything methodical and regulatory in the courts, from the inception of a suit to the entry of final judgment, including appellate action. "Rules of court" is also an ambiguous term, as there are two types of rule-making power. The one is a *supplementary* power; that is, the power of a court to make rules which supplement a set of statutory rules. The other is the *complete* power; that is, the power completely to regulate procedure by court-made rules which supersede statutory enactments. The *supplementary* power is common. All but a few courts exercise such power to some extent. The *complete* power is the true rule-making power both historically and analytically; a court cannot be said to be exercising rule-making power unless its rules override statutory rules.[6] Such complete power is the real subject of this chapter.

The advantages of judicial rule-making are obvious, and the objections to such rule-making are few.[7] The success of

[4] Ibid.

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

[6] See Harris, "The Rule-making Power," IV Annual Handbook National Conference of Judicial Councils 41 (1942).

[7] Appendix A at p. 514. Prof. Harris in his monograph, op. cit. supra n. 6, has listed the disadvantages of the legislative process: lack of expertness essential to such a specialized field as

the federal rules of civil and criminal procedure is the most conspicuous example of a judge-made system of procedure in this country.[8] Not only are the rules as drafted worthy of imitation, but the process used in adoption of the rules presents a pattern of action to be followed in the states. This example shows not only the value of the cooperation of the bar and the importance of public hearings, but also the practicability of court action as evidenced by the most thorough consideration possible, and the flexibility of court-made rules, subject as they are to ready amendment.

The Actual Exercise of the Rule-Making Power at the Present Time

(A) By the courts.

(1) Regulating their own procedure: local rule-making.

The procedure of practically every court (excepting for the most part municipal, probate, and justice of the peace courts) is to some extent regulated by its own rules, commonly known as "local rules." Such power is generally exercised, however, only to regulate management and practice supplementary to statutory rules and is not the *complete* power, *i.e.*, statutory rules are not superseded by "local rules" (except principally in the courts of last instance as noted later). But in some of the states in which no supervisory rule-making power is exercised by the court of last instance, local rules

legal procedure and the intermittent action of a legislative body. He has cited as the objections to court-made rules: failure to readily respond to the public point of view because the court system may have become inbred with legalisms, and because of inability to clearly determine what are matters of procedure to be controlled by rule and those which should be regulated by the legislature.

[8] Under 48 Stat. 1064 (1934), 28 U.S.C. (1948) § 2072, Congress authorized the Supreme Court to prescribe rules of civil procedure for the federal district courts. See as to history of the federal action I Moore's Federal Practice (1938) 1-28. 54 Stat. 688 (1940) 18 U.S.C. (1948) § 3771, provides authority for the Supreme Court to prescribe rules of criminal procedure for the federal courts. See N.Y.U. Institute, Federal Rules of Criminal Procedure passim (1946).

rather than statutes control exclusively, thus presenting instances of local rule-making of the *complete* type.

In the majority of instances where local rule-making power is not exercised, this has occurred because statutory provisions regulate procedure in detail. In some instances, however, common-law rules as to practice and procedure prevail to the exclusion of statutory or local court rules. The following exceptions to the exercise of local rule-making may be noted: *Alabama,* probate courts; *Colorado,* justice of the peace courts in justice precincts having a population less than 100,000; *Delaware,* justice of the peace, and register of wills (probate courts); *Florida,* probate courts; *Georgia,* justice of the peace and ordinary courts; *Illinois,* justice of the peace courts; *Kansas,* nonrecord courts; *Louisiana,* justice of the peace courts, and municipal courts other than that for New Orleans; *Montana,* justice of the peace, police, and municipal courts; *Nebraska,* county, and justice of the peace courts; *Nevada,* justice courts; *New Hampshire,* probate, municipal, and justice of the peace courts; *North Carolina,* recorders courts, general county courts, and special county courts; *Oregon,* probate courts; *Rhode Island,* district courts, and certain probate courts; *South Carolina,* municipal courts, county courts, and probate courts; *Tennessee,* city and county courts; *Texas,* criminal courts; *Utah,* justice courts; *Virginia,* courts other than Supreme Court of Appeals; *Wyoming,* courts other than Supreme Court.

(2) Regulating the procedure in other courts: supervisory rule-making.

In no state is rule-making power exercised over other courts without some specific authorization, either constitutional or statutory. Complete supervisory rule-making power over procedure has been expressly entrusted to courts of last resort in fourteen states: *Arizona, Idaho, Indiana, Maryland, Michigan, Missouri, New Jersey, New Mexico, North Dakota, South Dakota, Washington, West Virginia, Wisconsin,* and

Wyoming. And in nine states complete rule-making power has been entrusted to courts of last resort in civil proceedings only: *Colorado, Delaware, Florida, Georgia, Iowa, Minnesota, Pennsylvania, Texas,*[9] and *Utah.* In addition, in Georgia the court of last resort has been entrusted with the power of rule-making as to criminal appellate procedure.[10]

It is to be noted that generally in the authorization of rule-making it is provided that said rules shall make no change in substantive law or rights. While this may seem superfluous and redundant, since by definition rule-making is concerned with procedure, it is obvious that there are differences of opinion as to what is substantive and what procedural, and such statements would seem to add nothing to the clarification of the problem.

There are certain particular exceptions in the grant or exercise of the rule-making power to these courts of last resort which are worthy of mention. In *Arizona* probate procedure is principally regulated by statute, and eighty percent of the rules relating to evidence are governed by common law. In *Colorado* no rule may be made permitting the trial judge to comment on evidence. In *Indiana* the Supreme Court has not modified former statutory or common-law rules of evidence, and Rule 1-1 expressly incorporates all rules of practice and procedure applicable to trial courts enacted by statute or in effect on June 21, 1937, the date of the adoption of the rules by the Supreme Court. In *Michigan* the Supreme Court's constitutionally granted complete rule-making power over other courts extends to courts of record only, including probate courts. In *Missouri*, where the court rules have not as yet been promulgated,[11] the constitutional enactment authorizing rule-making by the court provided that the rules made should not change the law of evidence, the rules relating to oral ex-

[9] In Texas the proposal of a legislative act to extend the rule-making power to criminal proceedings was adopted by the state bar, July 1, 1948, and will be submitted to the next meeting of the legislature

[10] Ga. Code Ann. (Supp.) § 81-1501 as added by L. 1945, pp. 145-146.

[11] Court rules for special circumstances in civil causes only have been adopted.

amination of witnesses, juries, the right to trial by jury, or the right of appeal. The recent grant (1947) of rule-making power to the *Minnesota* Supreme Court excepted from such regulation the probate courts. The *Pennsylvania* grant of rule-making power, while general, did not authorize rule-making for all courts but excepted some, such as the courts of general sessions and the orphans court. In defiance of this express limitation, however, the Supreme Court in 1942 promulgated a set of rules for the orphans' court, acting on the assumption that it had the inherent power to make such rules. The *Texas* Rules of Civil Procedure as promulgated govern probate proceedings in some respects, but statutory regulation of such proceedings is primary and while the rule-making power extends to rules of evidence, the statutory rules were carried forward into the new rules which contain a provision declaring common-law rules of evidence in force so far as not inconsistent with any other law.[12] Under the grants of authority to the *Missouri* Supreme Court, the *South Dakota* Supreme Court, and the *Wisconsin* Supreme Court the right to modify in any manner the court-promulgated rules was reserved to the legislature, while in *Florida, Iowa,* and *Texas* the court-made rules, although effective without affirmative legislative action, must be submitted to the legislature, which may disapprove them; and in *Georgia* any rules made by the Supreme Court must be ratified by the legislature.

Virginia is of special interest here. In that state full rule-making power over all courts seems to have been entrusted to the Supreme Court at an early date although the enabling statute does not specifically provide that court rules supersede statutory rules. Such power has been little exercised, and the effectiveness of such grant of authority may be questioned. In a case holding a court rule could not alter jurisdictional provisions, *i.e.,* the mode of appeal, by providing an alternative mode of certification of testimony for purposes of review, it was stated that court-made rules cannot supersede statutory

[12] Subsequently the Supreme Court adopted Rule 184a, embodying the American Law Institute Model Code of Evidence Rules 801-806, relating to judicial notice of the law of another state.

rules of procedure.[13] Despite this decision, however, it is the opinion of many members of the Virginia bar that the Supreme Court of Appeals has complete rule-making power, and there are indications such power may be exercised.[14] Thus, the new Virginia judicial council, established in 1948, is engaged in drafting rules regulating civil, criminal and appellate procedure, which it intends to submit to the Supreme Court on the assumption it may adopt them without further legislative permission.

In other states limited rule-making power over various courts exists. In *Alabama* and *Maine* the courts of last resort have full power specifically to make rules for equity proceedings only. In *Arkansas* rule-making power over probate courts is granted to the highest court. The *Alabama, Illinois,* and *Nebraska* Supreme Courts are authorized to make supplementary rules for various courts, not inconsistent with statutory provisions. Supervisory rule-making power is also entrusted to a body other than a named court in *California,* where the judicial council is entrusted under the constitution with supplementary rule-making power for all courts and in addition recently was also granted complete rule-making power over appellate procedure.

(3) Development and actual extent of the use of the rule-making power of the courts.

(a) General development.

In England there have been four stages in the development of the rule-making power. The first was that in which customs as developed by the tribunals prevailed. These customs were supplanted by formal rules of court, which in turn were displaced by legislative acts making specific radical changes. The fourth stage occurred with the return of the rule-making power to the court while reserving to the legislative body a veto

[13] See Virginia Home for Incurables v. Coleman, 164 Va. 230, 178 S.E. 908, 912 (1935).

[14] The Virginia Bar Association at its 1948 meeting urged the court to adopt new rules of procedure.

power.[18] In the various states comprising the United States these four stages have been represented at one time or another, although the courts of all states have not gone through a regular progression from stage to stage. Thus, no regular pattern of development may be traced in the several states. Although it may be seen that a state such as New York, with a comparatively long history, has gone through the first three stages of development traced for the English courts, other states, such as California, which did not come into being until later dates in United States history, did not go through such stages successively.

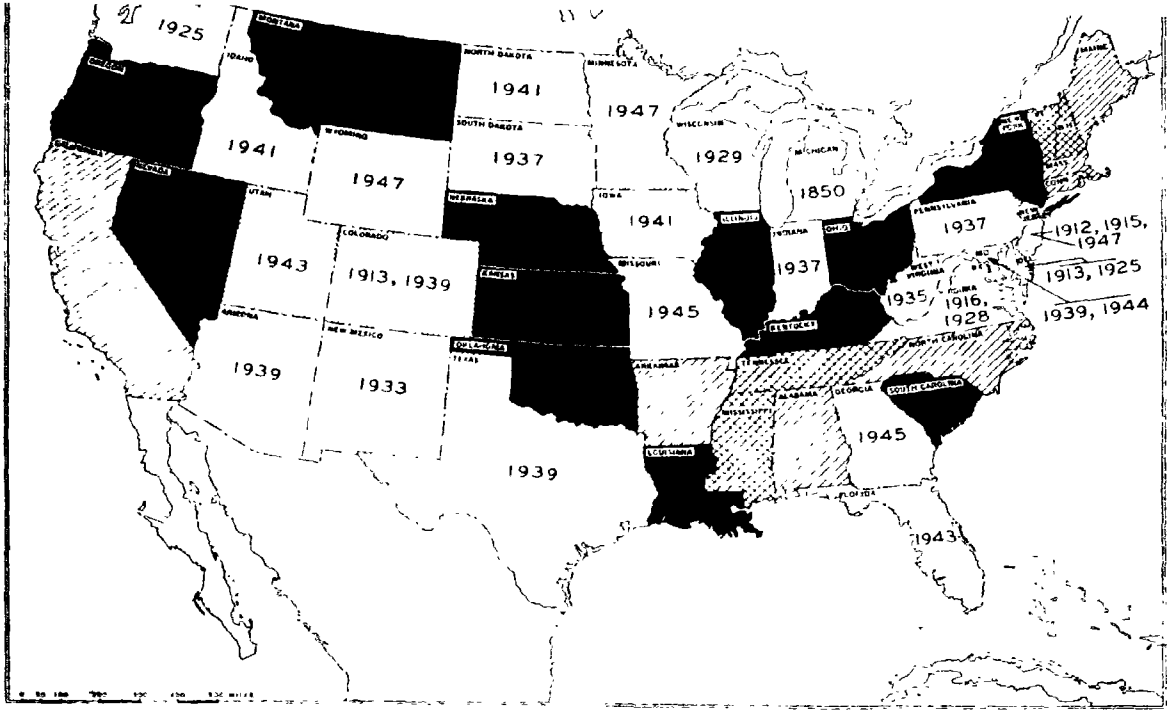
While it appears that certain states are in a particular stage of development of the rule-making power, in other states there is no clear demarcation of development, and it may be said that several of the four stages of development are simultaneously in evidence. To a large extent either customs of the tribunal or statutory rules prevail in municipal courts, county courts, those of the justice of the peace, and other inferior courts. In several of the states, *e.g., Michigan* and *Virginia,* rule-making has been authorized from an early date, although statutes have been enacted from time to time regulating procedure. Thus, in *Michigan* a rather comprehensive procedural statute was enacted in 1915 and has been accepted by the courts. Other states, such as *New York, Ohio,* and *Oklahoma,* have detailed codes purporting to effect radical changes of court rules which supplant rule-making by the courts and govern procedure rather completely; nevertheless there are rules of court even in those states. In other states, such as *Utah* and *Wyoming,* the rule-making power once exercised by the legislature recently has been entrusted to the courts, but in such states statutes do not cease to govern merely by virtue of this grant of rule-making power to the court of last instance, although on the adoption of rules by the courts statutory rules are of no force or effect.

Under any phase of development the courts always retained a measure of authority to prescribe necessary supplementary

[18] Pound, "The Rule-making Power of the Courts," 12 A.B.A.J. 599 (1926).

rules of procedure, and in some instances even retained a measure of *complete* rule-making power. In the nineteenth century, however, the trend was toward regulation of procedure by complex and minute code regulations because the common-law rules and court rules were inefficient.[16] In contrast, the tendency today is toward authorization of court action for the regulation of procedure in the interests of flexibility and simplification. Thus, in all but one of the twenty-five states in which the courts now have rather complete rule-making power, the present authority of the courts over procedure originated after 1900: *Michigan*, 1850; *New Jersey*, 1912, 1915, 1947; *Colorado*, 1913, 1939; *Delaware*, 1913, 1925; *Virginia*, 1916, 1928; *Washington*, 1925; *Wisconsin*, 1929; *Rhode Island*, 1930, 1940; *New Mexico*, 1933; *West Virginia*, 1935; *Indiana*, 1937; *Pennsylvania*, 1937; *South Dakota*, 1937; *Arizona*, 1939; *Maryland*, 1939, 1944; *Texas*, 1939; *Idaho*, 1941; *Iowa*, 1941; *North Dakota*, 1941; *Florida*, 1943; *Utah*, 1943; *Georgia*, 1945; *Missouri*, 1945; *Minnesota*, 1947; and *Wyoming*, 1947. It is to be noted that of the twenty-four states in which authority to promulgate rules of practice and procedure has been granted since 1900, in only three of the states in which this was done do the statutes provide that court-made rules shall not be effective until submitted to the legislature. These states are *Florida*, *Georgia*, and *Iowa*. In *Texas* the rules must be submitted to the legislature, but are effective unless disapproved. While in *Missouri*, *South Dakota*, and *Wisconsin* court-made rules need not be submitted to the legislature, the enabling provisions have a saving clause reserving to the legislature the power to modify procedural statutes

[16] Cf. Marvel, "The Rule-making Power of the Courts," 12 J. Am. Jud. Soc'y 55 (1928), in which the following states are listed as having enacted practice acts or codes of procedure following the adoption of the Field Code of Civil Procedure in New York in 1848: "Missouri, 1849; California, 1850; Iowa, 1851; Kentucky, 1851; Minnesota, 1851; Indiana, 1852; Ohio, 1853; Oregon, 1854; Washington, 1854; Nebraska, 1855; Wisconsin, 1856; Kansas, 1859; Nevada, 1860; North Dakota, 1862; South Dakota, 1862; Arizona, 1864; Idaho, 1864; Montana, 1865; Arkansas, 1868; North Carolina, 1868; Wyoming, 1869; South Carolina, 1870; Utah, 1870, Colorado, 1877; Connecticut, 1879; Oklahoma, 1890; and New Mexico, 1897." In addition to these twenty-eight states Louisiana had codes of civil procedure



STATES AUTHORIZING JUDICIAL REGULATION OF PROCEDURE

- Complete supervisory rule-making power entrusted to court of last resort
- Complete rule-making power in civil proceedings entrusted to court of last resort
- Limited grants of rule-making power as to certain proceedings, etc, or to particular courts, or to a judicial body other than a named court, statutory regulation as to remainder of procedure
- Statutes predominate in regulation of procedure, some court rule-making
- Procedure regulated almost completely by statute

and rules promulgated by the courts.[17] With the exception of Virginia, in all of the states in which rule-making is authorized by legislative provision, the grants of rule-making power expressly provide that in cases of conflict between prior statutes and court-made rules, court rules prevail and all laws in conflict fail.

(b) The states specifically.

Alabama.—As early as 1819 the Court of Errors and Appeals was given the responsibility and authority to make rules and regulations for the proceedings of the court, and also to establish a uniform practice throughout the courts of record. This statute, however, was part of an act which regulated specifically the proceedings of the courts.[18] In 1841 the chancellors were empowered to establish rules of practice for the chancery court, while in 1875 [19] and in 1935 authority over equity procedure was entrusted to the judges of the Supreme Court.[20]

From time to time since 1838 various rules have been promulgated for the courts of record, for equity proceedings and for the Supreme Court. There has not been any real comprehensive control of procedure by the courts, since the Supreme Court has merely been authorized to establish rules supplementary to the statutes,[21] except as to equity proceedings where complete rule-making power has been granted.[22] A bare majority of the rules of procedure, however, are court rules, made under the supplementary power, and equity rules were

and criminal procedure and criminal laws, Georgia had completely codified her laws and Texas had a code of criminal procedure and penal laws. See Mallonee, "Revised Statutes and Codes," 48 Am.L.Rev. 37, 39 (1914).

[17] E.g., Wis. Stat. (1947) § 251 18. Cf. Fla. Stat. Ann. (Supp.) § 25.47 enacted as L. 1943, c. 21995(6). "This section shall not be construed as consituting an abandonment or disclaimer of the power of the legislature to enact laws regulating procedure in the courts of this state."

[18] Ala. Gen. Acts (1819-22) at 3. See Clay, Ala. Digest 285-286, Appendix at 605-618.

[19] Ala. Gen. Acts (1874-75) No. 83 at 193.

[20] Ala. Code (1940) tit. 7, §§ 289, 290. Rules made under this grant supersede any statutes.

[21] Id. tit. 13, § 17. Grant of authority to establish rules of practice in Supreme Court and courts of record not contrary to code provisions.

[22] Supra n. 20.

promulgated in 1940 by the Supreme Court under its complete rule-making power.

Arizona.—From 1901 the Supreme Court had the right to adopt rules of practice for itself and the superior courts. In 1937 it adopted rules for procedure in the Supreme Court, which rules are still in force, and in 1938 adopted uniform rules of procedure for the superior courts which have since been superseded.[23] In 1939 the Supreme Court was authorized to promulgate rules regulating pleading, practice and procedure in all courts, and it was provided that all existing statutes relating to pleading, practice and procedure were to be deemed rules of court remaining in effect until modified or superseded by rules promulgated pursuant to this statute.[24] In 1940 the Supreme Court, pursuant to this authority adopted a set of rules regulating civil procedure in the superior courts, which with but a few minor exceptions are identical with the Federal Rules of Civil Procedure. And it has also adopted a code of criminal procedure governing proceedings in the superior courts and before magistrates which, with the exception of one of twenty-four chapters and minor textual changes, is identical with the model code of criminal procedure proposed by the American Law Institute. The rules of procedure for the superior courts, so far as applicable, govern the procedure in the justices' courts. Probate proceedings form the chief exception to court controlled procedure, as probate procedure is regulated in detail by statute.[25] Arizona can be denominated a court-rule state, as eighty-five percent of its practice and procedure is regulated by court rules. Rules as to evidence form another exception to the predominance of court-made rules, the majority of the rules of evidence being those of the common law.

Arkansas.—Procedure in Arkansas is governed largely by statutes somewhat complemented by rules of court.[26] The

[23] By rules adopted in 1940.

[24] Ariz. Code (1939) §§ 19-202 through 19-204.

[25] Id. §§ 38-101 through 38-2012.

[26] Ark. Stat. Ann. (1947) §§ 22-309, 22-803, 22-2142. Authorization of local supplementary rule-making by circuit courts, police courts, and Supreme Court respectively.

Supreme Court has promulgated rules regulating procedure before it, supplementing the statutes governing appellate procedure. Various other courts have formal written rules. Thus, several of the circuit courts have adopted rules providing for holding of pretrial conferences.[27] The Arkansas constitution gives to the Supreme Court a general superintending control over all inferior courts of law and equity,[28] and while at one time the Supreme Court had promulgated rules for the circuit courts, these rules are not now in use. In 1939 the Supreme Court was especially empowered to prescribe rules for probate court procedure, which rules were to supersede conflicting laws.[29] The Arkansas bar association is currently working on a judicial reorganization plan (revising Art. VII of the Arkansas constitution) which would entrust extensive rule-making powers to the judicial council.[30]

California.—Except for rules on appeal, effective in 1943, referred to below, all court rules which now exist in California are supplementary rules relating almost entirely to details of practice and court management.[31] Most matters of practice, pleading and evidence are subject to the detailed provisions of the Code of Civil Procedure, which is an all-inclusive legislative regulation of judicial procedure antedating the constitution of 1879 under which the courts exist. The judicial council, consisting of justices from different courts, is a constitutional creation in the judicial department. Its constitutional powers include the making of rules "not inconsistent with laws that are now or may hereafter be in force";[32] and its recommendations for adoption of changes in existing laws in practice and procedure must be submitted to the legislature. Rules adopted by the judicial council under this grant of authority, however would supersede "local" rules on any matters in conflict. The judicial council has, under a recent statutory authorization,[33] compiled a series of rules regulating appellate pro-

[27] See infra p. 210, n. 8.

[28] Ark. Const. Art. VII, §§ 4, 14.

[29] Ark. Stat. Ann. (1947) § 22-507.

[30] See draft, 2 Ark.L.Rev. 174, at 181 (1948).

[31] E.g., Rules adopted by the Judicial Council for the Superior Courts, effective Jan. 1, 1949. 23 Calif. S.B.J. 384 et seq. (1948).

[32] Calif. Const. Art. VI. § 1a.

[33] Calif. Code Civ. Proc. (Supp.) §§ 961, 988j and Calif. Penal Code

cedure.[34] Statutory rules superseded thereby were repealed in 1945, although the enabling statute had expressly declared such statutes to be ineffective upon promulgation of the rules of the judicial council. Thus, for the limited purpose of drafting appellate rules the judicial council was entrusted with complete rule-making power. Each of the various superior courts has local rules governing matters of individual concern. Especially in the appellate courts many problems are covered neither by statute nor court rule but are solved according to the unwritten custom of the particular court. Except for the recent authorization for action by the judicial council, California remains a state in which procedure for the most part is regulated by legislative enactment, and the rule-making power of the courts or judicial bodies is primarily supplementary.

Colorado.—As early as 1913 the legislature had given to the Supreme Court power to prescribe rules of civil procedure superseding statutes,[35] but this power was infrequently exercised until another statutory authorization was enacted in 1939.[36] This latter statute provided expressly that no rule could be made permitting a trial court judge to comment on the evidence. Acting under this statute in 1941, with the assistance of a committee of the Colorado bar association, a complete procedural code based primarily on the Federal Rules of Civil Procedure was adopted governing civil proceedings of all courts in the state. Courts of record, such as the district and county courts, as well as justices of the peace in certain precincts, are also given authority to supplement the Supreme Court rules with rules of their own and do so.[37]

Connecticut.—Connecticut delegated rule-making power to

(Supp.) §§ 1246, 1247k as enacted L. 1941, cc. 477, 562 as amended L. 1943, c. 4.

[34] See Rules on Appeal, 22 Calif. (2d) 1 (1943).

[35] Colo. Laws (1913) c. 121 at 447. Cf. Colo. Const. Art. VII, § 4, which gives to the Supreme Court general superintending power over all inferior courts.

[36] Colo. Laws (1939) c. 80 at 264. This statute, authorizing rule-making in civil proceedings, contains an exception providing that no rule is to be made permitting the trial court to comment on evidence given during a trial.

[37] Rule-making grant to justices of the peace in justice precincts having a population of more than 100,000. Colo. Stat. Ann. (1935) c. 96, § 214.

the courts at an early date.[38] As early as 1847 it was the custom of the Supreme Court of Errors to make rules of practice for itself as well as for the superior court.[39] Prior to 1929 appellate procedure was largely regulated by statute. In that year most of the procedural statutes governing appellate proceedings were repealed and the judges of the superior court were authorized to promulgate rules governing practice and procedure upon appeals.[40] The judges approved such rules in 1930, and these form the main body of the present rules of appellate procedure. The superior court judges are also empowered to make rules for certain specially denominated proceedings and rules to carry out the Practice Act, which rules are binding upon all courts, and these judges are endowed with additional authority to enact rules of procedure for the superior court.[41] These latter rules are to be given effect in the courts of common pleas wherever possible. All the courts of the state, with the exception of the probate courts, have adopted the rules promulgated by the judges of the superior court, adding those of their own to meet particular problems of their respective courts.

Delaware.—As early as 1852 the chancellor was authorized to draft rules to govern chancery proceedings, and the superior court had power to make regulations for its business.[42] In 1913 a statute was enacted empowering the chancellor for the court of chancery, and a majority of the other state judges for the various other courts, *i.e.*, Supreme Court, superior court, court of oyer and terminer, etc., to make rules for such courts.[43] This was a grant of complete rule-making power, since rules made thereunder were to supersede statutes inconsistent therewith.

[38] See Rubin, "The Rule-Making Power of the Connecticut Courts: Part I," 15 Conn. B.J. 367 (1942).

[39] See Conn. Rev. (1854) §§ 11, 12, 13 at 265 as to 1847 authorization by legislature.

[40] Conn. Gen. Stat. (1949) § 8012. There are twenty judges of the Superior Court. It is to be noted that the judges of the Supreme Court of Errors are automatically judges of the Superior Court. Id. § 7621.

[41] Id. §§ 7655, 7656, rule-making power for such special proceedings as bastardy, replevin, habeas corpus, prohibition, etc.

[42] Del. Code (1852) §§ 1935, 1936, 1921, 1943.

[43] Del. Rev. Code (1935) § 4240.

Again, in 1925, the chief justice and associate judges of the state were authorized to prescribe rules of procedure to govern all civil actions, such rules to make ineffective all conflicting laws.[44] The statutes of 1913 and 1925 are both in the present Delaware Code.

The various Delaware courts, except the court of oyer and terminer, had at an early date adopted fairly elaborate local rules, which rules were largely confined to matters of practice and management. Despite the existence of broad powers of action, however, real progress towards simplification of pleading and practice did not occur until recently, and many statutes were enacted governing pleading and practice. For the most part the rule-making power was dormant until 1947, when rules of procedure modeled after the Federal Rules of Civil Procedure so far as applicable were adopted for both the court of chancery and the superior court.

District of Columbia.—All courts of the District of Columbia are especially empowered to make their own rules, *i.e.*, local rules,[45] and no court of the District regulates the procedure of other courts. The United States District Court for the District of Columbia is, of course, regulated by the federal rules of civil and criminal procedure. All the courts have fully exercised their power to make local rules, and the process of amendment is continual. Legislative rule-making has been exercised to some extent, as in the establishment of small claims jurisdiction and procedure.

Florida.—Until 1943 the Supreme Court was authorized to make rules for its own proceedings superseding conflicting laws, and had also been empowered to make rules for other courts not inconsistent with the statutes.[46] Acting under such grant, the Supreme Court had made rules for its own procedure and for trial courts in common-law causes in 1936.

In 1940 the Florida state bar association prepared a draft of proposed rules based on the federal rules, which it sub-

[44] Id. § 4643. Cf. 43 Del. Laws (1941) c. 221, rule-making power of the Supreme Court over procedure in that court.

[45] D.C. Code (1940) §§ 11-930, 11-312; D.C. Code (Supp.) § 11-756.

[46] Fla. Stat. Ann. (1943) § 25.03. See Fla. Const. Art. III, § 20.

mitted to the Supreme Court for adoption on the theory it had the inherent power to make such rules. The court denied it had the power to do so,[47] and its decision led to the passage of an act in 1943, specifically lodging in the Supreme Court the rule-making power over civil actions in all courts of the state, with the proviso that any rules promulgated were to be reported to the legislature and would not be effective until the next session of the legislature had adjourned.[48] The Supreme Court under the 1943 act is expressly empowered to make rules of procedure, and it is engaged in formulating new rules for the trial courts, in large part incorporating the federal rules but confined in their operation to common-law actions.[49] As its next project the court is scheduled to draft rules for equity procedure.

Georgia.—Until 1945 the Supreme Court, the Court of Appeals, the superior courts and the superior court judges in convention were empowered to make rules governing their respective tribunals, provided such rules did not conflict with the constitution or statutes, but no court was authorized to make rules for any other court.[50] Practice, procedure, and management in the Supreme Court and Court of Appeals were largely governed by the rules which those tribunals were empowered to formulate, and the superior trial courts had promulgated a set of rules relating to practice in those courts, which had been formulated by a convention of judges of that court. In 1937 the legislature repealed the act authorizing superior court judges in convention to promulgate rules of practice for such courts and passed a statute authorizing the judges in conven-

[47] Petition of Florida State Bar Ass'n, 145 Fla. 223, 199 So. 57 (1940).

[48] Fla. Stat. Ann. (Supp.) § 25.47 enacted as L. 1943, c. 21995. This statute also included a provision that the legislative grant did not mean an abandonment of the legislative power to enact laws regulating procedure.

[49] Cf. Petition of Florida State Bar Ass'n for the adoption of Rules for Practice and Procedure, 155 Fla. 710, 21 S. (2d) 605 (1945). In this case the Supreme Court having decided that c. 21995 of the Laws of 1943 validly authorized it to adopt rules of procedure, held that it would not abandon its former system of common-law and equity procedure and substitute for it the Federal Rules of Civil Procedure.

[50] Ga. Code (1933) § 24-106.

tion to promulgate rules of practice for their courts, to be effective only when enacted into law by the legislature.[51]

In 1945 the Supreme Court was empowered to make rules of procedure in all civil actions in all courts and to make rules of appellate procedure in both civil and criminal cases, which rules or amendments thereof, however, were not to be effective until ratified by the legislature.[52] This statute expressly stated that the grant of authority did not constitute an abandonment of the legislature's power to enact rules of procedure. Pursuant to the authority of the 1945 enabling act, the Supreme Court appointed a committee from the state bar to aid it in preparation of new rules. A report was made recommending amendments to the various sections of the code and also a few new sections. This report was adopted by the Supreme Court in 1946, to become effective January 1, 1947, subject to legislative ratification. The General Assembly ratified the rules and they became effective on the date prescribed.[53]

Until this recent action Georgia was classified as a code state, since the majority of the rules of practice and procedure were controlled by statutes. The legislature, prior to 1945, had been most active in enacting rules of procedure for the different courts.[54]

Idaho.—While the legislature is empowered by the constitution to regulate procedure in inferior courts and in appellate matters,[55] in 1941 by statute the legislature recognized and confirmed the inherent power of the Supreme Court to prescribe rules for all matters in all courts.[56] Such rules as the Supreme Court was authorized therein to adopt were to take effect six months after promulgation, and thereafter all laws in conflict were to be ineffective. As yet (1948) no action has been completed by the Supreme Court under this grant of rule-making power and statutes govern procedure rather completely.

Illinois.—In Illinois certain rule-making power of various

[51] Ga. Code (Supp.) § 24-2628. See Jones v. Boykin, 185 Ga. 606, 196 S.E. 900 (1928).

[52] Ga. Code (Supp.) §§ 81-1591 et seq. enacted as L. 1945, at 145-146

[53] Ga. Laws (1946) at 726-782.

[54] Cf. Ga. Code (1933) § 2-4401.

[55] Idaho Const. Art. V, § 13.

[56] Idaho Code (1947) §§ 1-212 to 1-215.

courts is well established. The Supreme Court and the Appellate Court have promulgated rules for their respective tribunals. Among the inferior courts the actual exercise of the rule-making power is almost as diverse as the number of courts. Thus, the Municipal Court of Chicago exercises broad rule-making powers as to its own procedure under a statutory grant.[57] The only court in Illinois exercising regulatory powers over other courts is the Supreme Court, which, under a limited statutory grant contained in the 1933 Practice Act, regulates to a considerable extent matters of practice and management in the appellate courts.[58] Certain rules of the Supreme Court affecting pleading, practice, evidence, and management, and promulgated under the specific grant of authority, are applicable to the inferior courts. While the scope of activity is broad, the Supreme Court is limited to the rule-making necessary to effectuate the purposes of the Practice Act, such rules to be supplementary to and not inconsistent with that Act.[59] The Supreme Court, however, was also given limited power to overrule a certain specified schedule of rules contained in the Practice Act,[60] and it has exercised this power. The substituted set of rules adopted by the Supreme Court came into force on the effective date of the statute, January 1, 1934, and the schedule of rules as previously enacted never became operative.

Indiana.—The right of the Supreme Court to adopt rules to control all proceedings in all courts of the state was recognized by statute in 1937.[61] Statutes also authorize the circuit courts to adopt rules for the conduct of their business. Pursuant to its grant of authority the Supreme Court adopted revised rules, stating that such rules were adopted pursuant to its inherent rule-making power and the authority given by the legislature. These rules largely incorporated all prior code

[57] Ill. Rev. Stat. (Smith-Hurd, 1947) c. 37, § 375.

[58] Id. c. 110, § 203.

[59] Id. § 126. Cf. id. § 266, authorizing the Supreme Court to make rules as to administrative review, such rules to be consistent with statutes; c. 3, § 154, granting Supreme Court supplementary rule-making power as to probate courts.

[60] Id. c. 110, § 127.

[61] Ind. Stat. (Burns, Supp.) §§ 2-4718, 2-4719.

regulations, which were thus made rules of court except as modified by further rules of the Supreme Court.

The rule-making statute expressly preserves the power of the local courts to regulate procedure if not in conflict with the Supreme Court rules, and most trial courts of the state have exercised this power. The Supreme Court has not modified the former statutory or common-law rules of evidence, but Rule 1-1 adopts as rules of the Supreme Court "all other rules of procedure and practice applicable to trial courts adopted by statutory enactment and in effect on June 21, 1937" (the date of the Supreme Court action). This would seem to include the then existing statutes in the field of evidence.

Iowa.—In 1941 Iowa joined the states giving to their highest courts the power to prescribe all rules of pleading, practice and procedure in civil suits.[62] The enabling statute required the Supreme Court to report all rules adopted by it to the General Assembly, and prescribed that such rules take effect on July 4th following the adjournment of the session of the General Assembly, with such changes, if any, as were enacted by the Assembly, and thereafter all laws in conflict were to be ineffective. Thus, while court action in the field of rule-making was authorized and has been taken, there would still seem to be the danger of legislative interference with the judicial rule-making because of the statutory provision. After discussion, debate, and approval by the bar, rules adopted under the statute became effective in 1943, and approximately three quarters of the procedure in the courts of Iowa are now regulated by court rules. It is to be noted that prior to this recent action there was little exercise of the rule-making power by the courts in that few courts had local rules and no rules were adopted by any court to regulate procedure in other courts.

Kansas.—Court procedure has been to a large extent regulated by statute, as Kansas has always been a code state. The Supreme Court has been authorized to supplement the code,[63]

[62] Iowa Code (1946) §§ 684.18, 684.19 enacted as L. 1941, c. 311.

[63] Kan. Gen. Stat. (1935) § 60-3825, originally enacted in 1909. Kan. Gen. Stat. (Supp. 1947) § 62-2601, authorized court rules of criminal procedure supplementary to statute, enacted in 1941. Also cf. Kan. Gen. Stat. (1935)

and has promulgated rules consistent with the code, particularly as to matters of management, regulating procedure before it as well as procedure before the various district courts. The Supreme Court and the judicial council had also had under consideration the adoption of rules of practice for the probate courts, but no action was taken and the probate courts are now governed entirely by a legislative probate code. Statutory procedure together with the rules promulgated for district courts by the Supreme Court leave little to be regulated by local rules, except minor details such as the time the court will convene. In at least twenty-four of the thirty-six district courts in existence, however, rules governing such minor details of local practice and procedure have been adopted.

Kentucky.—Statutory law primarily regulates court procedure. As authorized by statute, however, procedure in the Court of Appeals is largely regulated by rules of court.[64] Although the various courts are authorized to make rules for their own procedure, few do so.[65] Thus, few circuit courts have any rules. No court makes rules to regulate procedure in other courts.

Louisiana.—Louisiana, being a civil law state, derived much of its procedural law from Spanish and French sources, and such law was embodied into statutes and codes. The courts generally have the power to adopt rules of procedure supplementary to those in the codes,[66] and the legislature is prohibited from enacting any local or special law regulating the practice or jurisdiction of any court.[67] No one court has the power to make rules for any other court. The greater part of procedural regulation has stemmed from legislative enactment, and the local supplementary rule-making power has been used only scantily. All expectation of having complete rule-making power entrusted to the courts may be said to have vanished,

§ 60-3826, consisting of rules of the Supreme Court.

[64] Ky. Code Civ. Prac. (Carroll, 1948) § 760.

[65] Ky. Rev. Stat. (1946) § 21.050 authorizes self-regulation by Supreme Court; id. §§ 24.030, 24.160, 24.250 authorize local rule-making by certain inferior courts.

[66] Thus, La. Gen. Stat. (1939) § 1412 authorizes self-regulation consistent with statute and constitution by Supreme Court.

[67] La. Const. Art. IV, § 4.

since in 1948 the Louisiana Law Institute was directed to prepare a revision of the Civil Code of Louisiana and the Code of Practice of Louisiana, for submission to and adoption by the legislature.[68]

Maine.—Local rule-making power has been granted to the various courts by legislative act.[69] No court has the right to regulate the rules of another. The Supreme Judicial Court, however, is given the power to make rules in equity,[70] and has made such rules governing the superior court sitting in equity. The Supreme Judicial Court's approval is also requisite for rules drafted by the three-judge commission of the probate courts for such courts.[71] The Supreme Judicial Court, the superior court, and the three-judge commission of the probate courts have promulgated rules for the government of procedure in their respective courts. While the courts are permitted to make and have made rules, in addition there have been specific statutes regulating procedure, although these have not been numerous.

Maryland.—Prior to 1939 the Court of Appeals had made rules for the prosecution of appeals and a number of general rules governing pleading and practice in the equity courts as authorized by the constitution.[72] Until recently these general equity rules were the only instances of one court's regulating the procedure of another. In Baltimore City, however, the judges of the Supreme Bench of Baltimore had power to establish rules for the practice of all courts in Baltimore except the orphans' court.[73] The circuit courts for the counties had prescribed local rules which in the main dealt with court man-

[68] La. Laws (1948) Act No. 335. See Miller, "'Minimum Judicial Procedural Standards'—How Met in Louisiana," 9 La.L.Rev. 382, 384-386 (1949).

[69] Thus, Me. Rev. Stat. (1944) c. 94, § 6, authorizing self-supplementary rule-making by the superior courts; but cf. c. 99, § 1, authorizing the Supreme Judicial Court to alter the forms of the writs in civil actions by general rules.

[70] Id. c. 95, § 3. Cf. id. c. 100, § 192, authorizing judicial council to make a continuous study of court rules of procedure.

[71] Id. c. 140 § 49.

[72] Md. Const. Art. IV, § 18. See Rules and Regulations Respecting Appeals and General Equity Rules, revised November, 1945.

[73] Md. Const. Art. IV, § 33, Md. Code Ann. (1939) art. 26, § 37. See Rules of Supreme Bench of Baltimore City, effective January 1, 1947. Cf. Md. Const. (1867) Art. IV, § 41A added 1940.

agement.[74] In 1939 the Court of Appeals was authorized by statute to adopt rules of civil procedure to govern all courts, such rules to be submitted to the legislature.[75] A committee was appointed in 1940 as authorized by the statute, and in 1941, rules were promulgated under this grant of authority.

In 1944 the voters of the state ratified a constitutional provision, vesting the Court of Appeals with authority to make from time to time rules and regulations to regulate and revise the practice and procedure in that court and in other courts of that state, which rules shall have the force of law until rescinded, changed or modified by the Court of Appeals "or otherwise by law."[76] In 1946 a Standing Committee on Rules of Practice and Procedure was appointed to make a study of the then existing practice and procedure of the state. The study resulted in a report with recommendations. The recommendations were adopted by the Court of Appeals and became effective on January 1, 1948. At the present time the Standing Committee of the said court is considering the adoption of rules regulating criminal practice and procedure. The present rules were adopted pursuant to the constitutional provision, and thus there was no submission to the legislature as required by the now superseded enabling act of 1939.

Massachusetts.—While much procedure is regulated by statute, the various courts from time to time have made rules for the conduct of judicial business.[77] The Supreme Judicial Court and the superior court have periodically revised their rules. Rule-making by judges of the probate courts, subject to modification and approval by the Supreme Judicial Court is authorized.[78] Prior to the authorization of rule-making in equity by the superior court,[79] the Supreme Court rules governed equity practice in the superior courts by statutory authorization, and the superior court now has adopted the equity

[74] Md. Code (1939) art. 26, § 1 (such rules were supplementary).

[75] Id. § 35 as enacted L. 1939, c. 719. Cf. Md. Laws (1927) c. 684.

[76] Md. Const. Art. IV, § 18A as approved 1944.

[77] Mass. Gen. Laws (1932) c. 213, § 3 as amended L. 1943 at 374, L. 1945 at 582, authorizing local rule-making consistent with law; c. 218, § 43 as amended L. 1939, at 347, § 3.

[78] Mass. Gen. Laws (1932) c. 215, § 30.

[79] Id. c. 214, § 6.

rules of the Supreme Judicial Court. While there has been little statutory regulation of equity procedure, statutory regulation of other procedure is rather thorough and complete. The legislature has always refused recognition of general rule-making power, as evidenced by the occasional grant of rule-making authority in specific directions only.[80]

Michigan.—The Supreme Court was vested with complete rule-making power over all courts for the first time in the constitution of 1850.[81] This power extends to courts of record and includes probate courts. More matters are now regulated by court rule than were so regulated at the beginning of the state's history. As far back as 1899 there were 149 rules promulgated by the Supreme Court. The last two decades have seen a rather marked period of rule-making by the Supreme Court, beginning with the promulgation of general rules for that court and for appellate practice, adopted in 1931 and revised in 1945. The Judicature Act adopted in 1915, however, was an attempt to systematize all rules of procedure, and as amended is still on the statute books.[82] Also scattered throughout the statutes of Michigan there are a great many other regulations respecting procedure. Although a considerable number of the statutory rules of procedure have been superseded by the rules promulgated by the Supreme Court in recent years, the court rules recognize the importance of the statutory rules and provide specifically that rules of practice in any statute not in conflict with any of the court rules shall be deemed in effect until superseded by rules adopted by the Supreme Court.[83]

[80] Thus, when the statewide small claims procedure was authorized for the district courts, the courts were directed to make rules as to details of procedure. The land court, established in 1908, has to a considerable extent developed its own practice.

[81] Mich. Const. (1850) Art. VI, § 5; id. (1908) Art. VII, § 5. Cf. Mich. Pub. Acts (1851) Art. 93, § 12, stating it was the duty of the Supreme Court to exercise its rule-making powers; semble, Mich. Comp. Laws (1948) § 601.14.

[82] Mich. Comp. Laws (1948) cc. 600-681.

[83] It would seem that the effectiveness of a statutory rule is not dissipated merely by the adoption of a court rule inconsistent with the statute, since then the problem may arise as to whether the court rules relate to procedure proper, or whether the court rule extends to something other than

Minnesota.—Some measure of rule-making power had always been granted by the legislature to the courts. Such rule-making was confined to self-regulation. No court was authorized to make rules in regulation of the procedure of other courts; all in all there was very little exercise of the rule-making power as granted and statutory regulation of procedure prevailed. In 1947, however, the legislature, while stating that the statute enacted did not abridge the legislative right to enact rules of procedure, authorized the Supreme Court to exercise full rule-making power as to all civil actions except probate proceedings.[84] This statute also provided that all present statutory rules were to be effective as rules of court until modified, and that the rules drafted by the Supreme Court were to become effective on a date set by the court. In accordance with the specific provisions of the statute an advisory committee is now at work on the rules authorized.

Mississippi.—There is no centralized judicial authority charged with rule-making for all the courts of the state, but some courts do promulgate local rules of pleading and practice. The inferior courts, such as the justice of the peace courts, municipal courts, and county courts, and even the circuit courts, are largely regulated by express statutory provisions. In 1948 an act eliminating the rules of common-law pleading in the courts of that state was enacted.[85] The chancellors in the equity courts have been active in promulgating rules for the government of their courts, although there are also statutes applicable to the chancery courts, such as the Chancery Act of 1924.

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mere procedure; i.e., if there is modification of the right or scope of review as provided by statute. See Jones v. Eastern Michigan Motor Buses, 287 Mich. 619, 283 N.W. 710 (1939).

[84] Minn. Stat. Ann. (Supp.) §§ 480.051-480.058, enacted as L. 1947, c. 498; cf. Minn. Stat. Ann. (Supp.) §§ 484.33, 525.06, authorizing annual meetings of the district courts and probate courts for the formulation and revision of rules for the district courts and probate courts respectively.

[85] Miss. Code (Supp.) § 1475.5 enacted as L. 1948, c. 230. See Griffith, "The New Mississippi Civil Practice Act—Its Background—Effects," 22 Miss. L.J. 1 (1948). In 1946 a short practice act, endorsed by the state judiciary and embodying the gist of the federal rules, was passed by the house. See also Miss. Code (1942) § 1290 modifying pleading and practice in equity courts, enacted in 1924. See Miss. Code (1946) § 1664, authorizing local rule-making supplementary to statutes.

The Supreme Court has freely exercised the rule-making power in reference to its own procedure in matters of pleading and practice.

Missouri.—The 1945 constitution authorized the Supreme Court to establish rules of practice and procedure for all courts, although the legislative right to annul or amend such rules by specific enactments was also expressly retained.[86] Prior to the adoption of the constitution of 1945 a Civil Code, regulating procedure in all the courts, had been enacted in 1943,[87] and the Supreme Court in addition had promulgated rules to harmonize the Civil Code with existing practice and statutory laws not repealed by the statute enacting the Civil Code. Until the Supreme Court in accordance with the constitution, promulgates new rules of procedure, the Civil Code in conjunction with the existing court rules governs procedure in the courts. A Supreme Court committee is now preparing a set of rules of civil procedure in trial and appellate courts.

Montana.—By statute courts of record are allowed to make rules for their own government and the government of their officers so long as such rules are consistent with the statutes. Also the Supreme Court is authorized to make rules for the district courts in case of nonaction by the district court.[88] Court rules adopted by a judge in Montana are not binding on his successor insofar as the district courts are concerned. Procedure is largely governed by statutory provisions.

Nebraska.—The Supreme Court has promulgated numerous rules of practice governing its own proceedings, and the district courts also have promulgated some rules of procedure. The greater proportion of all rules of procedure, however, are governed by statutory provision. The constitution authorizes the Supreme Court to make rules for all courts, not inconsistent with statutes,[89] and such power has been exercised.

[86] Mo. Const. (1945) Art. V, § 5.

[87] Mo. Rev. Stat. Ann. (1939) c. 847 contains the Missouri Civil Code.

[88] Mont. Rev. Code (1935) § 8845. Cf. id. § 9833, requiring publication of court-made rules.

[89] Neb. Const. Art. V, § 25. Cf. Neb. Rev. Stat. (1943) §§ 26-1, 26-2, supplementary rule-making grant to judges of municipal courts.

Thus, in 1946 pretrial rules patterned on the federal rules were promulgated.[90]

In 1939 the Supreme Court was authorized to promulgate general rules of practice and procedure for all courts.[91] Such rules were not to be effective until submitted to the legislature, which retained the right to modify any rules promulgated. Rules were submitted to the legislature in 1943, but the legislature rejected them and also repealed the statutes authorizing the court to promulgate such rules.[92]

Nevada.—Since 1913 the Supreme Court has had express statutory authority to make rules governing its procedure and the procedure of the district courts, which rules were not to be inconsistent with statutory rules.[93] The district court was authorized to make its own rules, not inconsistent with the constitution or statute, as early as 1865.[94] Pursuant to the 1865 statute, rules for the district court were approved in 1887 by all the district court judges and by the Supreme Court, when the state was one judicial district. There have been no marked periods of rule-making. In fact, the district court rules were last amended in 1911. Under the present system procedure is governed almost entirely by statute.

New Hampshire.—While self-regulation is authorized by statute[95] and there are some rules made by the various courts to regulate their own procedure, no court makes rules to regulate procedure in any other courts, and all rule-making is supplementary. Regulation of procedure, however, is not completely legislative, since the legislative rules are very general and necessitate court rules or the rules of common law for the regulation of procedure.

New Jersey.—Prior to 1947, rules were promulgated by the various courts. The 1912 Practice Act had provided that the Supreme Court might prescribe rules of civil procedure for certain courts, namely, the Supreme Court, circuit court,

[90] As to adoption of pretrial rules, see 26 Neb.L.Rev. 110 (1946).

[91] Neb. Sess. Laws (1939) c. 30.

[92] Id. (1943) c. 63.

[93] Nev. Comp. Laws (1929) § 8377 originally enacted as L. 1913, c. 198.

[94] Nev. Laws (1865) § 22 at 113.

[95] N.H. Rev. Laws (1942) c. 370, § 8, local rule-making power of superior court specified.

and common pleas court, to effectuate the Act and to simplify judicial proceedings. The schedule of rules attached to the Practice Act was specifically made subject to alteration by the courts. Such rules were to supersede conflicting statutory and common-law regulations.[96] The 1915 Chancery Act authorized rule-making by the chancellor to supplement and supersede conflicting statutory regulations.[97] The 1947 constitution authorized the Supreme Court to make rules of administration, and "subject to law" rules of practice and procedure for all of the courts in the state.[98] Such rules modeled largely on the federal rules of civil and criminal procedure were promulgated by the Supreme Court after extensive consultation with the entire bench and bar of the state, and became effective September 15, 1948.

New Mexico.—Complete rule-making power is vested in the Supreme Court by virtue of a 1933 statute authorizing the promulgation of rules to govern all courts.[99] A complete set of rules of civil procedure, based upon the federal rules, was adopted in 1941 and is now in effect for the district courts. Several district courts have supplementary local rules, most typical being those relating to divorce cases. The Supreme Court has also made rules to regulate its own procedure. It has also provided that existing statutes relating to procedure, except as amended by the court, shall remain effective as rules of court. Thus, all procedural provisions, whether they had their origin in statutes or in rules of court, are considered rules of court, but criminal procedure is still largely governed by rules originally statutory, since the court has failed to act in this field.

New York.—The Field Code of Civil Procedure[100] was a protest against the complexities and absurdities of special pleading at common law. This all-inclusive regulation of mat-

[96] N.J. Rev. Stat. (1937) § 2:27-1493.

[97] Id. § 2:29-16.

[98] N.J. Const. (1947) Art. 6, § 2, par. 3.

[99] N.M. Stat. (1941) art. 3, § 19-301 et seq. enacted as L. 1933, c. 84.

[100] Cf. N.Y. Laws (1848) c. 379, id. (1849) c. 438. See for complete and detailed history of New York situation, Flynn, "Regulating Procedure by Rules of Court," 26 Corn. L.Q. 653 (1941).

ters of procedure fastened on New York State a system quite as intolerable as the one it replaced. Since 1848 the legislature has exercised virtually complete control over procedure in New York courts, and rule-making by the courts is limited to matters not already governed by the very detailed Civil Practice Act and other special statutes relating to particular courts. The Rules of Civil Practice, adopted originally in 1921 by a convention of judges under express authorization of the legislature, exemplifies the exercise of a supplementary rule-making power. The Rules of Civil Practice are subject to amendment by a majority of the judges of all the appellate divisions, provided, however, that such amendments are not inconsistent with any statute.[101] Since the Rules of Civil Practice apply to all courts except the Court of Appeals, this is the only instance of rule-making by a judicial group affecting other courts. Such power has been exercised from time to time. The Court of Appeals makes some rules as to its own practice,[102] as do the appellate divisions, but the Supreme Court (the trial court of general jurisdiction) exercises virtually no rule-making authority. Court control of rule-making is insignificant when compared to almost total legislative control. A constitutional amendment to give to the Court of Appeals full rule-making power has been tabled by the judicial council after considerable study because "No general demand for a change was found to exist."[103]

North Carolina.—The Supreme Court is vested by the constitution with the exclusive right to make its own rules of practice and procedure.[104] Practice and procedure in the inferior courts are prescribed by the legislature under constitutional provision,[105] except that when the legislature fails to prescribe

[101] N.Y. Jud. Law (1948) § 83. See Hanna v. Mitchell, 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dept. 1922) aff'd without opinion 235 N.Y. 534, 139 N.E. 724 (1923).

[102] N.Y. Jud. Law (1948) § 51.

[103] 13 N.Y. Jud. Coun. Rep. 55-56 (1947). Cf. 5 id. 275-289 (1939).

[104] N.C. Const. Art. I, § 8; Art. IV, §§ 6, 12; N.C. Gen. Stat. (1943) § 7-20. See Lacy v. State, 195 N.C. 284, 141 S.E. 886 (1928); Horton v. Green, 104 N.C. 400, 10 S.E. 470 (1889).

[105] N.C. Const. Art. IV, §§ 12, 27; illustrative statutes, N.C. Gen. Stat. c. 1, "Civil Procedure," c. 7 "Courts," c. 15 "Criminal Procedure"; State v. Jones, 100 N.C. 438, 6 S.E. 655 (1888).

procedure, the Supreme Court is authorized by statute to do so.[106] Rules of practice promulgated by the Supreme Court for proceedings therein are now in effect.[107] The Supreme Court has also adopted some rules of practice for the superior court.[108] By statute the recorders courts and general county courts are governed by the same rules which apply in the superior court.[109] Except for the Supreme Court, procedure in the courts is for the most part regulated by statute.

North Dakota.—Prior to 1941 the Supreme Court had had the authority to make rules governing its own practice and practice in the district courts.[110] In 1939 revision of the codes was entrusted to the Code Revision Commission, which body completed its task in 1943. This revision contained a set of rules embodying to some extent the provisions of the new federal rules. While in 1941 the Supreme Court was empowered to make rules governing the practice of the courts in all civil and criminal proceedings,[111] it has not promulgated any rules under this comprehensive rule-making grant, and procedure remains governed by the rules in the code.

Ohio.—Procedure in the courts is almost completely regulated by statute, since Ohio is a code state. The Supreme Court is authorized to make rules for the various courts not inconsistent with statutes.[112] The various courts have drafted rules that vary from court to court.[113] The Supreme Court has promulgated certain rules as to appellate proceedings, but has not made any rules for inferior courts. The judges of the Court of Appeals, on September 21, 1948, adopted amended rules of practice which under statutory authorization were sub-

[106] N.C. Gen. Stat. (1943) §§ 7-20, 7-21; see Lee v. Baird, 146 N.C. 361, 59 S.E. 876 (1907).

[107] N.C. Gen. Stat. (1943) Vol. IV, App. I(1), Rules of Practice in Supreme Court.

[108] Id. App. I(2), Rules of Practice in Superior Courts.

[109] Illustrative statutes: N.C. Gen. Stat. (1943) § 7-189, recorder's court; §§ 7-286, 7-306, general county courts; §§ 7-318, 7-342, 7-377, civil county courts; § 7-430, special county courts.

[110] N.D. Comp Laws (Supp. 1925) § 769-a-6.

[111] N.D. Rev. Code (1943) § 27.0208 enacted as L. 1941, c. 238.

[112] Ohio Code (1938) §§ 12223-47, 1473, 10501-13.

[113] See id. § 1558, authorizing supplementary rule-making by the courts of common pleas.

mitted to the Supreme Court for approval.[114] The Supreme Court refused to act upon the rules, adhering to its view that the courts of record in Ohio have inherent power to promulgate rules without the preliminary approval of the Supreme Court. [115]

Oklahoma.—While statutory enactments regulate greatly most details of procedure in inferior courts, the Supreme Court and the Criminal Court of Appeals are governed to a large extent by their own respective rules of court. Supplementary rule-making power is also exercised to some extent by the district and county courts, and supplementary supervisory rule-making power over courts of record is entrusted to the Supreme Court.[116] This power, however, has not been exercised as fully as it might be.[117]

Oregon.—No courts in Oregon have ever attempted to make rules to govern procedure in other courts, and no statutory authority for such rule-making exists. Procedure in the Oregon courts is to some extent formulated in local rules, but statutes govern principally. It is to be noted that there has been no development in the exercise of the rule-making power by the courts of Oregon, since the rules now in existence are practically identical with those formulated when the courts were first organized. This is true although an Oregon statute authorizes any court to adopt process or modes of proceeding

[114] Id. § 12223-47, which reads as follows: ". . . the several judges of the courts of common pleas and the courts of appeals shall make rules, not inconsistent with laws of the state, for regulating the business of their respective courts, which they shall submit to the Supreme Court." But cf. id § 1522, authorizing rule-making by court of appeals without reference to Supreme Court action See 21 Ohio Bar Ass'n Rep. 317-318 (1948).

[115] This refusal of the Supreme Court to act seems by implication to declare unconstitutional that statute, Ohio Code (1938) § 12223-47, which vested supervisory power in the Supreme Court. It is noteworthy that the rules adopted by the judges of the court of appeals unquestionably are procedural in nature and not in conflict with any Ohio statute. This administrative ruling of the Supreme Court would seem to indicate also that statutes vesting supervisory control over court rules in the Supreme Court would be ineffectual in Ohio.

[116] Okla. Stat. (1937) tit. 12, § 74.

[117] Thus, in 1914 the Supreme Court adopted probate rules which were revised in 1917, but probably today no attention is paid to these rules. See 47 Okla. Rep. xiv. (1915).

suitable to the jurisdiction conferred upon it and conformable to the spirit of the code regulations.[118]

Pennsylvania.—Prior to 1937 the Supreme Court had adopted rules to govern its own procedure and procedure in equity suits in trial courts throughout the state. The Superior Court was governed in its procedure by rules adopted by the Supreme Court and also had adopted additional rules to govern its own management. Various other courts had adopted their own sets of rules. The rules adopted by the various courts covered a comprehensive field, but the majority of the rules adopted operated only to supplement statutory provisions and to regulate the procedure in areas not covered by statute.

In 1937[119] the Supreme Court was authorized by statute to adopt, with the assistance of a Procedural Rules Committee appointed by it, rules to govern civil procedure in all the trial courts of the state with the exception of certain named courts. The Supreme Court is now engaged in redrafting the rules of procedure that will supersede all conflicting laws. As each rule is drafted and approved, it becomes effective and so the law of procedure is being changed piecemeal. In addition to the rules of procedure there are also to be uniform rules of court to govern the business or management of trial courts. The trial courts retain the power to supplement the Supreme Court rules by their own local rules. The final result of this activity will probably be the complete regulation of civil procedure by court rules, since the Supreme Court in 1942 promulgated rules for the orphans court (probate) despite the fact that this court was one of those specified as being outside the Supreme Court power in the 1937 grant of authority.

Rhode Island.—No court at present has the power to make rules to regulate procedure in other courts. The Supreme Court and the superior court, however, are each empowered to make their own rules superseding any conflicting statutory regulations, and have done so.[120] No court rules have been author-

[118] Ore. Comp. Laws Ann. (1939) § 13-715.

[119] Pa. Stat. (Purdon, Supp.) art. 17, § 61 et seq. enacted as L. 1937, No. 392, as amended L. 1939, No. 14.

[120] R.I. Pub. Laws (1940) c. 943 amending R.I. Gen. Laws (1938) c. 497, § 7.

ized or adopted by the district courts or by any probate courts other than the probate court of Providence.

In the Supreme Court matters of practice are for the most part regulated by court rules, but matters of management are regulated by statute. Matters of practice and management in the superior court are regulated to only a minor extent by court rules. Full revision of all rules patterned on the federal rules is being considered.

South Carolina.—Procedure in the courts of South Carolina is controlled for the most part by the Code of Civil Procedure. Supplementary rule-making power is granted to the judges of the circuit court, acting together with the judges of the Supreme Court, to revise, amend and add to the rules regulating practice in the circuit courts, which rules apply also to the county courts.[121] The Supreme Court is authorized to adopt rules consistent with statutes for its own procedure, and for probate courts in cases not provided for by law.[122] The power to make rules has been exercised sparingly. Thus, the rules of practice for the probate courts have not been revised since 1879.

South Dakota.—Prior to 1939 much of South Dakota procedure was regulated by statute. In that year the Supreme Court was authorized to make rules for practice and procedure for courts in both civil and criminal proceedings.[123] The legislature expressly retained its right to amend any rules, although such legislative amendment is also expressly subject to further amendment by the court, thus manifesting the intention of the legislature that all rules be made or be subject to Supreme Court approval. The Supreme Court has promulgated a series of rules regulating the procedure of the various courts, and court rules control procedure rather completely. Moreover, the enabling statute provided that all statutes relating to practice, pleading and procedure in all actions which existed

[121] S.C. Code (Supp.) § 904. Cf. id. (1942) §§ 79, 124, 146, 168, 186-187, to the effect that the rules to be enforced in the county courts are those adopted for the circuit courts.

[122] Id. (1942) §§ 905, 238 respectively.

[123] S.D. Code (1939) § 32.0902.

and which afterwards are enacted are effective only as rules of court subject to Supreme Court action.[124]

Tennessee.—Procedure in general is governed in a more or less limited way by statute. Each of the various courts is authorized [125] to establish and has adopted local rules regulating procedure before the court, which, however, merely supplement statutory provisions. While the Supreme Court is authorized to make rules for other courts,[126] it is not authorized to modify statutes, and it has permitted the trial courts to make their own rules of procedure. Thus, while statutes regulate procedure in many aspects, rules made under the power to supplement the statutes control frequently.

Texas.—As early as 1876 the constitution contained a grant of full rule-making power for all courts to the Supreme Court.[127] This power never having been exercised, the constitution was amended in 1891 to limit the rule-making grant to that of a supplementary power, *i.e.*, rules not inconsistent with statutes.[128] The legislature continued to make the majority of the rules, although the court did make rules in recognized subordination to the legislature's power. The Supreme Court was authorized in 1939 to make rules of procedure to govern all the courts in civil proceedings, such rules to be effective after submission to the legislature unless vetoed or disapproved by the legislature.[129] This grant of authority has been acted upon. The rules as promulgated regulate everything in detail, and local rules of inferior courts are confined exclusively to matters of management. Criminal procedure is regulated entirely by statute, as are most probate and guardianship matters.

Utah.—Prior to 1943 the Supreme Court had promulgated rules governing its practice and procedure, and the district courts had also adopted some procedural rules. Apart from

[124] It has never been squarely settled whether the Supreme Court had both inherent and exclusive rule-making power, and thus the 1939 statute may be construed either as a grant of rule-making power or as a mere recognition of the existence of such power.

[125] Tenn. Code Ann. (1934) §§ 9928, 10638.

[126] Ibid.

[127] Tex. Const. (1875) Art. V, § 25.

[128] Id. (1891) Art. V, § 25.

[129] Tex. Civ. Stat. (Vernon, Supp.) art. 1731-a, enacted as L. 1939, c. 25 at 201.

these, however, procedure in all the courts was regulated completely by statute. In 1943 the legislature declared the Supreme Court had complete rule-making power in all civil proceedings.[130] Under this authority the federal rules relating to pretrial procedure have been approved by the Supreme Court with minor modifications, and such rules became effective May 1, 1948. Complete rules are now being drafted, modeled on the Federal Rules of Civil Procedure, and promulgation of these complete rules is expected in 1949, a preliminary draft having been completed by the Rules Commission appointed by the Supreme Court.

Vermont.—Broad statutes give to the Vermont judiciary supplementary rule-making power to be exercised in their respective courts and power to the Supreme Court and superior court judges acting together to make rules to carry out the provisions of the practice act.[131] Rules have been promulgated for the various courts under this rule-making grant, *e.g.*, rules for probate courts were adopted in 1929. There is thus general decentralization of the rule-making power. However, statutes regulate more aspects of procedure than do court rules.

Virginia.—Almost continually since 1849 the Supreme Court of Appeals of Virginia has been authorized to make regulations for procedure in the various courts. In 1916 a general rule-making statute was passed,[132] and in 1928 a similar statute was enacted.[133] However, there is no real system of court

[130] Utah Code Ann. (Supp.) § 20-2-4.10 enacted as L. 1943, c. 33. It will be noted that this statute did not "give" or "grant" to the Supreme Court the rule-making power. It merely declared that the Supreme Court "has" power to prescribe, alter, and revise, by rules, etc. The language in the enactment was so used advisedly. The bar committee, in framing the bill, had in mind that what the legislature could give, it could likewise take away, and to prevent any attempt at a later time to take away such rule-making power, the matter was presented to the legislature on the theory that the Supreme Court has always had, as an inherent power, the rule-making power, but the legislature was asked merely to declare such power.

[131] Vt. Stat. (1947) §§ 1276, 1626

[132] Va. Acts (1916) c. 521.

[133] Va. Code (1942) §§ 5960, 5960-a, enacted as L. 1928, c. 411, general rule-making statute providing for court rules superseding prior rules only in certain named exceptional instances; see also Va. Code (Supp.) § 6343, authorizing modification by Supreme Court of Appeals of four sections of code relating to making out and printing record on appeal.

rule-making. Comparatively few rules have been promulgated, and statutory rules of procedure are in the majority, so that it may be said that the rule-making power of the court, although authorized, is not exercised. It would seem that this power might not be exercised unless further statutory action were taken making such action by the Supreme Court effective, since the statute does not specifically provide that court rules supersede statutory rules and it has been stated that court rules made under the present statute cannot prevail over statutory rules.[134] Several committees of the judicial council, however, are now drafting rules to be submitted to the Supreme Court for adoption on the assumption that it may adopt them without further legislative action. And it seems probable that the rules will be adopted by the court if the bar sufficiently urges their adoption, the earlier dictum notwithstanding.

Washington.—Until 1925 practice, pleading and evidence were regulated entirely by statute. At that date complete power was entrusted to the Supreme Court to make rules of procedure for all courts in all proceedings, although the right to establish supplementary rules for their own government was reserved to the superior courts.[135] The Supreme Court established revised rules in 1938, and the superior courts issued supplementary rules relating chiefly to practice and management. To a certain extent court rules have superseded statutory regulation or procedure, but many statutes still remain, *i.e.*, statutes still govern many aspects of trial procedure, pleadings, judgment, and appeals.

West Virginia.—Under a statute enacted in 1935 complete rule-making powers have been vested in the Supreme Court of Appeals, the exercise of which is subject to certain limitations, *e.g.*, requirement of hearing protests, referring changes of rules to various judges and the judicial council.[136] All statutes relating to pleading and practice have force only as rules of court subject to being altered by court action. Prior

[134] See Virginia Home for Incurables v. Coleman, 164 Va. 230, 178 S.E. 908, 912 (1935).

[135] Wash. Rev. Stat. (Remington, 1932) §§ 13-1, 13-2, 13-3.

[136] W.Va. Code (1943) § 5183 enacted as L. 1935, c. 37.

to this the various courts had rule-making power over their own procedure, but there was no control over rule-making in the inferior courts. No startling innovations have been made under the new law and local rules are still being made. While several rules have been adopted from time to time since 1936, no general rule-making has been attempted.

Wisconsin.—In 1929 a statute was enacted authorizing the Supreme Court to promulgate rules to regulate procedure in all courts.[137] This statute has been held constitutional.[138] While all existing statutes were declared to have force only as rules of court, the legislature expressly retained the right to modify court rules. Acting under this statute the law of procedure has been formulated to a great extent in court rules drafted by the Supreme Court.[139]

Wyoming.—In 1886[140] Wyoming adopted in its entirety the Civil Code of Ohio regulating court procedure, which was derived in turn from the Field Code. Under this Code court procedure was for the most part regulated by statute, although there was some self-regulation by the Supreme Court. In 1947, however, the Supreme Court was authorized to make rules of procedure for all of the state courts.[141] In 1948 the Wyoming State Bar approved rules patterned on the federal rules, which were prepared and proposed by a committee of the state bar, and these rules were submitted to the Supreme Court for approval.[142]

[137] Wis. Stat. (1947) § 251.18 enacted as L. 1929, c. 404.

[138] Re Constitutionality of Statute Empowering Supreme Court to Promulgate Rules, 204 Wis. 501, 236 N.W 717 (1931).

[139] In addition to the power of the Supreme Court, the Board of Circuit Court Judges and the Board of County Court Judges, each acting under statutory authorization, has made rules supplementary to the Supreme Court rules governing those courts. Wis. Stat. (1947) §§ 252.08, 253.30. However, such rules are for the most part inconsequential, setting out motion days of the court, etc.

[140] Wyo. Sess. Laws (1886) at 128-273.

[141] Id. (1947) c. 53, at 50. See Trelease, "A Proposal for Wyoming Procedural Reform," 1 Wyo. L.J. 45 (1947).

[142] See 2 Wyo. L.J. 145-241 (1948) for text of proposed rules and statement of advisory committee. These rules are designed to govern procedure in courts of record in all civil actions, special statutory proceedings, and appeals in criminal cases.

(4) Use of advisory agencies to aid the courts in rule-making.

In a majority of the states advisory groups have aided the courts in the formulation of the rules of procedure.[143] Certain of these bodies have no official authorization but are voluntary groups. Others have been created by act of legislature or the act of a court. Voluntary groups of advisors, *i.e.*, without official authorization, have aided the courts in *Arkansas, Colorado, Delaware, Florida, Louisiana, Montana, New Jersey, New Mexico, North Dakota*, and *South Dakota*. In Arkansas this group, which is designated a judicial council, is a voluntary association of the judges and representatives of the bar association, while in South Dakota a permanent section of the integrated bar is called a judicial council. The only group named to aid the courts in Delaware in formulation of the recently adopted rules was the bar association's Committee on the Administration of Justice. Similarly, in many of the other states named the only advisory agencies have been representatives of the bar associations.

Statutes have authorized the establishment of judicial councils[144] or advisory committees to aid in the study of procedure for the formulation of rules in *Arizona, California, Connecticut, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland*,[145] *Massachusetts, Michigan*,[146] *Minnesota, New*

[143] The federal experience provides a sterling example of the effectiveness and importance of advisory groups.

[144] See chapter on "Managing the Business of the Courts" supra at 64 et seq., re judicial councils.

[145] Md. Code Ann. (1939) art. 26, §§ 60-64, provided for the creation of a judicial council. The act was passed in 1924. In 1925 a council was appointed pursuant to the act. The council cooperated with the then existing Johns Hopkins Institute of Law in the making of some legal studies. In 1937 appointments were made to fill vacancies which resulted from the expiration of terms of appointment. These terms expired in 1939 and apparently no action by the governor has been taken since. Though required to make reports to the General Assembly, the council has never done so. Apparently it has never actively functioned except for the aid it gave to the Institute of Law in the early 30's. Under the enabling act of 1939, as provided therein, the Court of Appeals appointed a rules committee of 31 members to make a study of existing practice and procedure. This committee made one report with recommendations, most of which were adopted by the Court of Appeals in 1941 and submitted to the legislature

Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Tennessee, Texas, Utah,[147] *Virginia, Washington, West Virginia, Wisconsin,* and *Wyoming.* These advisory groups are appointed either by the executive, the courts or the bar association. For the most part they are only paid expenses (in Arizona and Wisconsin not even these are paid) and are supposed to study court procedure continuously, making recommendations when action is considered appropriate. In some of the states provision for the appointment of such groups is contained in the enabling statute authorizing rule-making, while in other states the creation of such bodies, as judicial councils, is an independent act although their purpose is the study of procedure.[148] In other states the advisory group aiding the courts in the formulation of rules of procedure were appointed by the court without specific statutory authorization.[149]

as required by statute. The committee apparently considered its task complete and recommended that the Court of Appeals appoint a smaller permanent body to study the practice and procedure of the state and report to the court at frequent intervals. In 1946, two years after the constitutional provision authorizing rule-making, which did not provide for any advisory committee, the Court of Appeals announced the appointment of the Standing Committee on Rules of Practice and Procedure, consisting of fifteen members (eight judges and seven lawyers). This committee has functioned since January, 1946, and is continuing its study with particular emphasis on criminal procedure and rules, and is aided by several assistants.

[146] In Michigan, besides the judicial council authorized by statute, in 1927 the legislature (Act No. 377) created a commission appointed by the governor to act with the Supreme Court in an advisory capacity. Since the State Bar was integrated in 1935 (Act 3) its Committee on Civil Procedure has cooperated with the Supreme Court in making revisions and amendments to the rules.

[147] In Utah rules are now being prepared by a legislative-financed, Supreme-Court appointed Rules Commission cooperating with local bar associations and the judicial council of the Utah State Bar.

[148] It is to be noted that in Illinois the establishment of judicial advisory councils was authorized in 1929 to aid in procedural revision, but in recent years no provision has been made for their continuation, although such authorization in all counties of more than 500,000 population still exists.

[149] E.g.: In Iowa an advisory commission was appointed by order of the chief justice of the Supreme Court to study court organization and rules of procedure. In Missouri, which also has a judicial conference authorized by statute, the Supreme Court appointed a judicial council which has now been superseded by committees of lawyers and judges, one studying the revision of civil procedure, and one the revision of criminal procedure. Although Texas has an advisory judicial council created by statutory authority [Tex. Civ. Stat. (Vernon, 1925) art. 2328a] the advisory committee which prepared the first draft of the Texas Rules of

(B) By judicial bodies other than a named court.

Several instances were noted in which a judicial group, other than a named court, was designated to promulgate rules.

In *California* the judicial council, consisting of the chief justice, and an associate justice of the Supreme Court, three justices of the District Court of Appeals, four judges of the superior courts, one judge of a police or municipal court, and one judge of an inferior court, assigned by the chief justice, was authorized in 1941 and 1943 to prescribe the rules for practice and procedure in all appellate courts of the state in civil actions and criminal cases.[150] By limitation in the statutes these rules relating to appeals had to be reported to the 1943 legislature; this was done and such rules became effective. When the judicial council reported its draft of rules, there was insufficient time for thorough criticism and study of them, as the enabling act did not authorize postponement of legislative action. Since the statutes that were superseded by the 1943 rules were repealed by the legislature in 1945, matters of appellate procedure are now subject to further action by the judicial council.[151]

In *Maine* the right to establish rules for the probate courts has been granted by an express statute providing for the promulgation of such rules by a commission to be appointed by the governor, composed of three judges and two registers of probate, the rules to be further subject to the approval of the Supreme Judicial Court. Such a commission was appointed in 1931, and rules for the probate courts were adopted under provisions of the statute as of 1932. The majority of these rules relate to practice and management of the courts.

In *Minnesota* prior to the 1947 statute authorizing general rule-making, which excepted from this grant of authority the

Civil Procedure and periodically considers amendments to the rules is a separate body wholly appointed by the Supreme Court without specific statutory authorization Cf. Maryland, supra n. 245.

[150] Calif. Code Civ. Proc. (Supp.) §§ 961, 988j; Calif. Penal Code (Supp.) §§ 1246, 1247k.

[151] Calif. Const. Art. VI, § 1a. Under its consitutional power to make rules which are not inconsistent with statutes, there now being no statutes, the rules are subject to amendment.

probate courts, the statutes provided for annual meetings of the judges of the district courts and probate courts respectively. Pursuant to these statutory authorizations the judges of those courts had adopted rules effective throughout the state, and the probate court rules and manner of regulation would seem to remain effective in view of the exception in the 1947 statute.

In *Wisconsin* the Board of Circuit Court Judges (consisting of all the judges of the circuit courts, which are the courts of general original jurisdiction in the state) and the Board of County Court Judges (consisting of all the county court judges, county courts being courts with probate jurisdiction and in certain counties a limited civil jurisdiction), each acting under statutory authorization, have made rules supplementary to the Supreme Court rules governing the circuit courts and county courts respectively.

(C) By the legislature.

In every state some courts and some matters of procedure are to a certain extent regulated by statutes, *i.e.*, proceedings in certain special courts in some states and municipal courts in almost every state. It may be said, however, that in certain of the states statutory enactments form the bulk of the rules of procedure and not too much is left to court discretion or to court rule-making.

There are two groups of states in which statutes predominate in the regulation of procedure. The first type is that in which matters of procedure are for the most part regulated by a series of statutes enacted at various times but where there is also some court rule-making, either local or supervisory. *Arkansas*, *Mississippi*, *New Hampshire*, and *Virginia* are all of this type. So are *Alabama* and *Connecticut*, where there is some rule-making by one court for others and some local rule-making but statutory regulation is of great importance. *Maine*, *Massachusetts*, *Tennessee*, and *Vermont* are also of this type. In these states statutes play an important role in the regulation of many details of procedure, but court rule-making is likewise very significant.

The second group of states in which matters of procedure are regulated primarily by statute, although there may be either or both local and supervisory rule-making by the courts, are those known as code states. In these states the regulations of procedure are complex and unite to form one correlated code of rules relating to court procedure. The primary state of this type is *New York*.[152] Others are *California, Idaho, Illinois*,[153] *Kansas*,[154] *Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina*, and *Wyoming*. Idaho, Minnesota, and Wyoming are included in this list, since prior to the recent authorization of rule-making by the highest court code regulation prevailed and will continue to prevail until the courts act.

Sources of Rule-making Power of the Courts

(A) Inherent or self-declared power.

Generally it may be said that no court denies that it has the inherent power to make some rules to regulate its own procedure. Inherent power may have variable meanings, depending on whether the particular court is constitutionally created (*e.g.*, the Supreme Court of the United States) or legislatively created (*e.g.*, United States District Court). General declarations by the courts[155] that they have inherent power to make rules must therefore be read and understood according to the constitutions and the statutes which respec-

[152] See supra n. 16.

[153] Simplification of code regulation of procedure was attempted in the Illinois Practice Act of 1933. Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110.

[154] Although it has been recognized that the promulgation of procedural rules is a judicial function, the Supreme Court of Kansas has from its earliest existence recognized and acquiesced in the control of procedure by various statutes or by a general code of civil procedure. And for that reason it has definitely refused to assume the responsibility for the promulgation of its own rules of civil procedure, unless and until the legislature shall by resolution pass the question to the court and request it to function in that respect. When this question was raised, the legislature refused to approve such a resolution, which seemingly amounts to a reassertion of legislative power over procedure.

[155] See 110 A.L.R. 22-28 (1937), 158 id. 706-707 (1945) for a general discussion of cases dealing with the inherent power of the court to prescribe rules of procedure.

tively (a) distribute judicial powers, (b) create courts, and (c) impose or fail to impose limitations on inherent powers.

In *Arizona*,[156] *Arkansas, California, Delaware*,[157] *Illinois*,[158] *Indiana*,[159] *Kansas, Maine, Massachusetts, Montana, Nebraska*,[160] *New Jersey, New Hampshire, New Mexico, Ohio*,[161] *Oregon, Pennsylvania*,[162] *Utah*,[163] and *Wisconsin*[164] the courts have expressly maintained that the rule-making power of the courts is inherent, or have acted in reliance on such principle.[165] It is to be noted that while the Supreme Court of Florida had stated in early decisions that the courts were vested with the inherent power to prescribe rules,[166] in 1940 although it was argued that it had such inherent power, the Supreme Court refused to adopt rules of procedure drafted by the bar associa-

[156] See Brown v. Haymore, 43 Ariz 466, 32 P. (2d) 1027 (1934).

[157] See Wilmington Trust Co v. Baldwin, 8 W. W. Harr. 595, 195 Atl. 287, 294 (1937): "We readily concede the rule-making power of courts both under statutes and as an inherent attribute of the court itself." Court held rule promulgated secured jurisdiction to a court which otherwise did not have it, and rule-making power did not extend to securing jurisdiction. Rule required notice to parties prior to a court hearing in an action for a statutory remedy, while statute did not provide for such notice. Rule could not remedy defective statute. Rule here was made by probate court, which has no statutory rule-making power.

[158] See People v. Callopy et al., 358 Ill. 11, 192 N.E. 634 (1934). Court of last resort may make rules for inferior courts where there is statutory silence on question involved.

[159] The rules of the Supreme Court of Indiana expressly state that they were adopted "Pursuant to its inherent rule-making power and the authority vested in it by the General Assembly. . . ."

[160] See Verling v. State, 125 Neb. 374, 380, 250 N.W. 243, 246 (1933).

[161] See State ex rel. Hawke v. LeBlond, 108 O. St. 126, 140 N.E. 510, 513 (1923), but cf Cleveland Ry. Co v. Halliday, 127 O St. 278, 188 N.E. 1 (1933).

[162] Thus, the Supreme Court of Pennsylvania has provided rules for the orphans' court despite exception for such court in the enabling statute.

[163] Thus in Utah the Supreme Court has always maintained it had inherent power to make some rules to regulate its procedure. When the legislature was presented with a proposed legislative enactment, it was not asked to "give" to the court the rule-making power, but merely to declare that the court "had" such power, and the act is entitled "An Act recognizing the power of the Supreme Court" etc. Utah Code Ann. (Supp.) § 20-204 enacted as L. 1943, c. 33. See supra n. 130.

[164] In Re Constitutionality of § 251.18, Wis. Stat., 204 Wis. 501, 236 N.W. 717 (1931).

[165] By analogy the Supreme Court of Oklahoma would probably hold the rule-making power to be inherent, since it held it had inherent power to integrate the Oklahoma State Bar and has done so.

[166] E.g., see State v. Call, 37 Fla. 504, 22 So. 748 (1897); Humphries v. Hester & Stinson Lumber Co., 103 Fla. 1079, 139 So. 147, 141 So. 749 (1932).

tion on the pattern of the federal rules.[167] The basis for this decision was the court's view that the proposed rules embodied changes in the substantive law, and the court considered itself powerless to promulgate a rule having the effect of enacting or repealing a statute involving jurisdiction or substantive law. The court also expressed its conviction that the rules were designed to govern subordinate courts in the judicial system and that the Supreme Court had no inherent right of supervision or jurisdiction over such courts.

(B) Statutory provisions.

While there are constitutional provisions relating specifically to complete court rule-making in only four states, in all others express statutory provisions authorize the exercise of some measure of rule-making by a court, or courts, or a body composed of judges. Of course, many of these grants authorize local or supplementary action or limit rule-making to certain fields such as equity or probate. As noted above, however, in only ten states has complete supervisory rule-making power over procedure been entrusted by statute to the court of last resort,[168] while in nine states such statutory grant of rule-making is limited to civil procedure,[169] and even in some of these states the legislature's right to act may be retained in some fashion.[170] In the other twenty-five states the grants of rule-making are even more limited: *Alabama,* the rule-making authorized is limited to equity jurisdiction and rule-making not contrary to the codes; *Arkansas, Louisiana, Mississippi,* and *Nebraska,* the making of local court rules

[167] Petition of Florida State Bar Ass'n, 145 Fla. 223, 199 So. 57 (1940). Cf. decision of Supreme Court after enabling statute enacted. Petition of Florida State Bar Ass'n, 155 Fla. 710, 21 So. (2d) 605 (1945).

[168] Ariz., Idaho, Ind., N.M., N.D., S.D., Wash., W.Va., Wis., and Wyo.

[169] Colo., Del., Fla., Ga., Iowa, Minn., Pa., Tex., and Utah.

[170] Thus in Florida, Iowa, and Texas the exercise of the rule-making power is subject to legislative disapproval or veto although no affirmative legislative action is required. In Missouri, South Dakota, and Wisconsin the legislature's right to make rules of procedure was expressly stated in the legislative or constitutional grant to the court, and in Georgia any court-made rules must be ratified by the legislature.

supplementary to statutes is authorized; *California,* only appellate procedure is the subject matter of the authorized complete rule-making action of the judicial council; *Connecticut,* appellate procedure is the subject matter of regulation, and the superior court is also authorized to make rules only for certain special proceedings to carry out the Practice Act; *Illinois,* the rule-making authorized is supplementary to the Practice Act with minor exceptions; *Kansas,* the Supreme Court is authorized to make rules for any courts consistent with and in furtherance of code provisions; *Kentucky,* there is statutory authority for rule-making for its own procedure only for the Court of Appeals; *Maine* and *Massachusetts,* complete rule-making is limited to equity; *Montana,* local and supervisory rule-making is supplementary only; *Nevada,* the power to exercise supervisory rule-making power is circumscribed by statutes; *New Hampshire,* no court exercises supervisory rule-making power; *New York, Ohio, Oklahoma, Oregon, South Carolina, Tennessee,* and *Vermont,* rule-making is supplementary; *North Carolina,* complete rule-making power as to its own procedure is exercised only by the Supreme Court; *Rhode Island,* no court has supervisory rule-making power although complete rule-making is authorized; *Virginia,* it is questionable whether the rule-making grant is complete, since the enabling act does not specifically provide that court-made rules shall supersede conflicting statutes.

(C) Constitutional provisions.

While not precisely relating to rule-making power, it must be noted that in thirteen states there are provisions in which in very general language the highest court is given a superintending power over other courts. A typical provision is that of *Arkansas,* to the following effect:

> Art. VII, Sec. 4.—The Supreme Court . . . shall have a general superintending control over all inferior courts of law and equity.
>
> Art. VII, Sec. 14.—The circuit courts shall exercise a superintending control and appellate jurisdiction over county,

> probate, court of common pleas and corporation courts and justices of the peace . . .

Provisions similar to Art. VII, Sec. 4, of the Arkansas constitution are to be found in the constitutions of *California, Colorado, Iowa, Louisiana, Michigan, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Wisconsin,* and *Wyoming.*[171] These provisions as such have had little effect due to the unwillingness of the courts to assert themselves or the failure of the bar to stir them into action. 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.

Provisions in the constitutions of six states relate more specifically to the power of rule-making, authorizing either complete or supplementary rule-making by a court. The constitutions of *Maryland, Missouri, Michigan,* and *New Jersey* authorize the exercise of complete and supervisory rule-making by the courts of last resort in those states,[172] while the constitutions of *Nebraska* and *Texas* authorize the exercise of supervisory but supplementary rule-making power.[173]

Conflict Between Court-Made Rules and Statutory Rules—Effect

It may be said generally that the question of whether court-made rules or statutory rules prevail in cases of conflict would be determined as follows: statutes would prevail wherever the legislature has pre-empted the entire sphere of procedural

[171] Calif. Const. Art. VI, § 2; Colo. Const. Art. VII, § 4; Iowa Const. Art. V, § 4; La. Const. Art. 7, § 10; Mich. Const. Art. VII, § 4; Mont. Const. Art. VIII, § 2; N.M. Const. Art. VI, § 3; N.D. Const. § 86; Okla. Const. Art. VII, § 2; S.D. Const. Art. V, § 2; Wis. Const. Art. VII, § 3; Wyo. Const. Art. V. § 2.

[172] Md. Const. Art. IV, § 18a, ratified in 1944; Mich. Const. (1908) Art. VII, § 5; Mo. Const. (1945) Art. V, § 5 (rules are not to change substantive rights, the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal); N.J. Const. (1947) Art. 6, § II, par. 3.

[173] Neb. Const. Art. V, § 25; Tex. Const. Art. V, § 25. It is to be noted that the Calif. Const. Art. 6, § 1a, grants supplementary rule-making power to the judicial council.

rule-making as in code states;[174] court-made rules would prevail where rule-making by the courts is authorized by statute or constitution unless such enabling provision contained a reservation for legislative approval or action. In the states not clearly falling within one or the other of these categories, a clear answer to this question is rather difficult to determine, since such disputes arise only infrequently, though the trend over the last quarter of a century has been in cases of doubt to prefer judicial rule-making.

In the following twenty states it has been reported that court-made rules would prevail if contrary to a statutory enactment: *Arizona*,[175] *Colorado*,[176] *Connecticut, Delaware, Indiana, Iowa, Maryland, Michigan, New Jersey, New Mexico, North Dakota*,[177] *Pennsylvania*,[178] *Rhode Island, South Dakota, Texas*,[179] *Utah, Vermont, Washington, West Virginia*, and *Wyoming;* while in twenty other states court rules would

[174] Cf. Moot v. Moot, 214 N.Y. 204, 108 N.E. 424 (1915), but cf. Butterfield v. Butterfield, 1 Calif. (2d) 227, 34 P. (2d) 145 (1934).

[175] The court in State v. Superior Court, 60 Ariz. 69, 131 P. (2d) 983, 988 (1942) states: "The rule-making power to formulate rules of procedure rests in both the court and legislature. When the legislature enters the field, the courts will bow to its judgment so *long as these rules accord with the* proper administration of justice When, however, it appears that the legislative rule unduly hampers the court in the performance of the duties imposed upon it by the constitution, the rule adopted by the court will prevail." However, the legislature had vacated the field as far as rules adopted by it prior to 1939 are concerned, since Ariz. Code (1939) § 19-204 states that "all statutes relating to pleadings, practice and procedure existing at the time this act takes effect, shall be deemed to be rules of court and shall remain in effect as such until modified or suspended by rules promulgated pursuant to this act." The court in Burney v. Lee, 59 Ariz. 360, 129 P. (2d) 308 (1942), held that this section operated as a legislative repeal of existing procedure statutes to take effect at a determinable future time; i.e., the action of the court changing them.

[176] No rule made contrary to the enabling act's express provisions, i.e., no rule authorizing the trial judge to comment on evidence, could of course prevail over a statutory enactment.

[177] Prior to the passage of the enabling act in 1941 (N.D. Laws, c. 238) it is probable that statutes would have prevailed over court-made rules in cases of conflict, since this was a code state.

[178] Prior to the enactment of the enabling statute in 1937 (Pa. Laws, No. 392) it is probable that statutes would have prevailed over court rules.

[179] Prior to the enactment of the enabling statute in 1939 (Texas Laws, c. 25) statutes would have prevailed over court-made rules in view of the limitation in the constitution, Art. V, § 25. See textual discussion of Texas supra.

fail if statutory regulations differ: *Arkansas, California, Georgia,*[180] *Illinois,*[181] *Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, Ohio,*[182] *Oklahoma, Oregon, South Carolina, Tennessee,*[183] *Virginia,* and *Wisconsin.*[184] *North Carolina* presents a peculiar instance in which certain court-made rules would prevail over statutes while other court-made rules would yield to legislative enactments. Any rule made by the North Carolina Supreme Court for itself would overcome any statute, since any statute regulating the North Carolina Supreme Court would be ineffective whether it conflicted with the court-made rules or not.[185] On the other hand, court-made rules for any other court would have to yield to a statutory regulation.[186]

Statutes of *Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Iowa, Minnesota, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin,* and *Wyoming,* authorizing rule-making action by the courts contain provisions establishing the precedence of the court rules of procedure to be promulgated over previous legislative acts in cases of conflict, although, as shown above, under some of these grants the right of the legislature to act in this field was also specifically reserved. A typical provision of this nature is that found in Iowa, which reads as follows:

> Any such rules and forms prescribed by the Supreme Court shall be reported to the General Assembly . . . and shall take effect

[180] The enabling act in Georgia requires legislative ratification of court-made rules, and states also that it was not to be construed as constituting an abandonment of the legislature's power to regulate procedure. Ga. Code Ann. (Supp.) §§ 81-1502, 81-1505. This indicates that the legislature may repeal or modify such rules by statute, in which instance the statutory rule would prevail. See Brown v. Hutcheson, 167 Ga. 451, 146 S.E. 27 (1928); Lovett v. Sandersville Rwy. Co., 199 Ga. 238, 33 S.E. (2d) 905 (1945). Cf. Halliman v. State, 175 Ga. 232, 165 S.E. 11 (1932).

[181] Statutes authorizing court rule-making usually provide such rules shall not be inconsistent with statutory rules.

[182] See Cleveland Ry. Co. v. Halliday, 127 O. St. 278, 188 N.E. 1 (1933).

[183] See Hilton v. Johnson City Gen. Hosp., 160 Tenn. 535, 26 S.W. (2d) 626 (1930).

[184] The enabling act expressly retained the right to modify court rules. Wis. Laws (1929) c. 404.

[185] N.C. Const. Art. I, § 8.

[186] Id. §§ 6, 12. See Lacy v. State, 195 N.C. 284, 141 S.E. 886 (1928).

> . . . following the adjournment of such session, with such changes, if any, as may have been enacted at such session; and thereafter all laws in conflict therewith shall be of no force or effect.[187]

The Florida grant of rule-making power provides that in drafting rules the Supreme Court should designate any statutes which should be repealed or superseded, and if the legislature did not provide otherwise at its next session, such statutes should be considered repealed. And the Texas statute similarly provides that the Supreme Court list all statutes repealed by its rules, in reporting its rules to the legislature.

The *Maryland, Michigan,* and *New Jersey* constitutional provisions relating to rule-making by the courts contain no specific mention of this problem, but since power to make rules of court regulating procedure is constitutionally contained, it would seem that in those states such rules would prevail over prior statutory enactments. However, it is to be noted that the Maryland constitution states that court-made rules "shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law," and the New Jersey constitution similarly provides that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." [188] The meaning of the references in these constitutional sections to modification by law and subjection to law is still indefinite. The *Missouri* constitution specifically provides that any "rule may be annulled or amended by a law limited to that purpose." [189] Thus, while in Missouri later statutory action may modify a court-made rule, the latter may inferentially alter a prior statutory rule of practice and procedure so long as such rules do not, contrary to the constitutional grant, extend to changes of substantive rights, the law relating to evidence, oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.

[187] Iowa Code (1946) § 684.19.

[188] Md. Const. Art. IV, § 18A as ratified 1944; N.J. Const. (1947) Art. VI, § II, par. 3, (italics added).

[189] Mo. Const. (1945) Art. V, § 5.

Evaluation of Various Present Systems of Rule-making

In the following twenty-six states the present systems of rule-making have been reported to be satisfactory: *Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Missouri,*[190] *New Jersey, New Mexico, Oklahoma,*[191] *Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin,* and *Wyoming.* Eighteen of these are states in which rule-making by the courts is the predominant mode of the regulation of procedure.[192] In several of this group, *Delaware, Georgia, Iowa, Maryland,* and *Wyoming,* the former systems or failure of court activity where there was power to act had caused criticism prior to 1948.[193] Of the states in which regulation of procedure by statute principally is considered satisfactory, three, *Illinois, Kansas,* and *Oklahoma,* are properly denominated code states.

The present mode of the regulation of procedure is reported to be unsatisfactory in *Arkansas, California,*[194] *Louisiana,*[195] *Mississippi, Montana,*[196] *New Hampshire, New York,*[197] *North*

[190] Some criticism of the legislature's retention of the right to change court rules has been forthcoming.

[191] However, there is a movement to make rule-making action by the Supreme Court mandatory.

[192] Ariz., Colo., Del., Ga., Ind., Md., Mich., Mo., N.J., N.M., Pa., R.I., S.D., Tex., Wash., W.Va., Wis., and Wyo.

[193] I.e., prior to the enactment of statutes in Georgia, Iowa, and Wyoming, the approval of constitutional changes in Maryland and the action taken in Delaware. Prior to this, although there was rule-making power in Delaware, the courts were criticized for inertia.

[194] Method of rule-making through a judicial council, followed by subsequent necessary legislative action, is awkward, while the authorization of complete power to the judicial council over appellate procedure is considered a step in the right direction.

[195] Effort to have a statute enacted entrusting to the Supreme Court full rule-making power has been unsuccessful, and in July, 1948, the Louisiana State Law Institute was given a mandate to revise the La. Civil Code and Code of Practice. La. Laws (1948) Act No. 335. While efforts may continue to be made to secure rule-making power for the courts, the chances of success have almost vanished.

[196] In Montana the Bar Association Committee on the Administration of Justice is working to have uniform local rules adopted by the district courts of the state.

[197] Flynn, "Regulating Procedure by Rules of Court," 26 Corn. L.Q. 653, 663-666 (1941). Cf. also supra n. 103; Clark, "Code Pleading and Pratice Today," in David Dudley Field Centenary Essays 55, 71 n. 40 (ed. Reppy, 1949).

Carolina,[198] *Ohio*,[199] *South Carolina*, and *Virginia*. Six of these states are those in which statutory regulation of the details of procedure in code form is most complete: *California*, *Louisiana*, *Montana*, *New York*, *Ohio*, and *South Carolina*. In three others, *Arkansas*, *New Hampshire*, and *North Carolina* procedure is probably regulated to a greater extent by statute than by court rule, while in *Mississippi* all courts are regulated primarily by statute. Of this group only in *Virginia* is there authorization for rule-making by the courts. The extent of the power is subject to question,[200] and there the court has been criticized for inertia. In Virginia the judicial council is now drafting rules to be submitted to the Supreme Court, while attempts are being made to secure a legislative mandate making it the duty of the Supreme Court of Appeals to act.

In the following states no particular criticism of the present systems for the regulation of procedure has been reported: *Florida*, *Kentucky*, *Idaho*, *Massachusetts*, *Minnesota*, *Nebraska*,[201] *Nevada*, *North Dakota*, *Oregon*, and *Utah*. In *Kentucky* a study of the problem is being made. In *Florida*, *Idaho*, *Minnesota*, *North Dakota*, and *Utah* the exercise of complete rule-making power recently authorized has not been utilized as yet, although in Florida, Minnesota, and Utah preparation of rules is going forward and action in the near future can be expected. *Massachusetts*, *Nevada*, and *Oregon* are states in which statutory regulation of procedure is of great importance.

[198] In 1947 the North Carolina legislature authorized the creation of a commission to study the administration of justice, which among other things in its report to the Assembly recommended granting to the Supreme Court power to prescribe rules of civil procedure, terming it "the most important single proposal offered by us . . ." See 15 Pop. Gov't 1, 5 (1949).

[199] The present method of changing rules of procedure involves legislative action in general reliance on outside agencies. It is to be noted that the Supreme Court has refused to act where authorized, so it would seem that legislative activity in the regulation of procedure is a necessity. See supra n. 115.

[200] See Virginia Home for Incurables v. Coleman, 164 Va. 230, 178 S.E. 908, 912 (1935) and discussion in text at p. 96-97, 126 supra.

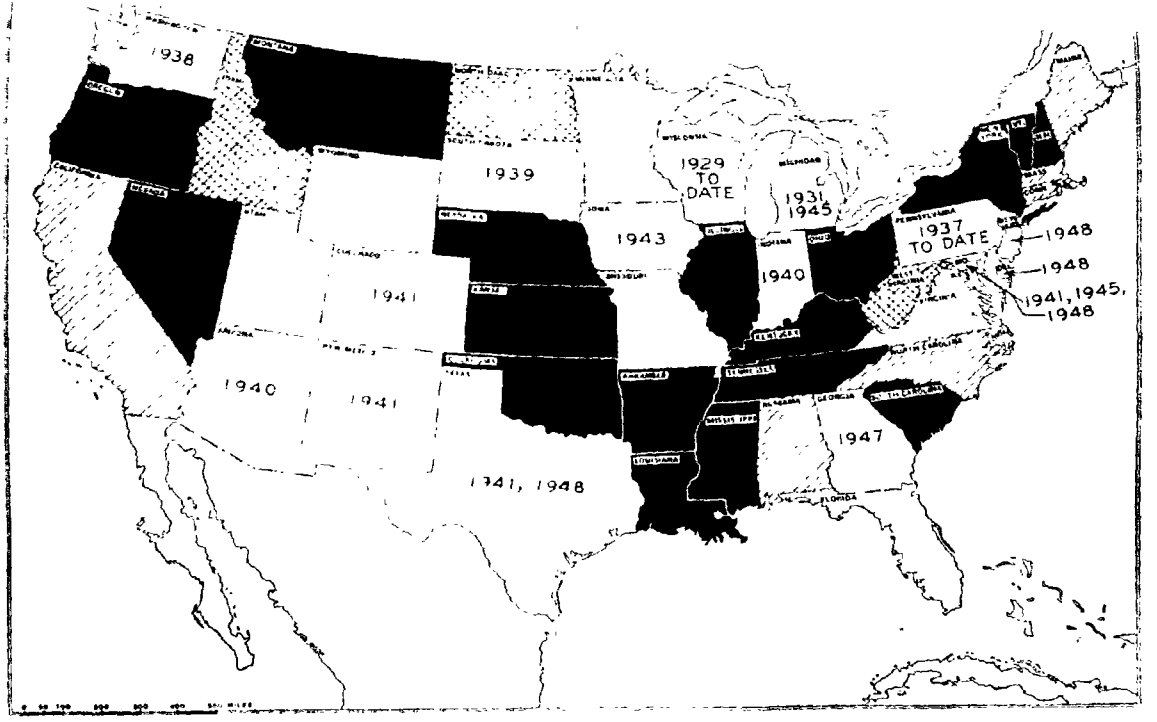
[201] It is to be noted that in Nebraska there was an abortive attempt to entrust the Supreme Court with full rule-making powers in 1939-1943. See supra notes 91, 92

Conclusion

No clear-cut picture of the regulation of procedure in the various states emerges from the preceding survey. Common-law rules still underlie our thinking on procedure, particularly in the field of evidence and in those courts where there is little local rule-making. Statutes are utilized for rather complete code regulation in some states and for major piecemeal regulation in others. A definite trend towards granting the court of last resort full rule-making authority over the procedure in all courts is apparent, however, and spurred by the federal example more courts are exercising their admitted rule-making powers to a greater extent now than ever before. Thus, it is to be noted that the Federal Rules of Civil Procedure have been followed almost completely in *Arizona, Colorado, Delaware, Maryland, New Jersey,* and *New Mexico,* and to a lesser degree in *Iowa, Missouri,* and *Texas,* while certain details of the federal rules have been incorporated in the rules of *North Dakota, Pennsylvania, South Dakota,* and *Washington.*[202]

New rules have been promulgated by the courts or judicial bodies in the various states as of recent date: *Alabama,* equity rules only, 1940; *Arizona,* 1940; *California,* rules of appellate procedure, 1943; *Colorado,* 1941; *Delaware,* 1948; *Georgia,* 1947; *Indiana,* 1940, latest revision, 1946, 1948; *Iowa,* 1943; *Maryland,* 1941, 1945, 1948; *Michigan,* 1931, 1945; *New Jersey,* 1948; *New Mexico,* 1941; *Pennsylvania,* from time to time since 1937; *South Dakota,* 1939; *Texas,* 1941; *Utah,* pretrial, 1948; *Washington,* 1938; and *Wisconsin,* from time to time since 1929. Moreover, prior to the 1945 constitution authorizing rule-making by the court, the *Missouri* legislature in 1943 adopted a new code of procedure recommended by the Supreme Court as requested by the legislature in 1939. A committee of the Missouri Supreme Court is now at work on rules of civil procedure for trial and appellate courts. The situation in *North Dakota* is somewhat parallel to that in

[202] Clark, "The Influence of Federal Procedural Reform," 13 Law & Contemp. Prob. 144 at 160-162 (1948).



EXERCISE OF RULE-MAKING POWER

Exercise of rule-making power, date of exercise

Steps being taken toward exercise of rule-making power, rules now being drafted

Limited grants of rule-making power exercised

Rule-making power dormant, no action presently being taken

Complete or supervisory rule-making power not authorized; some exercise of rule-mak-

Missouri, since in 1943 a code of procedure, prepared by the Code Revision Commission under legislative mandate, became effective, and as yet the Supreme Court has taken no action under the enabling act of 1941 to change such rules. Court rules of procedure are now being drafted in *Florida, Minnesota, Utah, Virginia,* and *Wyoming.*

In nineteen states more matters are regulated by court rules today than ever before: *Arizona, California, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Maryland, Michigan, Missouri, New Mexico, New Jersey, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas,* and *Washington.* The only really definite period of marked rule-making activity by the courts has occurred since 1930. Prior to that date, even in those states where action was authorized, the courts unaided by any real assistance and unspurred by a vigorous public and professional opinion had failed to use to the full the powers of regulation accorded to them by the legislature. *Colorado, Delaware, Michigan,* and *Virginia* are examples of such failure to act.

From this survey it appears that the recommendation of the American Bar Association for regulation of procedure by the courts is gradually being followed. Those states making changes in the mode of regulation of procedure are entrusting the rule-making power to the court of last resort. The example set by the Supreme Court of the United States, while drafting the federal rules of civil and criminal procedure, in circularizing the judiciary and the bar has been imitated on a lesser scale in the states. The state courts generally have been aided by advisory committees, and for the most part such grants of rule-making power provide that court-made rules of procedure shall supersede prior legislative acts. And it may be said that in all states a greater awareness of the problems pertaining to the regulation of procedure has been aroused.

In conclusion, it is to be noted that the authorization of rule-making action by the courts is not sufficient if the legislature retains the right to disapprove rules and does do so, as occurred in Nebraska. The courts cannot afford to be sluggish; they must assume their proper responsibilities. If rule-making

is authorized and such power is not exercised when necessary, a reversal of the present trend towards granting courts rule-making power may occur. If the bar and the courts fail to fulfill their duty where there is dissatisfaction with court procedure, the legislatures may be forced to act again as they did in the nineteenth century when the Field Code of Civil Procedure literally swept the country. In this matter the importance of the activity of official and voluntary advisory agencies, such as judicial conferences, judicial councils, and committees of the bar associations, must be emphasized. Without their aid and widespread interest among the members of the bar, little could have been accomplished in securing legislative mandates for court action or in having the court accomplish the tasks which were set.

CHAPTER IV

THE SELECTION AND SERVICE OF JURIES

Recommendations Adopted by the American Bar Association, July, 1938

(1) That jurors should be selected by commissioners appointed by the courts.[1]

(2) That in the metropolitan centers, some such system as that now in use in Cleveland, Ohio, should be adopted.[2]

(3) That the examination of jurors on their *voir dire* should be in accordance with the procedure outlined in Rule 47 of the new Federal Rules of Civil Procedure:

> "The Court may permit parties or their attorneys to conduct the examination of prospective jurors or may of itself conduct the examination. In the latter event, the Court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper." [3]

(4) That, for prospective long trials, one or more jurors in addition to the regular panel should be selected and impaneled to sit as alternate jurors, in accordance with the practice authorized and regulated by Rule 47 of the new federal rules.[4]

[1] Appendix A at 508. This recommendation follows that made by the committee on the selection of jurors of the Section of Judicial Administration of the American Bar Association. Id. at 549.

[2] Id. at 508. While the wording of this recommendation is not precisely the same as that originally made by the committee on the selection of jurors, its meaning would seem to be similar. Cf. recommendation of aforementioned committee, reading as follows:

> "that the key-number system of jury selection with elimination of the unfit by a personal examination impartially conducted be adopted where present methods of jury selection are unsatisfactory."

Id. at 549.

[3] Id. at 507. This recommendation was made by the Committee on Trial Practice originally. Id. at 539.

[4] Id. at 507. This recommendation was made by the Committee on Trial Practice originally. Id. at 539.

STUDIES OF JURY SELECTION AND SERVICE

(A) Background of the recommendations of the American Bar Association.

Despite the guarantees embodied in the federal and state constitutions[5] and the lip-service frequently accorded to it, trial by jury has been the subject of many criticisms over the years. The conviction that the efficiency of jury trials must be increased if they were not to be discarded completely, was basic to the recommendations relating to jury service.[6] The efficacy of jury trials depends as much on the caliber of the jurors as on the character and training of the trial judges and the powers accorded them in the conduct of jury trials. The caliber of the juries in turn hinges on the mode of selecting them. In selecting jurors the elimination of political influence is a paramount consideration. This can never be accomplished when the jury commissioners are politically elected or appointed officials. Therefore, the recommendation for the appointment of jury commissioners by the courts is a fundamental one. The need to acquaint the juror summoned for service with the general nature of his duties, the proper quartering and protection of the jury in all cases, and the instruction of the jury orally in language they can understand were also considered of importance by the Committee on Trial by Jury and Selection of Jurors which studied these problems in detail,[7] although no

[5] But cf. La. Const. Art. I, § 9, Art. VII, § 41, jury trial guarantee limited to certain criminal cases; there is no guarantee of trial by jury in civil actions. See Deutsch, "Jury Trials Under the Federal Rules and the Louisiana Practice," 3 La.L.Rev. 422 (1941); Miller, "'Minimum Judicial Procedural Standards'—How Met in Louisiana," 9 id. 382, 383 (1949).

[6] Appendix A at 545. Cf. Remarks of Judge John J. Parker at Hearings Before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 80th Cong. on S.17, S.18, S.19, held April 23, 24, 1947 at 5: "There are many defects in the jury system, and if we are going to preserve the system, we must make the system more efficient." Cf. also Grant, "Methods of Jury Selection," 24 Am. Pol. Sci. Rev. 117 (1930).

In England in civil cases jury trials are increasingly infrequent. Jackson, Machinery of Justice in England 62-63 (1940).

[7] Appendix A at 546. See also A.B.A. Handbook, The Improvement of the Administration of Justice 60-65 (1949). Cf. Report to the Judicial Conference of Senior Circuit Judges of the Committee on Selection of Jurors (1942), Recommendations XV, X, XX.

specific recommendations were made on these topics. The recommendations for the improvement and the proper conduct of the *voir dire*, and for the use of alternate jurors were founded on the need for time- and money-saving devices, and were patterned on federal practices.[8]

The basic question to be borne in mind in considering the problems of jury selection presented herewith was phrased at an earlier date in this manner:

> Having assumed the continuation of the present system, the next question is, what kind of a jury do we want? Should it be strictly a cross-section of the community, or should it be selected solely on the basis of ability to understand and decide cases? . . . The problem is to find honest jurors with sufficient intelligence to understand the issues presented and yet representative of the community.[9]

(B) Cleveland system: "key-number."

The jury system used in Cleveland was recommended for adoption in other metropolitan centers. Its main feature is the key-number system. The registration list of voters forms the basis of the jury list. The number of jurors required for the year is estimated by the court, and to this is added a number equal to that which past experience has shown probably will be eliminated upon examination. The resultant figure is divided into the entire list of voters, the quotient then being used as a key number in selecting jurors' names from the polling list. The citizens whose names have been so chosen according to the

[8] Appendix A at 539.

[9] As quoted id. at 547. Cf. Otis, "Selecting Federal Court Jurors," 29 A.B.A.J. at 19-21:

> ". . . the community is made up of many segments. . . . *In every segment there are men of outstanding intelligence and integrity.* . . . Let juries be selected from the intelligent and upright in each segment, with no segment systematically excluded. The use of the phrases 'cross-section of the community,' 'representative of the community,' so understood, is justified."

But cf. Mr. Justice Murphy dissenting in Moore v. New York, 333 U.S. 565, 569, 68 Sup. Ct. 705, 92 L. Ed. 637 (1948):

> "The vice lies in the very concept of 'blue ribbon' panels—the systematic and intentional exclusion of all but the best or most learned or intelligent of the general jurors. Such panels are completely at war with the democratic theory of our jury system . . ."

key number are required to answer questionnaires, then are summoned to appear before the jury commissioners and be personally examined, until the requisite number of prospective jurors is selected. The purpose of the examination is to secure jurors who are "physically and mentally healthy, possessing good reputation for honesty and morality; with at least enough education to be able to read, write and understand English; and finally of sufficient intelligence and experience in life to be able to understand the various problems presented in both civil and criminal litigation." [10] The names of those selected are typewritten on cards and placed in a large wheel. Each week a sufficient number of names is drawn for service for two weeks, which results in approximately half the jurors having had one week's experience and the other half being new jurors. Every Monday morning the new jurors are instructed generally with reference to their duties. The names so drawn from the large wheel in turn are placed in a smaller wheel in the assignment room, where cases are assigned for trial. As jury cases are sent to trial rooms, the names are drawn from this smaller wheel. When jurors are discharged from the trial, their names are returned to the smaller wheel unless their two-weeks term has expired. Grand jurors are drawn in the same manner as petit jurors.[11]

(C) Juries in the federal courts.

(1) Prior to 1948.

Since the studies were made by the committees of the Section of Judicial Administration, and after the American Bar Association's recommendations were made, the problem of jury service in the federal courts was subjected to intensive study by a committee of district judges appointed by the Judicial Conference of Senior Circuit Judges and headed by Judge John C. Knox (hereafter this committee will be re-

[10] Appendix A at 550, quoting one of the annual reports of the Jury Commission.

[11] Id. at 551. Rossman, "The Judge-Jury Relationship in the State Courts," 10 L. Soc'y J. 349, 367-368 (1942).

ferred to as the Knox Committee[12]). *At that time (1941-*1942) and until the enactment of the revision of Title 28 of the United States Code in 1948, federal statutes required that jurors in the federal courts in each state have the same qualifications and be entitled to the same exemptions as jurors of such state.[13] Hence the importance to the federal judiciary of state statutes,[14] an examination of which showed "that throughout the country there are at least 18 groups of qualifications and disqualifications affecting federal jury selection . . ." [15] while "there are at least 68 general classes of possible grounds of exemption." [16] Notwithstanding this requirement for conformity in qualifications for jury service, it is interesting to note that a survey of Texas attorneys [17] indicated a preference for juries in the federal courts as compared with those in the state courts. This would seem to indicate that despite the controlling effect of the conformity statute, administration and the mode of choosing jurors play an important role in the quality of jurors obtained. Thus, although the same standards serve as guides, different types of juries may result.[18] The Knox Committee found that because of vague statutory language, the means of making up the jury list and the activities of the jury commissioners charged by law with the duty of placing names of qualified jurors in the jury box or wheel varied from court to court, while in many districts there was "no pretense at literal compliance with the statutory requirement." [19]

[12] This committee, consisting of Judges Neblett, Lindley, Procter, Watkins, and Knox as Chairman, was appointed in September, 1941, and made their initial report one year later. Report to the Judicial Conference of Senior Circuit Judges of the Committee on Selection of Jurors (1942) cited hereafter as Report. See Hickey, "Improvement of Jury System in Federal Courts," 35 Geo. L.J. 500 (1947).

[13] 28 U.S.C. §411 (1946).

[14] See Report, op. cit. supra n.12 at 32-33.

[15] Id. at 33.

[16] Id. at 36.

[17] Stayton, "Report Upon Federal and State Jury Questionnaires," 17 Tex.L.Rev. 62 (1938).

[18] A majority of those preferring federal juries expressly did so because of the mode of selection of the jurors.

[19] See Report, op. cit. supra n. 12 at 13 et. seq., 48 et seq.

(2) The Knox Committee's recommendations for the revision of the laws relating to jury selection in the federal courts.

After the Knox Committee completed its study of jury selection, its report, recommendations and suggestions for legislative action were circulated for comment and criticism.[20] The committee studied the comments, re-examined its findings, and in 1943 submitted a supplemental report. The 1943 meeting of the Judicial Conference recommended adoption of the legislation drafted by the committee.[21] Bills embodying these proposals were introduced in 1944 and 1945 in the Senate and House of Representatives respectively.[22] While the reports of the Judicial Conference for 1944, 1945, and 1946 contained renewals of the recommendation in support of the bills, and hearings thereon were held in 1947, no action was taken thereon until 1948.

The legislation advocated by the Knox Committee was based on twenty-three recommendations, four of which are fundamental. These are as follows:

I. In order that grand and petit jurors to serve in United States district courts may be so drawn as to be truly representative of the community, the sources from which they are selected should include all economic and social groups of the community. From whatever sources they are drawn, those chosen should possess as high a degree of intelligence, morality, integrity, and common sense as can be found by those who make the selection. . . .

II. The choice of specific sources from which names of prospective jurors are selected must be entrusted to the good faith of the clerk and jury commissioner, acting under the direction of the district judge. . . .

III. The statutory requirement that Federal courts must observe the qualifications and exemptions prescribed for jurors in the state courts should be abandoned, and in its place there should be adopted a uniform standard for all Federal jurors, with

[20] To all federal judges, the clerks of court, the jury commissioners, and a number of bar associations. See id. at 1.

[21] Report of the Jud Conf. of Senior Circuit Judges 15-17 (1943).

[22] See Hickey, op. cit. supra n. 12.

liberal qualifications and very few exemptions, leaving to the district judges a large degree of discretion in determining whether or not certain individuals or classes should be subject to jury service. . . . These proposals give to the district judge general powers of supervision in the listing and drawing of names for the jury, provide in substance that all adult citizens of the United States, both men and women, may be called upon to perform either grand or petit jury service. . . .

IV. The office of jury commissioner, and the jury commissioner system should be continued, but provisions of law now regulating them should be revised and strengthened. To that end, the Committee proposes drafts of legislation to provide that: (1) final responsibility and choice of means of selecting jurors vest with each district judge. . . .[23]

[23] See Report, op. cit. supra n. 12 at 7-11:

"V. . . . the practice should be followed in every district of requiring each prospective juror to answer a questionnaire and, where conditions permit, to be personally interviewed. No name should be placed in the jury wheel or added to the jury lists until the jury commissioner and clerk are satisfied from the questionnaire or interview that the juror is qualified. . . .

"VI. The mechanics of jury selection and the form and content of records in the office of the jury commission should be given constant and careful attention by the court and the jury commission to the end that paper work may be at a minimum consistent with efficiency. . . .

"VII. The waste in the time of the jurors and in government funds that now results from calling more jurors than are needed for trials, and from failing to calendar sufficient jury trials when jurors are in attendance can and should be avoided. . . . In most metropolitan districts, central calendar systems and jury pools can be used to advantage and will promote the juror's comfort as well as economy of operation. . . .

"VIII. The present statute authorizing the court to order jurors to be summoned by registered mail instead of by personal service of the summons is satisfactory and should be employed uniformly in all districts. . . .

"IX. The assignment to trial work of jurors reporting for service should be by lot from beginning to end. All jury pools or rotating systems of assigning jurors should operate by lot. . . .

"X. The accommodations of the courthouse should be such that jurors are not required to wait in corridors and crowded anterooms to be called for service. If a jury pool system is used, suitable and comfortable waiting rooms should be provided. . . .

"XI. The use of talesmen for petit juries, as authorized by U.S.C., Title 28, sec. 417, should be reduced to a minimum. . . .

"XII. Except in extraordinary circumstances no person should be compelled to serve as a petit juror for a longer continuous period than two weeks, and no person should ever be asked to serve as either a grand or petit juror oftener than once in two years. Legislation should be enacted to permit additional pay for jurors who serve at trials lasting 30 days or more. . . .

"XIII. The method of compensating jurors for travel and subsistence should be uniform and provision should be made for payment of expenses for subsistence of 'out-of-town' jurors. . . .

"XIV. The Committee endorses

Based on these recommendations three statutes were drafted. The first act [24] authorized all citizens over twenty-one years of age to serve as grand or petit jurors unless exempt under one of six classifications, which included those the Knox Committee thought should never be called to serve, *i.e.*, "the illiterate, criminals, the infirm, public officials, members of the armed forces in active service, and those who have performed jury service within two preceding years." [25] The stated disqualifications were supplemented by a subdivision dealing with excuses to persons or classes, the granting of which were left to the discretion of the court. It is of special note that the Knox Committee found it desirable that the same provisions apply to all jurors, wheresoever used, declaring that separate standards for jurors in civil and criminal cases, or for grand and petit jurors, would create too many difficulties in administration.[26] Similarly, the Cleveland system does not distinguish

the recommendations . . . that provision be made that persons lawfully charged with crime whose cases are awaiting action by grand juries and who desire to plead guilty, be permitted to waive indictment by a grand jury and consent to be charged by information.

"XV. All jurors should be given accurate instruction regarding the nature of the duties they will be called upon to perform. To this end it is recommended that the district judge should make it a regular practice to deliver general and carefully prepared oral charges to the grand jury when it is empaneled, and to all petit jurors at the time when they report for service. The preparation of a printed pamphlet, stating in simple and general terms the functions of the petit jury in civil and criminal cases and of grand jurors should be undertaken by the Administrative Office of the United States Courts and supplies of the pamphlet should be made available to all district courts desiring to use it. . . .

"XVI. The present statute permitting alternate jurors in criminal cases to serve only if a regular juror dies or becomes ill should be amended to permit the alternate as in civil cases to replace any juror who for any reason becomes unable to perform his duties.

"XVII. It is suggested that at the time they empanel the grand jury, the district judges consider the advisability of appointing a deputy foreman to act as foreman whenever the foreman is absent or disqualified.

"XVIII. In criminal cases the number of peremptory challenges allowed to the government and to the defendant should be the same. . . .

"XIX. The voir dire examination of trial jurors by the judge alone results in great savings of time and the character of the examination is thereby much improved. . . .

"XX. The present Federal practice which permits the trial judge to instruct the jury orally and to comment upon the evidence is an outstanding and satisfactory feature of Federal procedure and should be preserved."

[24] Id. at 62.

[25] Id. at 42; S.18, 80th Cong. 1st Sess. (1947).

[26] See Report, supra n 12 at 42.

between grand and petit jurors, but has employed the same mode of selection for both groups. Secondly, the appointment of jury commissioners by the court was regularized; their compensation, the use of questionnaires and personal interviews were regulated; and provision was made for the exercise of judicial authority and discretion in the selection of grand and petit jurors. Public drawings of jury names and the use of jury wheel or box were also required.[27] A final bill provided for the compensation of jurors, and special payments in event a juror was required to sit more than thirty days.[28]

(3) Present federal statutes relating to jury selection and service.

In the 1948 revision of Title 28 of the United States Code, the sections relating to jury selection were rewritten. The revision as made did not embody the Knox Committee's recommendations in full. The extent to which the revised statutes departed from the recommended legislation is shown by the language of Sections 1861 and 1862, relating to qualifications and exemptions of jurors. Although the language is not precisely identical, the major part of the committee's recommendations as to uniform standards for the qualifications of jurors were followed, but the requirement was added that no person be a federal juror who "is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." [29] This requirement of conformity to the state laws as to competency of jurors is entirely contrary to the conclusions and recommendation of the Knox Committee that the conformity principle be abandoned.[30] Also, instead of authorizing a claim of exemption from jury service for persons who had served on a jury within the preceding two-year period, as recommended, the statute provides that service in the preceding year is a ground for challenge.[31]

[27] Id. at 62; S.17, 80th Cong. 1st Sess. (1947).

[28] See Report, supra n. 12 at 107; S.19, 80th Cong. 1st Sess. (1947).

[29] 28 U.S.C. § 1861 (1948).

[30] See Report, supra n. 12 at 39.

[31] Cf. S.18, 80th Cong., 1st Sess. (1947) and 28 U.S.C. § 1869 (1948). So also while the exemptions accorded public officers and members of the

The section relating to jury commissioners was not revised in accordance with the legislation drafted by the Knox Committee, and the new statute merely rephrased the former one, providing for the appointment of a jury commissioner by the court, who alternately with the court clerk is "to place one name in the jury box." [32] In a separate enactment in 1948, Congress increased the compensation of jurors (not originally recommended by the Knox Committee) and also provided for payments up to $10.00 per day for every day's service by a juror in excess of thirty days as recommended.[33]

(D) Recent Supreme Court decisions relating to jury selection.

In the decade since the American Bar Association made its recommendations, the Supreme Court has had occasion to clarify the legal principles relating to the proper selection of juries.[34]

In these cases the improper exclusion from the jury panel of a group or groups was charged, *i.e.*, the exclusion of women,[35]

armed forces in active service are within the Knox Committee's Recommendation, the exemption granted to members of the police and fire departments is not. Cf. S.18, 80th Cong. 1st Sess. (1947) and 28 U.S.C. §§ 1862, 1863 (1948).

[32] Cf. S 17, 80th Cong. 1st Sess (1947) 28 U.S.C. §§ 1864, 1865 (1948) and 28 U.S.C. §§ 412, 412a (1946).

[33] See Report, supra n. 12 at 101. Cf. S.19, 80th Cong. 1st Sess. (1947); I U.S. Code Congressional Service 702, 80th Cong. 2nd Sess (1948) tit. 28, § 600 as amended L. 1948, c. 652. This statute would seem to supersede the revision of tit. 28, § 1871, approved the same day, June 25, 1948.

[34] Cf. Frazier v. United States, 335 U.S. 497, 507, 69 Sup. Ct. 201, 93 L. Ed. 160 (1948) decided Dec. 20, 1948, in which petitioner complained that he had been denied the trial by an impartial jury guaranteed by the 6th Amendment. He was convicted of violating the Harrison Narcotics Act by a jury composed entirely of employees of the Federal Government. The Court held that petitioner was given a fairly and lawfully selected panel stating:

> "The well settled rule is that, given a lawfully selected panel, free from taint of invalid exclusions or procedures in selection and from which all disqualified for cause have been excused, no cause for complaint arises merely from the fact that the jury finally chosen happens itself not to be representative of the panel or indeed of the community. There is, under such circumstances, no right to any particular composition or group representation on the jury."

[35] Glasser v. United States 315 U.S. 60, 62 Sup. Ct. 457, 86 L. Ed. 680 (1942) discussed in 30 Geo. L.J. 570; 31 Ill. B. J. 71; 10 Kan. CityL.Rev. 117; 41 Mich.L.Rev. 321; 26 Minn.L. Rev. 657; 16 Temp. U. L.Q. 439; 9

of negroes,[36] of the working class, or wage-earners.[37] From these cases the following principles may be enunciated; no particular group of persons, as a group, may be arbitrarily excluded from the jury panel; proportional representation of any group on the jury is not requisite; discrimination against

U. of Chic.L.Rev. 733; 27 Wash. U. L.Q. 581 (1942). In this case the contention was made that a grand jury composed of all men was illegal, but this was overruled because the Illinois statute (state where federal court was sitting) authorizing women to sit as jurors was in effect a very short time prior to the summoning of the grand jury in question. The petitioners also argued that they were denied an impartial trial because of the alleged exclusion from the petit jury panel of all women not members of the Illinois League of Women Voters. The Court held that there was no proof of this allegation on the record, although it stated that such action would be partisan and improper.

Ballard v. United States 329 U.S. 187, 189, 67 Sup. Ct. 261, 91 L. Ed. 181 (1946) discussed in 28 B.U.L. Rev. 55, 35 Calif.L.Rev. 461, 25 N. C. L. Rev. 334, 20 So.Calif.L.Rev. 374, 33 Va. L.Rev. 519 (1946). The Court held that where women were intentionally excluded from a federal jury panel although eligible for service in the state in which the court sat, the panel was improperly constituted, and the conviction was reversed.

Fay v. New York, 332 U.S. 261, 272, 67 Sup. Ct. 1613, 91 L. Ed. 2043 (1947) discussed in 47 Col.L.Rev. 463, 33 Corn. L.Q. 272, 36 Geo. L.J. 97, 16 Ford.L.Rev. 271, 46 Mich.L.Rev. 262, 32 Minn.L.Rev. 297, 19 Miss. L.J. 101, 27 Neb.L.Rev. 434, 23 N.Y.U. L.Q. Rev. 331, 21 So.Calif.L.Rev. 102, 26 Tex. L.Rev. 533, 33 Va.L.Rev. 655 (1947).

Moore v. New York, 333 U.S. 565, 68 Sup. Ct. 705, 92 L. Ed. 637 (1948).

[36] Hill v. Texas, 316 U.S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559 (1942); Akins v. Texas, 325 U.S. 398, 66 Sup. Ct. 86, 90 L. Ed. 491 (1947); Patton v. Miss., 332 U.S. 463, 68 Sup. Ct. 184, 92 L. Ed. 164 (1947); Moore v. N.Y., 333 U.S. 565, 68 Sup. Ct. 705, 92 L. Ed. 637 (1948).

[37] Thiel v. Southern Pacific Ry. Co., 328 U.S. 217, 66 Sup. Ct. 984, 90 L. Ed. 1181 (1946) discussed in 35 Calif.L.Rev. 142 (1947), 59 Harv. L.Rev. 1167, 22 Ind. L.J. 97, 22 Notre Dame L.Rev. 137, 20 Temp. L.Q. 154, 25 Tex.L.Rev. 171, 21 Tul.L.Rev. 116 (1947). In this case the names of all persons who worked for a daily wage were excluded from the jury list, since such persons were usually excused by the judge because jury service would be an undue hardship. Such a panel was held unfairly drawn and a new trial was ordered.

Fay v. New York, supra n. 35. In this case two labor leaders charged with extortion challenged the New York blue-ribbon jury system on the ground that women and certain working groups were purposely excluded from such special panels, and juries drawn from special panels were "convicting juries." See 3 N.Y. Jud. Counc. Rep 123 (1937), 4 id. 46 (1938), 8 id. 39-40 (1942). The Court refused to set aside the conviction on the ground that no purposeful discrimination was proved (no facts to show there was not a cross-section of community on jury panel, or to show special juries more prone to convict) and because state courts are not controlled by same constitutional considerations as determine cases from the federal courts. Re special juries it is to be noted that these are still used in England, where a bill has now been introduced to abolish them. N.Y. Times, Feb. 2, 1949, p. 30.

any group must clearly be shown by factual evidence; and the same considerations do not control the selection of juries in state courts as in federal courts.[38] In the case dealing with the exclusion of wage-earners from a federal jury panel, Mr. Justice Murphy, speaking for the Court, stated:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community. . . . Jury competence is an individual rather than a group or class matter. . . .[39]

The Supreme Court's position as to the standards of jury selection applicable in federal courts was predicated not only on constructional provisions, but more particularly on its position as the head of the federal court system, charged with supervision of the administration of justice in the federal courts.[40] Thus, in cases where juries in federal courts were involved, it was held that proof of prejudice to the defendant because of exclusion of a particular group was not required,[41] whereas when the composition of juries in state courts was questioned, proof of prejudice to the defendant by discrimination in the exclusion of particular classes was considered necessary.[42]

(E) Conclusion: comparison of recommendations of the American Bar Association with those of the Knox Committee.

The problems of jury selection and jury service are vital and, as shown by the consideration accorded them by the

[38] Fay v. New York, supra n. 35, 332 U.S. at 285-288, 294. Cf. Rawlins v. Georgia, 201 U.S. 560, 26 Sup. Ct. 560, 50 L. Ed. 899 (1906) in which Mr. Justice Holmes speaking for the Court said: "If the state constitution and laws as construed by the state court are consistent with the 14th Amendment, we can go no further."

[39] Thiel v. Southern Pacific Ry Co., supra n. 37, 328 U.S. at 220.

[40] Id. at 225; Ballard v. United States, supra n. 35, 329 U.S. at 193-195.

[41] Ibid.

[42] Fay v. New York, supra n. 35, 328 U.S. at 285.

American Bar Association and the Judicial Conference, their importance is recognized by those concerned with the administration of justice.[43] However, in spite of the activities of the leaders of the bar and the federal judiciary, except for comments on court decisions,[44] customarily the work of student editors, the law reviews have paid scant attention to these problems. The scholars and teachers of the law, whose writings illustrate the trends of thought among those who in many ways set the pace for the profession, have not examined the basic issues involved, nor have they for the most part even commented on the problem.[45] The articles in the law journals and bar association reviews, reflecting the thoughts of the

[43] Thus, the committee on trial by jury said in 1938: "Jury service today is the chief remaining governmental function in which lay citizens take a direct and active part, and trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community." Appendix A at 545. And see A.B.A. Handbook, The Improvement of the Administration of Justice at 60 (1949); the Journal of the American Judicature Society, passim, especially Coffin, "Jury Trial Tragic But Not Entirely Hopeless," 25 id. 13 (1942); Osborn, "Selection of Jurors," 22 id. 209 (1939); Otis, "Qualifications of Jurors," 25 id. 178 (1942); Parker, "Improvement of Jury Systems Must Come," 26 id. 71 (1943); "The Jury Looks at Trial by Jury," 31 id. 105 (1948). Cf. Bomar v. Keyes, 162 F. 2d 136 (C.C.A. 2d, 1948), certiorari denied 332 U.S. 825, 845 (1948), discussed in 16 Geo. Wash.L.Rev. 260, 43 Ill.L.Rev. 105 (1948).

[44] E.g., see footnotes 35-41, also Note, 34 Ill.L.Rev. 236 (1939); Recent Cases, 21 Minn.L.Rev. 868 (1937), 26 Calif. L.Rev. 153 (1938), 18 Tex.L.Rev. 511 (1940), 18 So. Calif.L.Rev. 258 (1945), 46 Mich.L.Rev. 696 (1948).

[45] Thus a check of the Legal Periodical Index since 1937 reveals only the following articles concerned with jury problems in the law reviews, other than case comment and notes:

Arpaia, "Hints to a Young Lawyer Picking a Jury," 6 John Marshall L.Q. 344 (1941); Blume(d), "Jury Selection Analyzed: Proposed Revision of Federal System," 42 Mich.L.Rev. 831 (1944); Churchill(e), "Alternate Jurors—A Remedy for Felony Mistrials," 1 Tex. L. & Legis. 80 (1947); Deutsch, "Jury Trials Under the Federal Rules and the Louisiana Practice," 3 La.L.Rev. 422 (1941); Edling(e), "Obtaining Jurors; A Comparative Study of Methods Employed," 1 Tex. L. & Legis. 68 (1947); Hickey(d), "Improvement of Jury System in Federal Courts," 35 Geo. L.J. 500 (1947); Jefferson, "Race Discrimination in Jury Service," 19 B.U.L.Rev. 413 (1939); Knox(a), "Jury Selection," 22 N.Y.U.L.Q.Rev. 433 (1947); Mayer, "Constitutional Guarantee of a Jury Trial in New York," 7 BrooklynL.Rev. 180 (1937); Miner, "The Jury Problem," 41 Ill.L.Rev. 183 (1946); Moffatt(c), "As Jurors See a Law Suit," 24 Ore.L.Rev. 199 (1945); Moore(a), "Preliminary Remarks to Jurors," 47 W.Va. L.Q. 323 (1941); Otis(a), "The Jury," 17 Tenn.L.Rev. 191 (1942); Reardon, "The Woman Juror Law (Legislation)," 12 St. John L.Rev. 172 (1937); Schecter & Affron(b), "Selecting Persons for Jury Service in

practitioners, however, indicate interest. Such articles[46] are usually merely descriptive, although some concern with the basic issues involved in these problems is evidenced. In view of the diversity of statutory regulations in the several states, and since Congress has rejected several of the recommendations of the Knox Committee despite the studies made by it and by the American Bar Association, the attention of the legal scholars may well be directed to consideration of the fundamentals involved in the problems of jury selection and service.

The study of the Knox Committee was thorough and unbiased, and its findings must be compared with the recommendations which head this chapter for a better understanding of these problems. The Knox Committee's recommendation for the use of jury commissioners appointed by the courts, although very detailed and specific, coincides essentially with

New York," 26 Corn. L.Q 677 (1941); Schlesinger(e), "Improving the Jury System by Improving the Juror," 1 Tex. L. & Legis. 55 (1947); Stayton, "Report Upon Federal and State Jury Questionnaires," 17 Tex L.Rev. 62-72 (1938); Stayton & Watkins, "The Pick-Up Jury," 19 Tex.L.Rev. 141 (1940); Thatcher, "Why Not Use the Special Jury?" 26 Ore.L.Rev. 251 (1947), 31 Minn.L.Rev. 232 (1947); Watkins(a), "Selecting Jurors," 48 W.Va. L.Q. 47 (1941). As to these twenty articles, four are by judges(a), one was written in connection with the Section of Judicial Administration Survey(b), one was written from the viewpoint of the juror(c), only two were concerned with the work of the federal committee(d), and three were published in one issue of one periodical, which issue was devoted to problems of criminal procedure(e).

[46] Beer, "Jury Reform Urged by Federal Bar Association," 66 N.J.L.J. 249, 251, 253, 257, 259, 264 (1943); "Choosing the Twelve," 22 Conn. B.J. 316 (1948); Daly, "Juries in Connecticut," 18 Conn. B.J. 9 (1944); Dowd, "General Instructions to New Venire of Jurors," 10 L. Soc'y J. 375 (1942); Galston, "Civil Jury Trials and Tribulations," 29 A.B.A.J. 195 (1943); Herzberg, "Suggested Changes in Jury System of Georgia," 5 Ga. B.J. 38 (1942); Holtzoff, "District Court of the United States for District of Columbia. Some Aspects of the Administration of the Court, and of the Work of the Jury Commission in the Selection of Jurors," 13 J. B. A. Dist. Col. 154 (1946); Hughes, "The Half-Citizen [Jury Service for Women]" 2 Tex. B.J. 99, 108 (1939); Osborne, "New Jersey Juries," 62 N.J.L.J. 255 (1939); Otis, "Selecting Federal Court Jurors," 29 A.B.A.J. 19 (1943); Rossman, "Judge-Jury Relationship in State Courts," 10 L. Soc'y J. 344 (1942); Sweet, "Improvement of Procedure by Jury Trials," 12 Calif. S. B. J. 276 (1937); Weatherby, "To a Jury Venire," 3 Tex. B.J. 105 (1940); Whatley, "Juror Selection," 1939 N.M.S.B. 21; "Important Proposals on Jury Selection Made by Federal Judges," 7 Ky. S. B. J. 27, 32 (1942), 10 L. Soc'y J. 499 (1942), 13 Okla. B. A. J. 310 (1942), 17 Conn. B.J. 58 (1943).

the recommendation of the American Bar Association. The essence of the Knox Committee's recommendations that the judge be vested with authority and responsibility for the selection of jurors, and, more specifically, that "the sound judgment of the district courts must be exercised" [47] to choose the "means by which all sections of society are to be reached" [48] differs from the only comparable recommendation of the American Bar Association. The latter had recommended the adoption of the Cleveland system, under which there is specific regulation in detail of the source of names for the basic list, the manner in which the basic list is made, etc. The Knox Committee considered that the "sources to which the district courts may go to obtain jurors . . . must depend in the final analysis upon conditions in the district where the court in held," [49] and did not recommend any specific manner of securing the list of original names. The Knox Committee's recommendation for the use of a questionnaire and, if necessary and possible, a personal interview [50] corresponded with the Cleveland practice, as did its recommendation that in most metropolitan districts jury pools be used and that the assignment of trial work be by lot from beginning to end.[51] The Knox Committee's recommendation that except in extraordinary circumstances no person should be compelled to serve as a petit juror for a longer continuous period than two weeks was also in accord with the approved Cleveland practice.[52] While a specific recommendation was not made by the American Bar Association, the committee on selection of jurors of the Section of Judicial Administration had recognized the need for adequate instruction of jurors as to their duties, as is the practice in Cleveland and as did the Knox Committee.[53] Since the committees of the Section of Judicial Administration were concerned pri-

[47] See Report, supra n. 12 at 22 and 13.

[48] Id. at 13.

[49] Id. at 15.

[50] Recommendation V, supra n. 23. Cf. A.B.A. Handbook, The Improvement of the Administration of Justice at 63 (1949).

[51] Recommendations VII-IX, supra n. 23.

[52] Recommendation XII, supra n. 23. But the legislation as recommended by the Knox Committee did not include such a provision.

[53] Cf. Recommendation XV, supra n. 23, and Appendix A at 546, 551.

marily with the problem of trial by jury, and thus with the petit jury, there is no conflict between their reports and the Knox Committee's conclusion that the same standards of selection, etc., apply to grand as to petit jurors. Moreover, this is the Cleveland practice.[54] It is to be noted that the third and fourth recommendations of the American Bar Association were patterned on the Federal Rules of Civil Procedure, and thus as to these matters there can be no disagreement.[55]

The recommendations of the American Bar Association and of the Knox Committee are alike in many details. The recommendations of the latter are more numerous and more specific, since they were intended to be the basis of legislative proposals and were the result of a study of the federal jury system in operation. There was, however, a difference in stress, which bears noting. This is to be found in the emphasis on the part to be played by judicial discretion and responsibility, and the necessity of *selecting* jurors in the federal report.[56] Due respect must be accorded it, since it is of more recent date and was based on a survey of the actual *modus operandi* of jury selection in the federal district courts, but it must be noted that conditions in the state courts to which the American Bar Association's recommendations apply present different problems in some respects, especially in those states in which the judiciary are elected. Thus, the manner of securing a jury that is representative of the community and yet consists of persons of sufficient intelligence and experience to be able to understand the problems presented in litigation is one for which it may be said no final answer can be found until sound education and good character become universal. The following survey of the statutory provisions relating to the mode of jury selection and service in the various states is designed to

[54] See Report, op. cit. supra n. 12 at 42, and Appendix A at 551.

[55] The Knox Committee concurred in its recommendations as to the usefulness of these rules. See Recommendations XVI and XIX, supra n. 23.

[56] Cf. Knox, "Jury Selection," 22 N.Y.U.L.Q.Rev. 433 (1947): ". . . the criticism is levelled that the persons who serve in the United States District Court for the Southern District of New York are handpicked. If this be a valid indictment, I cannot do otherwise than admit my guilt for this state of affairs." For a more recent similar expression, see N.Y. Times, Jan. 23, 1949, p. 36, col. 1.

disclose the present shortcomings in a field of fundamental importance to the proper administration of justice.

Statutory Provisions Relating to the Mode of Jury Selection and Jury Service in the Several States

(A) Selection from whom: qualifications and exemptions.

As noted above and as found by the Knox Committee, the basis for and mode of selection of jurors vary tremendously from state to state. While no recommendations were made as to the proper standards for the qualification and exemption of jurors by the American Bar Association in 1938, it is apparent that such qualifications and exemptions are of basic importance to its first recommendation.[57] Thus, if the qualifications and exemptions set by statute are so fanciful and numerous as to exclude the majority of otherwise available citizens, it will be almost impossible for the jury commissioners to select jurors "who are honest and upright, and who bring to their task the intelligence, sound judgment and courage that will enable them rightly to decide questions of fact, and to do so without fear or favor." [58]

It is to be noted that the statutory provisions applicable to the selection of persons for jury service within certain of the states vary among counties on the basis of population.[59] *Pennsylvania* and *Missouri* are extreme examples of this type. In *Pennsylvania* there is little uniformity in the selection of jurors, but it varies from county to county and in some instances from court to court. Pennsylvania has eight different classes of counties, based on population. Philadelphia County, the only first-class county, has many special statutory provisions applicable only to its courts. Allegheny County, in which Pittsburgh is located, is the only second-class county, and it is governed largely by a special act. Third-class counties are also largely governed by special acts. There are in addition a number of

[57] Knox, "Jury Selection," 22 N.Y.U.L.Q.Rev. 433 (1947); Schlesinger, "Improving the Jury System by Improving the Juror," 1 Tex. L. & Legis. 55 (1947).

[58] Knox, op. cit. supra n .57 at 434.

[59] I.e., Colo., Fla., Kan., Mich., Mo., Neb., N.Y., Pa., and Ohio.

general acts which apply to all counties except where inconsistent with or repealed by special legislation.[60] The *Missouri* statutes present another complicated picture. There are general provisions relevant to exemptions and qualifications for jury service and the mode of selection for such service. The Missouri law, however, also includes provisions for jury selection and service pertaining to various classifications of counties and cities, such as counties of 60,000 to 200,000 population; counties of 200,000 to 400,000; counties of 400,000 to 800,000; cities with over 100,000; and cities containing more than 500,000 inhabitants. There is no uniformity among these statutes; the terms used in parallel provisions are different and the arrangement of the various provisions differs in each classification, making it extremely difficult to present an accurate picture of Missouri law without giving detailed provisions for each classification.[61]

The varied regulations as to qualifications may be classified as those relating to: (1) citizenship and eligibility as a voter;[62] (2) residence in the locality;[63] (3) ownership of

[60] In this survey references to Pennsylvania law will be made as references to the various acts, designating them for convenience as 2d class county act, 3d class county act, Philadelphia act and general act. The Pennsylvania picture is further confused because in addition to these acts local customs or rules govern many procedures not specified by statute. This to be exact would require a description for each of the 67 counties.

[61] In this survey references to Missouri law for the most part will be made only to the general provisions. See Special Note infra n. 79.

[62] Eligibility as a voter is a prerequisite in the following states: Ark. Stat. Ann. (1947) § 39-101; Conn. Gen. Stat. (1949) § 7906; Del. Rev. Code (1935) § 4721; Idaho Code (1947) § 2-201; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Ind. Stat. (Burns, 1946) § 4-3317; Iowa Code (1946) § 607.1; Kan. Gen. Stat. (1935) § 43-102; La. Code Crim. Law & Prac. (1943) Art. 194 as amended L. 1944, No. 151 (Parish of New Orleans); Me. Rev. Stat. (1944) c. 103, § 2; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) § 602.121; Miss. Code (1942) § 1762; Neb. Rev. Stat. (1943) § 25-1601; Nev. Const. § 78; N.M. Stat. (1941) § 30-103; N.D. Rev. Code (1943) § 27-0901; Ohio Gen. Code (1938) § 11419-9; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Pa. Stat. (Purdon, 1930) tit. 17, § 942 (general act); R.I. Gen. Laws (1938) c. 506, § 3; S.C. Const. Art. 5, § 22; S.D. Code (1939) § 32.1001 as amended L. 1947, c. 149; Tex. Civ. Stat. (Vernon, 1925) Art. 2133; Vt. Stat. (1947) § 3489; Wash. Rev. Stat. (Remington, 1932) § 94; Wis. Stat. (1947) § 255.01.

The juror must be a citizen of the United States in the following jurisdictions: Ariz. Code (1939) § 37-102; Calif. Code Civ. Proc. (1946) § 198(1); D.C. Code (1940) § 11-1417; Idaho Code (1947) § 2-201; Ind.

certain property,[61] or payment of taxes;[65] (4) minimum and

Stat. (Burns, 1946) § 4-3304; Iowa Code (1946) § 607.1; La. Code Prac. (1942) Art. 532.1; Mont. Rev. Code (1935) § 8890 as amended L. 1937, c. 203; Neb. Rev. Stat. (1943) § 25-1601; N.M. Stat. (1941) § 30-101; N.Y. Jud. Law (1948) §§ 502, 596; N.D. Rev. Code (1943) § 27-0901; Ore. Comp. Laws Ann. (1940) § 14-107; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class), tit. 17, § 1333 (3d class), tit. 17, § 1235 (Phila. County); Utah Code Ann. (1943) § 48-0-8; Vt. Stat. (1947) § 1720; Wis. Stat. (1947) § 255.01; Wyo. Comp. Stat. Ann. (1945) § 12-101. See as to common law, North Carolina, Hinton v. Hinton, 196 N.C. 341, 145 S.E. 615 (1928).

[63] The requirements as to residence within the jurisdiction vary greatly from state to state. The following states have a residence requirement, the variations of which are shown infra: Ala. Code (1940) tit. 30, §§ 20, 55; Ariz. Code (1939) § 37-102 as amended L. 1945, c. 50 (6 mo. county); Ark. Stat. Ann. (1947) § 39-101 (county); Calif. Code Civ. Proc. (1946) § 198(1) (1 yr. state and county); Colo. Stat. Ann. (1935) c. 95, § 1 as amended L. 1945, p. 426; Conn. Gen. Stat. (1949) § 7909; Del. Const., Art. V, § 2 (requirements for voting, 1 yr. in state, 3 mo. county); D.C. Code (1940) § 11-1417; Fla. Stat. Ann. (1944) § 40.01(1) (1 yr state, 6 mo. county); Ga. Code Ann. (1933) § 59-201 (6 mo. county); Idaho Code (1947) § 2-201; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Ind. Stat. (Burns, 1946) § 4-3317; Iowa Code (1946) § 607.1 (6 mo. state, 60 days county); Ky. Rev. Stat. (1946) § 29.020 (county); La. Code Prac. (1942) Art. 532.1 (1 yr. parish); Me. Rev. Stat. (1944) c. 103, §§ 2, 3; Md. Code Ann. (1939) art. 51, § 6; Mass. Const. § 105 (requirement for voting, 1 yr. in state, 6 mo. in county); Mich. Comp. Laws (1948) § 602.121; Minn. Stat. Ann. (1945) §§ 593.04, 628.41, 628.54; Miss. Code (1942) § 1762; Mo. Rev. Stat. Ann. (1939) § 697 as amended L. 1945, p. 1065 (citizenship in Mo., resident of county); Mont. Rev. Code (1935) § 8890 as amended L. 1939, c. 203 (1 yr. state, 90 days county); Neb. Rev. Stat. (1943) § 25.1601; Nev. Comp. Laws (1929) § 8476 (county); N.H. Rev. Laws (1942) c. 375, §§ 1, 2; N.J.Rev. Stat. (1937) § 2:85-1 as amended L. 1943, c. 113 (2 yrs. state, county); N.M. Stat. (1941) § 30-101 (1 yr. state, 6 mo. county); N.Y. Jud. Law (1948) §§ 502, 596; N.C. Gen. Stat. (1943) § 9-1 as amended L. 1947, c. 1007 (county); N.D. Const. § 121, N.D. Rev. Code (1943) § 27-0901; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 28; Ore. Comp. Laws Ann. (1940) § 14-107 (1 yr. county); Pa. Stat. (Purdon, 1930) tit. 17, § 942 (general act), tit. 17, § 1279 (2d class act), tit. 17, § 1333 (3d class act); R.I. Gen. Laws (1938) c. 506, § 1 (city or town); S.C. Const. Art. 2, § 4; S.D. Code (1939) § 32.1001 amended L. 1947, c. 149; Tenn. Code (1934) § 9987; Tex. Civ. Stat. (Vernon, 1925) Art. 2133; Utah Code Ann. (1943) § 48-08 (6 mo. county); Vt. Stat. (1947) § 1720; Va. Code (1942) § 5984 (1 yr. state, 6 mo. county); Wash. Rev. Stat. (Remington, 1932) § 94 (1 yr. county); W.Va. Code (1943) § 5264 (county); Wis. Stat. (1947) § 255.05; Wyo. Comp. Stat. Ann. (1945) § 12-101 (1 yr. state, 90 days county).

Other variations as to residency may be present in those states which require eligibility as an elector for jury service. Cf. supra n. 62.

[61] Mont. Rev. Code (1935) § 8890 as amended L. 1939, c. 203; N.Y. Jud. Law (1948) §§ 502, 596; Wyo. Comp. Stat. Ann. (1945) § 12-101. Indiana, Tennessee and Texas require that the prospective juror be either a freeholder or a householder, while in Kentucky a juror must be a householder. Ind. Stat. (Burns, 1946) § 4-3317; Ky.

maximum age limits;[66] (5) general health, ability to see and

Rev. Stat. (1946) §§ 29.010, 29.020 Tenn. Code Ann. (1934) § 10006; Tex. Civ. Stat. (Vernon, 1925) Art. 2133. While the general statutes applicable to jurors in Missouri make no property requirements, the statutes relating to particular classes of counties do require that the prospective juror have visible means of support, and in Kansas a person may not be compelled to be a juror who has no visible means of support. Mo. Rev. Stat. Ann. (1939) cf. §§ 697, 691 and §§ 742, 758, 807; Kan. Gen. Stat. (1935) § 43-140. Only tales jurors are subject to the property requirement in North Carolina. N.C. Gen. Stat. (1943) § 9-11. In contrast to these requirements the Maryland statute expressly states that no property qualification be required of any juror, although it is also provided that the jury list be made up from a list of taxable inhabitants. Md. Code Ann. (1939) Art. 51, §§ 3, 4, 6.

[65] Utah Code Ann. (1943) § 48-0-8; Wyo. Comp. Stat. Ann. (1945) § 12-101. In Washington the juror must be either an elector or a taxpayer, and *payment of present-day sales, gasoline* tax, etc. are sufficient for qualification. Wash. Rev. Stat. (Remington, 1932) § 94. The prospective juror would seem to be required by inference to be a taxpayer in those states in which the tax assessor's list is used as the basis of the jury list. See *infra* n. 90. But cf., in the selection of jurors in the upper peninsula of Michigan it is expressly provided that jurors need not be taxpayers and that it is not necessary that their names appear on any assessment roll. Mich. Comp Laws (1949) § 691.413.

[66] Age requirements differ greatly in the various jurisdictions. In the following jurisdictions a juror must be over twenty-one years of age: Ala. Code (1940) tit. 30, § 21; Ariz. Code (1939) § 37-102; Ark. Stat. Ann. (1947) § 39-101; Calif. Code Civ. Proc. (1946) § 198; Colo. Stat. Ann. (1935) c. 95, § 1 as amended L. 1945, p. 426; Del. Rev. Code (1935) §4721; D.C. Code (1940) § 11-1417; Fla. Stat. Ann. (1944) § 40.01(1); Ga. Code Ann. (1933) § 59-201; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Iowa Code (1946) § 607.1, and Iowa Const. Art. 2, § 1; Kan. Gen. Stat. (1935) § 43-140; Ky. Rev. Stat. (1946) §§ 29.010, 29.020; La. Code Prac. (1942) §532.16, La. Gen. Stat. (1939) §§ 1938, 1949, 1965, La. Code Crim.Law and Prac. (1943) Art. 172; Mass. Gen. Stat. (1932) c. 234, § 1, Mass. Const. § 105; Minn. Stat. Ann. (1945) §§ 593.04, 628.54; Miss. Code (1942) § 1762; Mo. Rev. Stat. Ann. (1939) § 697 as amended L. 1945, p. 1065; Mont. Rev. Code (1935) § 8890 as amended L. 1939, c. 203; N.J. Rev. Stat. (1937) § 2:85-1 as amended L. 1943, c. 113; N.M. Stat. (1941) § 30-101; N.Y. Jud. Law (1948) §§ 502, 596; N.C. Gen. Stat. (1943) § 9-1 as amended L. 1947, c. 1007; N.D. Rev. Code (1943) § 27-0901 and N.D. Const. § 121; Ohio Gen. Code (1938) §11419-9; Ore. Comp. Laws Ann. (1940) § 14-107; Pa Stat. (Purdon, 1930) tit. 17, § 1279 (2d class act), § 1333 (3d class act) (adult citizens) as enacted 1939, P.L. 157; S.C. Const. Art. 5, § 22; Tenn. Code Ann. (1934) § 10006; Tex. Civ. Stat. (Vernon, 1925) Art. 2133; Utah Code Ann. (1943) § 48-0-8; Va. Code (1942) § 5984; Wash. Rev. Stat. (Remington, 1932) § 94; W.Va. Code (1943) § 5261; Wis. Stat. (1947) § 255.01; Wyo. Comp. Stat. Ann. (1945) § 12-101.

In the following states the juror must be over twenty-five years of age: Conn. Gen. Stat. (1949) § 7906; Md. Code Ann. (1939) Art. 51, § 1; Neb. Rev. Stat. (1939) §§ 25-1601, 25-1636; R.I. Gen. Laws (1938) c. 506, § 1 as amended L. 1939, c. 700.

Persons over 65 years are ineligible in the following jurisdictions: D.C. Code (1940) § 11-1417; Mo. Rev. Stat. Ann. (1939) §§ 742, 774, 823 (certain geographical units); N.J. Rev. Stat.

hear, and to serve generally;[67] (6) sex;[68] (7) mental ability

(1937) § 2:85-1 as amended L. 1943, c. 113; S.C. Const. Art. V, § 22; W.Va. Code (1943) § 5261; Wyo. Comp. Stat. Ann. (1945) § 12-101.

Those over 70 years are ineligible in the following states: Mont. Rev. Code (1935) § 8890 as amended L. 1939, c. 203; Neb. Rev. Stat. (1943) §§ 25-1601, 25-1636; N.Y. Jud. Law (1948) §§ 502, 506; S.D. Code (1939) § 32.1001 as amended L. 1947, c. 149.

[67] Physical disabilities may lead to the disqualification of a juror in the following jurisdictions: Ala. Code (1940) tit. 30, §§ 20, 21; Me. Rev. Stat. (1944) c. 103, § 2; Minn. Stat. Ann. (1945) §§ 593.04, 628.53; N.J. Rev. Stat. (1937) § 2:85-1 as amended L. 1943, c. 113; N.D. Rev. Code (1943) § 27-0902; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class act); S.D. Code (1939) § 32.1001 as amended L. 1947, c. 149; Utah Code Ann. (1943) § 48-0-8.

In the following jurisdictions the requirement is made that the juror be able to see and to hear: Calif. Code. Civ. Proc. (1946) § 198(2); Fla. Stat. Ann. (1944) § 40.08; Idaho Code Ann. (1947) § 2.201; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Ind. Stat. (Burns, 1942) § 9-1504 (13) (in criminal cases, subject to challenge if sight and hearing defective); Iowa Code (1946) § 607.1; Kan. Gen. Stat. (1935) § 43-102; Mich. Comp. Laws (1948) § 602.121; Minn. Stat. Ann. (1945) § 631.29; Mont. Rev. Code (1935) § 8890; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp. Laws (1929) § 8476; N.Y. Jud. Law (1948) §§ 502, 596; Okla. Stat. (1938) tit. 38, § 10 as amended L. 1937, p. 2; Ore. Comp. Laws Ann. (1940) § 14-107; S.D. Code (1939) § 32.1001 as amended L. 1947, c. 149; Utah Code Ann. (1943) § 48-0-8; Wash. Rev. Stat. (Remington, 1932) § 327; Wis. Stat. (1947) § 255.01; Wyo. Comp. Stat. Ann. (1945) § 12-101.

[68] Women are ineligible for service in the following states: Ala. Code (1940) tit. 30, § 21; Fla. Stat. Ann. (1944) § 40.01; Ga. Code Ann. (1933) §§ 59-106, 59-201; Mass., Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931); Miss. Code (1942) § 1762; N.M. Stat. (1941) § 30-101; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2, § 1; S.C. Const. Art. V, § 22; Tenn. Code Ann. (1934) § 10006; Tex. Civ. Stat. (Vernon, 1925) Art. 2133; Va. Code (1942) § 5984; W.Va. Code (1943) § 5261; Wyo. Comp. Stat. Ann. (1945) § 12-101. Prior to 1945 women were ineligible for jury service under the Georgia Constitution. The legislature is now authorized to require jury service of women, Ga. Code (1947) § 2-5102, but no enabling act has been passed thus far.

In several of the states women have only been made eligible for jury service in very recent years: Ariz. Code (1939) § 37-102 amended L. 1945, c. 50; Colo. Stat. Ann. (1935) c. 95, § 1 as amended L. 1945, pp. 425-426; Md. Code Ann. (Supp. 1947) Art. 51, § 6A; N.C. Const., Art. I, § 13 (1946); S.D. Laws (1947) c. 149; Vt. Laws (1941) No. 31, pp. 41-43. In Nebraska and Rhode Island women are ineligible in those districts which have no accommodations for women jurors. Neb. Rev. Stat. (1943) § 25-1601.01; R.I. Gen. Laws (1938) c. 506, § 37 as amended L. 1939, c. 700.

Special Note: The title of the Colorado amending statute, the body of which amended c. 95, § 1, to allow women to serve as jurors contained a statement of repeal of Colo. Stat. Ann. (1935) c. 95, §§ 3-9. These latter sections relate to exemption from jury service, etc. However, no mention of such repeal was made in the body of the statute and therefore it may be questioned whether the sections were actually repealed. Inclusion of references to these sections of the Colo.

and intelligence of the juror, *i.e.*, the capacity for speaking and understanding English,[69] education and native intelligence;[70] (8) character, morals and a criminal record;[71]

Stat. Ann. (1935) c. 95, § 3-9 in the footnotes will be indicated by † after such references. Chapter 95, § 1 as amended in 1945 to permit women to serve as jurors also included a provision that excuses from jury service were to be left to the discretion of the court, and that courts of record are authorized to establish such system and rules as are necessary to facilitate and expedite selection and summoning of jurors.

[69] The ability to read and write English is one of the statutory requirements in the following jurisdictions: D.C. Code (1940) § 11-1417; Fla. Stat. Ann. (1944) § 54.12 (when nature of the case requires ability); Iowa Code (1946) § 607.1; La. Code Prac. (1942) § 532.1; Mich. Comp. Laws (1948) 602.121; Miss. Const. § 264; Mo. Rev. Stat. Ann. (1939) §§ 742, 758, 774, 807 (counties of certain population); Neb. Rev. Stat (1943) § 25-1601; N.J. Rev Stat. (1937) § 2:85-1 as amended L. 1943, c. 113; N.Y. Jud. Law (1948) § 596 (New York City only); S.D. Code (1939) § 32.1001 as amended L. 1947, c. 149; Tex. Civ. Stat. (Vernon, 1925) Art. 2133, requires ability to read and write but does not specify English, and Art. 2133(7) provides that the provision as to reading and writing does not apply if it would reduce the number of prospective jurors to less than the minimum required for the jury list; Utah Code Ann. (1943) § 48-0-8; Wash. Rev. Stat. (Remington, 1932) § 94; Wis. Stat. (1947) § 255.01.

Requirements of similar import are found in other states: In Alabama the juror must be able to speak and write English unless a freeholder or householder. Ala. Code (1940) tit. 30, § 20 as amended L. 1945, p. 45. South Carolina makes a similar requirement unless the person is a taxpayer. S.C. Const. Art. 2, § 4. Colorado and Minnesota require the ability to speak and understand English when spoken. Colo. Stat. Ann. (1935) c. 95, § 1, as amended L. 1945, pp. 425-426; Minn. Stat. Ann. (1945) §§ 593.04, 628.43. In Arizona, Illinois and Pennsylvania only the ability to understand English is required by statute. Ariz. Code (1939) § 37-102 as amended L. 1945, c. 50, § 2, p. 130; Ill. Rev. Stat. (Smith-Hurd 1947) c. 78, § 2; Pa. Stat. (Purdon, 1930) tit. 17, § 1333 as added L. 1939, P.L. 157, § 2 (3d class county act). In five states the statutes require of jurors a sufficient knowledge of English: Calif. Code Civ. Proc. (1946) § 198(3); Idaho Code (1947) § 2-201; Mont. Rev. Code (1935) § 8890 as amended L. 1939, c. 203; Nev. Comp. Laws (1929) § 8476; Wyo. Comp. Stat. Ann. (1945) § 12-101. In Ohio a juror is subject to challenge for want of a competent knowledge of English. Ohio Gen. Code (1938) § 11419-52. In Indiana a prospective juror may be challenged in criminal cases if unable to understand English. Ind. Stat. (Burns, 1942) § 9-1504(13).

[70] "Ordinary" or "sufficient intelligence," "intelligence," "sound judgment" "sound mind," judiciousness or discretion are required of jurors in the following states: Ala. Code (1940) tit. 30, § 20; Ariz. Code (1939) § 37-102; Ark. Stat. Ann. (1947) § 39-206; Calif. Code Civ. Proc. (1946) § 198(2); Conn. Gen. Stat. (1949) § 7906; Del. Rev. Code (1935) § 4724; Fla. Stat. Ann. (1944) § 40.01(3); Ga. Code Ann. (1933) §§ 59-106, 59-201; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Ind. Stat. (Burns, 1946) § 4-3301; Iowa Code (1946) § 607.1; Ky. Rev. Stat. (1946) § 29.020; La. Code Prac. (1942) § 532.1; Me. Rev. Stat. (1944) c. 103, § 2; Mass. Gen. Laws (1932) c. 234, § 4; Mich. Comp.

Laws (1948) § 602.121; Minn. Stat. Ann. (1945) § 631.29; Miss. Code (1942) § 1766; Mo. Rev. Stat. Ann. (1939) § 697 as amended L. 1945, p. 1065; Mont. Rev. Code (1935) § 8890; Neb. Rev. Stat. (1943) § 25-1601; N.M. Stat. (1941) §30-101; N.Y. Jud. Law (1948) § 502 (outside New York City); N.C. Gen. Stat. (1943) § 9-1; N.D. Rev. Code (1943) § 27-0901; Ohio Gen. Code (1938) § 11419-9; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Pa. Stat. (Purdon, 1930) tit. 17, § 942 (general act), cf. tit. 17, § 1235 (Phila. County act); S.C. Code (Supp. 1944) § 608; Utah Code Ann. (1943) § 48-0-8; W.Va. Code (1943) § 5264; Wis. Stat. (1947) § 255.01; Wyo. Comp. Stat. Ann. (1945) § 12-101. Vt. Stat. (1947) § 1586 ("mentally, morally and physically qualified").

In these states the juror must be well informed: Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Kan. Gen. Stat. (1935) § 43-102; Me. Rev. Stat. (1944) c. 103, § 2; Mich. Comp. Laws (1948) § 602.121; N.Y. Jud. Law (1948) § 596 (applying to New York City).

[71] General requirements are made as to the juror's character as well as disqualification resulting from conviction for various crimes. The prospective juror must be possessed of good or fair character in the following jurisdictions: Ala. Code (1940) tit. 13, § 21; Ariz. Code (1939) § 37-102; Ark. Stat. Ann. (1947) § 39-206; Conn. Gen. Stat. (1949) § 7906; Fla. Stat. Ann. (1944) § 40.1(3); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Iowa Code (1946) § 607.1; Kan. Gen. Stat. (1935) § 43-102; Mass. Gen. Laws (1932) c. 234, § 4; Me. Rev. Stat. (1944) c. 103, § 2; Mich. Comp. Laws (1948) § 602.121; Miss. Code (1942) § 1766; Neb. Rev. Stat. (1943) § 25-1601; N.Y. Jud. Law (1948) §§ 502, 596; N.C. Gen. Stat. (1943) § 9-1; S.C. Const. Art. V, § 22; Tenn. Code Ann. (1934) § 992; Tex. Civ. Stat. (Vernon, 1925) Art. 2133; Vt. Stat. (1947) § 1586; W.Va. Code (1943) § 5264; Wis. Stat. (1947) § 255.01.

Other phrases used include "upright character," Ga. Code Ann. (1933) §§ 59-106, 59-201; "moral character," Ariz. Code (1939) § 37-102; Me. Rev. Stat. (1944) c. 103, § 2; N.C. Gen. Stat. (1943) § 9-1; R.I. Gen. Laws (1938) c. 506, §16; Tex. Civ. Stat. (Vernon, 1925) Art. 2133; W.Va. Code (1943) § 5264; and "good reputation," Mo. Rev. Stat. Ann. (1939) § 697 as amended L. 1945, p. 1065. The juror must be a good and lawful person in the District of Columbia, D.C. Code (1940) § 11-1417; must be of "approved integrity," Ark. Stat. Ann. (1947) § 39-206; Me. Rev. Stat. (1944) c. 103, § 2; Mich. Comp. Laws (1948) § 602.121; Neb. Rev. Stat. (1943) § 25-1601; Wis. Stat. (1947) § 255.01. Moreover, the juror must not be an habitual drunkard in several jurisdictions: Ala. Code (1940) tit. 30, § 21; Miss. Code (1942) § 1762; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Tenn. Code Ann. (1934) § 10009; W.Va. Code (1943) § 5262.

Conviction of a crime is a bar to jury service: Mass. Gen. Laws (1932) c. 234, § 8; Mo. Rev. Stat. Ann. (1939) §§ 4322, 4427, 4561, 460 (named crimes); Nev. Const. § 78 (named crimes, forgery, bribery, etc.); N.J. Rev. Stat. (1937) § 2:85-1 as amended L. 1943, c 113; N.D. Rev. Code (1943) § 27.0902 (crimes punished by imprisonment in penitentiary); Ohio Gen. Code (1938) § 11419-51; Utah Code Ann. (1943) § 48-0-9; Va. Code (1942) § 5984 (crimes specified).

Conviction of a felony bars the prospective juror in the following jurisdictions: Ala. Code (1940) tit. 30, §§ 55 (ground for challenge for cause); Ark. Stat. Ann. (1947) § 43-1917 (conviction of a felony is ground for a general challenge); Ariz. Code (1939) § 37-102 as amended L. 1945, c. 50; Calif. Code. Civ. Proc. (1946) § 199(2); Del. Const. Art. V, § 2, Del. Rev. Code (1935) § 4721 as an elector; Colo. Stat. Ann. (1935) c. 95, § 1

(9) membership in a specified group or class;[72] (10) prior

as amended L. 1945, p. 426; D.C. Code (1940) § 11-1417; Fla. Stat. Ann. (1944) § 40.01(2); Ky. Rev. Stat. (1946) § 29.010 (grand juror); Minn. Stat. Ann. (1945) § 631.29; Mont. Rev. Code (1935) § 8892; Neb. Rev. Stat. (1943) §25-160; Nev. Comp. Laws (1929) § 8476; N.Y. Jud. Law (1948) § 596 (applying only to N.Y. City); Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Ore. Comp. Laws. Ann. (1940) § 14-107; Pa. Stat. (Purdon, 1930) tit. 17. § 1279 (2d class county), § 1333 as added L. 1939—P.L. 157 (3d class county); S.D. Code (1939) § 32.1001 amended L. 1947, c. 149; Tex. Civ. Stat. (Vernon, 1925) art. 2133; Vt. Stat. (1947) § 1720; Va. Code (1942) § 5984; Utah Code Ann. (1943) § 48-0-9; Wyo. Comp. Stat Ann. (1945) § 12-102.

Several states bar those convicted of any crime involving moral turpitude: Ala. Code (1940) tit. 30, § 21; D.C. Code (1940) § 11-1417; Ga., Wright v. Davis, 184 Ga. 846, 851, 193 S.E. 757 (1937); N.Y. Jud. Law (1948) § 596 (N.Y. City only); N.C. Gen. Stat. (1943) § 9-1 as amended L. 1947, c. 1007; Ore. Comp. Laws Ann. (1940) § 14-107.

It is to be noted that among persons who shall not be compelled to serve are persons of bad reputation and persons convicted of a felony. Kan. Gen. Stat. (1935) § 43-140 (counties over 90,000 population).

Those convicted of an infamous crime are barred from jury service: Kan. Gen. Stat. (1935) § 21-127; La. Code Prac. (1942) art. 508; Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Nev. Comp. Laws (1929) § 8476, Nev. Const. § 78; N.M. Stat. (1941) § 30-101; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Tenn. Code Ann. (1934) § 10009; W.Va. Code (1943) § 5262; cf. Wis. Stat. (1947) § 255.02(8) (persons so convicted are exempt).

Those convicted of malfeasance in office are barred from jury service: Calif. Code Civ. Proc. (1946) § 199(2); Mont. Rev. Code (1935) § 8892; Utah Code Ann. (1943) § 48-0-9; Wyo. Comp. Stat. Ann. (1945) 12-102.

Those guilty of scandalous crime or gross immorality are barred: Me. Rev. Stat. (1944) c. 103, § 2; S.C. Code (1942) § 628; W.Va. Code (1943) § 5265. Maine also bars those engaged in unlawful traffic in liquor, Me. Rev. Stat. (1944) c. 57, § 78; while in New Hampshire the names of persons interested in the illegal sale of liquor and renting buildings for that purpose are not to be put on the jury list. N.H. Rev. Laws (1942) c. 375, § 3. Mississippi's statute is more liberal, barring only those convicted of an infamous crime or the unlawful sale of intoxicating liquor within five years, but also not permitting "common gamblers" to serve as jurors, Miss. Code (1942) § 1762.

Five states prohibit those under indictment from serving on juries: Ala. Code (1940) tit. 30, § 55; Ariz. Code (1939) § 37-102; Ky. Rev. Stat. (1946) § 29.020 (grand juror); Pa. Stat. (Purdon, 1930) tit. 17, §1333 as added L. 1939, P.L. 157 (3d class county); Tex. Civ. Stat. (Vernon, 1925) art. 2133.

[72] Lawyers are ineligible for service in: N.D. Rev. Code (1943) § 27.0902; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; S.D. Code (1939) § 32.1001 as amended L. 1947, c. 149. As a matter of practice lawyers' names are omitted from the jury list in Georgia, Indiana, Maryland, and many counties of Pennsylvania. Specified public officials, local, state, and federal, are ineligible in: Fla. Stat. Ann. (1944) § 40.07(2); N.Y. Jud. Law (1948) §§ 503, 598; N.D. Rev. Code (1943) § 27-0902; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; S.C. Code (1942) § 627; S.D. Code (1939) § 32.1001 as amended L. 1947, c. 149.

service [73] and requests for service.[74] This classification indicates only the general spheres in which there is regulation. The

[73] Previous service as trial or grand juror leads to disqualification from further service in many of the states under varying circumstances. The statutes are very diverse, almost impossible to classify and for the most part must be enumerated in particular. Thus: In North Dakota no person is to be put on the jury list who served as juror from the town or city in the preceding ten years. N.D. Rev. Code (1943) § 27-0909. In Massachusetts a person serving as a juror is not liable for service again within three years. Mass. Gen. Laws (1932) c. 234, § 2 (except for Nantucket and Duke Counties). Service within two years as a trial juror makes a prospective juror ineligible in eight states: Miss. Code (1942) § 1762; Neb. Rev. Stat. (1943) § 25-1609; N.H. Rev. Laws (1942) c. 375, §§ 15, 16; N.Y. Jud. Law (1948) §§ 549, 601; R.I. Gen. Laws (1938) c. 506, § 21 as amended L. 1939, c. 700; S.D. Code (1939) §32.1007; Tenn. Code Ann. (1934) §§ 9990, 9991; W.Va. Code (1943) § 5264. In the only large grouping possible, service as a trial juror within one year causes ineligibility in fourteen states: Ark. Stat. Ann. (1947) § 39-224; Calif. Code Civ. Proc. (1946) § 199(3), 200(13); D.C. Code (1940) § 11-1410; Kan. Gen. Stat. (1935) § 43-103, see also § 43-140; Ky. Rev. Stat. (1946) § 29.040; Mich. Comp. Laws (1948) 602.123; Mo. Rev. Stat. Ann. (1939) §§ 742, 744, 813.10 as added L. 1945, p. 815; N.J. Rev. Stat. (1937) § 2:85-1 as amended L. 1943, c. 113, § 2:92-2 (person who has served any of three preceding terms is subject to challenge); N.M. Stat. (1941) § 30-113; Okla. Stat. (1937) tit. 38, § 2; Ore. Comp. Laws Ann. (1940) §14-107; Pa. Stat. (Purdon, 1930) tit. 17, § 1101; Va. Code (1942) § 5995; Wis. Stat. (1947) § 255.02(9), see also § 255.07. Cf. Ind. Stat. (Burns, 1946) § 4-3318, person who served as a juror within one year is subject to challenge; if not challenged, may serve. Persons serving as grand jurors within the year are disqualified in New York. N.Y. Jud. Law (1948) §§ 549, 601. In Pennsylvania a juror is disqualified from further service in the same year. Pa. Stat. (Purdon, 1930) tit. 17, § 1101, "persons may be called to serve on jury but once within same year," (general act). A tales juryman is ineligible for service in the same court in North Carolina for two years, and in Oklahoma for one year, N.C. Gen. Stat. (1943) § 9-11; Okla. Stat. (1937) tit. 38, § 5. In Iowa service as a juror since January 1, preceding the last general election disqualifies the juror, and service in the prior year is ground for challenge for cause. Iowa Code (1946) § 609.2 (disqualification), Rule Civil Proced. § 187f. Jury service within six months in a district court and three months in a county court disqualifies jurors in Texas. Tex. Civ. Stat. (Vernon, 1925) art. 2133. In Delaware the jury commissioners are directed to omit as jurors persons serving as grand jurors in the previous year and as petit jurors for past preceding term. Del. Rev. Code (1935) § 4725. In Georgia jurors are ineligible for service for the following term of court. Ga. Code Ann. (1933) § 59-114.

[74] Persons requesting jury service are disqualified in the following states: Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 13 (for 60 days); Ind. Stat. (Burns, 1946) § 4-3301; Iowa Code (1946) § 609.2; Kan. Gen. Stat. (1935) § 43-102; Mich. Comp. Laws (1948) § 602.121; Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Neb. Rev. Stat. (1943) § 25-1612; S.D. Code (1939) § 32.1006; Va. Code (1942) § 5998; W.Va. Code (1943) § 5264 (for two years).

mere listing of these classes cannot create a true picture of the complicated variations of these requirements for qualification as a juror in each state. This is an impossibility.[75]

The exemptions from jury service vary similarly, so much so as to make classification almost hopeless. These exemptions bear witness not only to the varied necessities of life in the United States, but also to the inventiveness and ingenuity of the state legislatures and to the pressures exerted by the various groups that have obtained exemptions.[76] In many states, moreover, persons classified as exempt from jury service but otherwise qualified are in reality disqualified since they are eliminated from the final jury list,[77] although in nine

[75] Report, supra n. 12 at 33 et seq.

[76] Ibid. Cf. also Report of the Special Commission on the Improvement of the Administration of Justice in North Carolina, which has recommended that the grant of exemption to eight named classes be withdrawn. 15 Pop Gov't 7 (1949). Colorado and Michigan appear to be the only states in which the matter of exemption from jury service is primarily left to judicial discretion and is not regulated in minute detail by statute, although even in those states there are certain specific exemptions. Lawyers, persons on active duty with the state guard, and members of religious sisterhoods are those exempted by name in Colorado. Colo. Stat. Ann. (1935) c. 95, § 1 as amended L. 1945, p. 426, § 1. See Special Note, supra n. 68, on repeal of c. 95, §§ 3-9, which related specifically to exemptions; id. c. 111, § 136(b) as amended L. 1943, p. 443, § 14. In Michigan, other than in Wayne County for which there is a statute containing many specific exemptions, throughout the state only pharmacists, persons who have served in the militia for six years, firemen in certain cities and villages, public officials, attorneys and persons over 70 years of age are specifically exempt from jury service. Mich. Comp. Laws (1948) §§ 338.429, 32.15, 70.10, 109.10, 602.139. Cf. id. § 691.464 as to Wayne County.

[77] Ariz. Code (1939) § 37-106; Calif. Code Civ. Proc. (1946) § 205; Colo. Stat. Ann. (1935) c. 95, § 10 (counties with less than 40,000 population); D.C. Code (1940) § 11-1420; Fla. Stat. Ann. (1944) § 40.10 (only if exemption claimed); Conn Gen. Stat. (1949) § 7909; Ga. (cutomary practice); Idaho Code (1947) § 2-302; Iowa Code (1946) § 609.2, par. 9; Kan. Gen. Stat. (1935) § 43-102 (general provision); Me. Rev. Stat. (1944) c. 103, § 5; Mass. Gen. Laws (1932) c. 234, § 4; Mich. Comp. Laws (1948) § 602.121; Miss. (customary practice); Mo. Rev. Stat. Ann. (1939) § 823 (cities of not more than 500,000 inhabitants); Mont. Rev. Code (1935) § 8895 as amended L. 1939, c. 203 (only if exemption claimed) Neb. Rev. Stat. (1943) § 25-1629, Nev. Comp. Laws (1929) § 8484; N.H. Rev. Laws (1942) c. 375, § 3; N.Y. Jud. Law (1948) §§ 593-595 (N.Y. City only); Ohio Gen. Code (1938) § 11419-14; Ore. Comp. Laws Ann. (1940) § 14-202; Pa. Stat. (Purdon, 1930) tit. 17, § 1092 (general act, certain exemptions must, however, be claimed or are considered waived); R.I. Gen. Laws (1938) c. 506, § 16; Tex. Civ. Stat. (Vernon, 1925) arts. 2107, 2160 (small counties); Utah

states the names of those qualified but known to be exempt are placed on the final jury list.[78]

Among the classes of exemptions that may be defined [79] are those applying to: (1) persons practicing certain professions considered vital or valuable to the public [80] (including veteri-

Code Ann. (1943) § 48-0-17; Vt. Stat. (1947) § 1586; Va. Code (1942) § 5988.

[78] Fla. Stat. Ann. (1944) § 40.10 (if have not claimed exemption); Ind. Stat. (Burns, 1946) § 4-3304 as amended L. 1947, c. 15; Kan. Gen. Stat. (1935) § 43-136 (counties over 90,000 population); Md. Code Ann. (1939) art. 51, § 6; Mont. Rev. Code (1935) § 8895 as amended L. 1939, c. 203 (if have not claimed exemption); N.M. Stat. (1941) § 30-109; N.C. (a matter of usual practice); Okla. Stat. (1937) tit. 38, § 2; Wyo. Comp. Stat. Ann. (1945) § 12-105.

[79] Cf. Report, supra n. 12 at 36.

Special Note: Missouri—Under the general provisions relating to jurors various classes, such as attorneys, firemen, clergymen, doctors, oculists, dentists, ferry-keepers, druggists, embalmers, postmasters, coroners, constables, millers, professors, and teachers, are listed as exempt from jury service. Mo. Rev. Stat. Ann. (1939) § 699. However, as indicated in text above, Missouri law also includes provisions for jury service specifically pertaining to various classifications of counties and cities. In some of these provisions relating to these different classes of counties and cities, there are sections entitled "Persons exempted from jury service," Mo. Rev. Stat. Ann. (1939) §§ 742,744, 823, which state either that none of the following persons should be called as, or be permitted to serve as jurors. Among these are persons not sufficiently acquainted with the English language to read or write it, and members of such classes as attorneys, clergymen, physicians, druggists, professors, teachers, ferry keepers, etc. Cf. Mo. Rev. Stat. Ann. (1939) § 813.10 as added L. 1945, p. 815, and § 760 as reenacted L. 1947, No. 19. In these statutes a distinction is made between those ineligible for jury service and those exempted from jury service. Other statutes relate to exemptions in particular geographical units. Mo. Rev. Stat. Ann. (1942) §§ 777-779, 793, 826. These various statutes list different classes of persons, and have individual and particular provisions differing in language and application making classification impossible. All references to Missouri in footnotes 80-88 will be indicated by an asterisk and will only state the general provisions, the asterisk indicating that for counties and cities of various populations the relevant statute must be examined.

[80] *Lawyers:* Ala. Code (1940) tit. 30, § 3; Ariz. Code (1939) § 37-104; Ark. Stat. Ann. (1947) § 39-104; Calif. Code Civ. Proc. (1946) § 200; Colo. Stat. Ann. (1935) c. 95, § 3†; Conn. Gen. Stat. (1949) § 7927; Del. Rev. Code (1935) § 4721; D.C. Code (1940) § 11-1420; Fla. Stat. Ann. (1944) § 40.08(2); Idaho Code (1947) § 2-203; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) § 43-116; Ky. Rev. Stat. (1948) § 29.030(2)(h); La. Code Pract. Ann. (1942) art. 532.2, La. Gen. Stat. (1939) § 1950; La. Code Crim. Law & Proc. (1943) art. 174; Me. Rev. Stat. (1944) c. 103, § 5; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) §§ 602.138, 691.464 (Wayne County); Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699*; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp.

Laws (1931-41) § 8479; N.H. Rev. Laws (1942) c. 375, § 3; N.M. Stat. (1941) § 30-102; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as amended L. 1947, c. 1007; Ohio Gen. Code (1938) § 11419-43; Ore. Comp. Laws Ann. (1940) § 14-108 as amended L. 1943, c. 75; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class county act), tit. 17, § 1322 (3d class county act); R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700; S.C. Code (1942) § 629; Tenn. Code (1934) § 10010; Tex. Civ. Stat. (Vernon, 1925) art 2135 as amended L. 1927, c. 88, L. 1931, c. 221, L. 1933, c. 106; Utah Code Ann. (1943) § 48-0-10; Vt Stat. (1947) § 1724; Va. Code (1942) § 5985; Wash. Rev. Stat. (Remington, 1932) § 95; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.02(2); Wyo. Comp Stat. Ann. (1945) § 12-103.

Clerks, stenographers, and secretaries of attorneys: Calif. Code Civ. Proc. (1946) § 200(3).

Physicians Ala Code (1940) tit. 30, § 3; Ariz. Code (1939) § 37-104; Ark. Stat. Ann. (1947) § 39-104; Calif. Code Civ. Proc. (1946) § 200(6); Conn. Gen. Stat. (1949) § 7927; Del. Rev. Code (1935) § 4721; D.C. Code (1940) § 11-1420; Fla. Stat. Ann. (1944) § 40.08(2); Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) § 43-116; Ky. Rev. Stat. (1946) § 29.030; La. Code Prac. Ann. (1942) art 532 2; Me. Rev. Stat. (1944) c. 103, § 5; Md. Code Ann. (1939) art. 51, § 3; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) § 691.464 (Wayne County); Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699, Mont. Rev. Code (1935) § 8893; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp. Laws (1941) § 8479; N.H. Rev. Laws (1942) c. 375, § 3; N.J. Rev. Stat. (1937) § 2:86-1; N.M. Stat. (1941) § 30-102; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19; N.D. Rev. Code (1943) § 27-0903; Ohio Gen. Code (1938) § 11419-43; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Ore. Comp. Laws Ann. (1940) § 14-108 as amended L. 1943, c. 75; Pa. Stat. (Purdon, 1930) tit. 17, §§ 1279, 1322 (2d class and 3d class counties); R.I. Gen. Laws (1938)c. 506, § 3 as amended L. 1939, c. 700; S.C. Code (Supp. 1944) § 624; S.D. Code (1939) § 32.1002; Tenn. Code (1934) § 10010; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) § 48-0-10; Vt. Stat. (1947) § 1724; Va. Code (1942) § 5985; Wash. Rev. Stat. (Remington, 1932) § 95; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.02(2); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Dentists Ala. Code (1940) tit. 30, § 3; Ariz. Code (1939) § 37-104; Ark. Stat. Ann. (1947) § 39-106; Calif. Code Civ. Proc. (1946) § 200(6); Del. Rev. Code (1935) § 4721; Fla. Stat. Ann. (1944) § 466 21; Ga. Code Ann (1933) § 59-112; Idaho Code (1947) § 53-1322; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 91, § 69; Ind. Stat. (Burns, 1943) § 63-524; Iowa Code (1946) § 607.2; Ky. Rev. Stat. (1946) § 29.030; La. Gen. Stat. (1939) §§ 1942-1943; Me. Rev Stat. (1944) c. 103, § 5 as amended L. 1947, c. 139; Md. Code Ann. (1939) art. 32, § 18; Minn. Stat. Ann. (1945) § 593.18; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699*; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Neb Rev. Stat. (1943) § 25-160; Nev. Comp. Laws (1941) § 8479; N.J. Rev. Stat. (1937) § 2:86-1; N.M. Stat. (1941) § 30-102; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 90-45; N.D. Rev. Code (1943) § 27-0903; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Ore. Comp. Laws Ann. (1940) § 14-108; R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700; S.C. Code (1942) §§ 629, 5220; S.D. Code (1939) § 32.1002; Va Code (1942) § 5985; W.Va Code

(1943) § 5262; Wis. Stat. (1947) § 255.02(2).

Pharmacists or druggists: Ala. Code (1940) tit. 30, § 3; Ariz. Code (1939) § 37-104; Ark. Stat. Ann. (1947) § 72-162; Calif. Code Civ. Proc. (1946) § 200(6); Del. Rev. Code (1935) § 4721; Fla. Stat. Ann. (1944) § 40.08(2): Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) § 43-116; Ky. Rev. Stat. (1946) § 29.030; La. Code Prac. Ann. (1942) art. 532.2; Md. Code Ann. (1939) art. 51, § 3; Mich. Comp. Laws (1948) § 338.429; Minn. Stat. Ann. (1945) § 593.18; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699; Mont. Rev. Code (1935) § 8893 as amended 1939; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp. Laws (1931-41) § 8479; N.M. Stat. (1941) § 36-102; N.Y., Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19; N.D. Rev. Code (1943) § 27-0903; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Ore. Comp. Laws Ann. (1940) § 14-110; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class); R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700; S.C. Code (1942) § 629; S.D. Code (1939) § 32.1002; Tenn. Code (1934) § 10010; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) 48-0-10; Va. Code (1942) § 5985; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.02(5); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Embalmers, undertakers, morticians, or funeral directors: Ala. Code (1940) tit. 13, § 3; Ariz. Code (1939) § 37-104; Ark. Stat. Ann. (1947) § 39-105; Del. Rev. Code (1935) § 4721; Fla. Stat. Ann. (1944) § 470.27; Ga. Code Ann. (1933) § 59-112; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) § 65-1709; Ky. Rev. Stat. (1946) § 29.030; Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Mo. Rev. Stat. Ann. (1939) § 699*; Mont. Rev. Code (1935) § 8893 as added L. 1939; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp. Laws (1941) § 8479; N.M. Stat. (1941) § 30-102; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as amended L. 1947, c. 1007; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Ore. Comp. Laws Ann. (1940) § 14-108; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class counties); R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700; S.C. Code (1942) § 629; S.D. Code (1939) § 32.1002; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Va. Code (1942) § 5985; Wash. Rev. Stat. (Remington, 1932) § 94; Wis. Stat. (1947) § 255.02(5); Wyo. Comp. Stat. Ann. (1945) § 37-1213.

Optometrists: Ala. Code (1940) tit. 30, § 3; Calif. Code Civ. Proc. (1946) § 200(6); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Mo. Rev. Stat. Ann. (1939) § 699*; N.Y. Jud. Law (1948) §§ 546,599; N.C. Gen. Stat. (1943) § 9-19 was amended 1947; Ore. Comp. Laws Ann. (1940) § 14-108 as amended L. 1943, c. 75; R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700; S.C. Code (1942) § 629; Va. Code (1942) § 5985.

Chiropractors and/or osteopaths Iowa Code (1946) § 607.2; Miss. Code (1942) § 1764; N.C. Gen. Stat. (1943) § 90-150; Ore. Comp. Laws Ann. (1940) § 14-108 as amended 1943; R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700.

Veterinarians: Del. Rev. Code (1935) § 4721; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Ind. Stat. (Burns, 1943) § 63-1710; Iowa Code (1946) § 607.2; Me. Rev. Stat. (1944) c. 103, § 5.

Nurses: Iowa Code (1946) § 607.2; Me. Rev. Stat. (1944) c. 103, § 5; Mont. Rev. Code (1935) § 8893 as added 1939; Nev. Comp. Laws (1941) § 8479; N.C. Gen. Stat. (1943) § 9-19 as amended 1947; Pa. Stat. (Purdon, 1930) tit. 17, §1279 (2d class). In South Carolina dental hygienists are exempt. S.C. Code (1942) § 5220.

naries and embalmers, etc., as well as members of the legal and medical profession); (2) persons engaged in certain businesses or trades where private and public interest require they should not be taken from their employment [81] (including such persons

Teachers and professors: Ala. Code (1940) tit. 30, § 3; Ariz. Code (1939) § 37-104 (also exempts school truck drivers, school janitors, and school boiler tenders); Ark. Stat. Ann. (1947) § 80-508; Calif. Code Civ. Proc. (1946) § 200(5); Del. Rev. Code (1935) § 4721; Fla. Stat. Ann. (1944) §§ 40.08(2), 231.05; Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) § 43-116; Ky. Rev. Stat. (1946) § 29.030; La. Code Prac. Ann. (1942) art. 532 2; Me. Rev. Stat. (1944) c. 103, § 5; Md. *Code Ann. (1939) art. 51, § 3;* Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) § 691.464 (Wayne County); Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699*; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Nev. Comp. Laws (1941) § 8479; N.J. Rev. Stat. (1937) § 2:86-2; N.M. Stat (1941) § 30-102; N.D. Rev. Code (1943) § 27.0903; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class); R.I. Gen. Laws (1938) c. 506, § 3; Tenn. Code Ann. (1934) § 10010, Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) § 48-0-10; Va. Code (1942) § 5985; Wash. Rev. Stat. (Remington, 1932) § 95; W.Va. Code (1943) §§ 1812, 5262; Wis. Stat. (1947) § 255.02(3); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Clergymen: Ariz. Code (1939) § 37-104; Ark. Stat. Ann. (1947) § 39-104; Calif. Code Civ. Proc. (1946) § 200(4); Del. Rev Code (1935) § 4721; D.C. Code (1940) § 11-1420; Fla. Stat. Ann. (1944) §§ 40.08(2), 231.05; Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) § 43-116; Ky. Rev. Stat. (1946) § 29 030; La. Code Prac. Ann. (1942) art. 532.2; Me. Rev. Stat. (1944) c. 103, § 5; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) § 691.464 (Wayne County); Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699*; *Mont.* Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp. Law (1941) § 8479; N.H. Rev. Laws (1942) c. 375, § 3; N.M. *Stat. (1941) § 30-102;* N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as amended 1947; N.D. Rev. Code (1943) § 27-0903; Ohio Gen. Code (1938) § 11419-43; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class); S.C. Code (1942) § 629; S.D. Code (1939) § 32.1002; Tenn. Code Ann. (1934) § 10010; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Vt. Stat. (1947) § 1724; Va. Code (1942) § 5985; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.62(2); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Certified public accountants: Ky. Rev. Stat. (1946) § 325.430.

Actuaries: Ala. Code (1940) tit. 30, § 3.

* See Special Note supra n. 79.
† See Special Note supra n. 68.

[81] *Newspaper reporters, editors, publishers, printers, linotype operators:* Ala. Code (1940) tit. 30, § 3; Ariz. Code (1939) § 37-104; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Mont. Rev. Code (1935) § 8893 as added 1939; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as

amended 1947; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) § 48-0-10; Wyo. Comp. Stat. Ann. (1945) § 12-103.

Radio announcers and engineers: Ala. Code (1940) tit. 30, § 3; N.C. Gen. Stat. (1943) § 9-19 as amended 1947.

Certain railroad employees: Ala. Code (1940) tit. 13, § 3; Ariz. Code (1939) § 37-104, Calif. Code Civ. Proc. (1946) § 200(12); Colo. Stat. Ann. (1935) c. 95, § 7 †; Fla. Stat. Ann. (1944) § 40.08(2); Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ky. Rev. Stat. (1946) § 29.030; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) § 691.64 (Wayne County); Miss. Code (1942) § 1764; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Nev. Comp. Laws (1941) § 8479; N.C. Gen. Stat. (1943) § 9-19 as amended 1947: S.C. Code (1942) § 629; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) § 48-0-10; Va. Code (1942) § 5985; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.01(6); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Seamen, pilots and steamboat personnel: Ala. Code (1940) tit. 13, § 3; Calif. Code Civ. Proc. (1946) § 200(10); D.C. Code (1940) § 11-1420; Ga. Code Ann. (1933) § 59-112; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as amended 1947; R.I. Gen. Laws (1938) c. 506, § 3; Va. Code (1942) § 5985.

Ferryboat men: Ark. Stat. Ann. (1947) § 39-104; Calif. Code Civ. Proc. (1946) § 200(10); Fla. Stat. Ann. (1944) § 40.08(2); Ga. Code Ann. (1933) § 59-112; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4 (constant ferrymen); Ind. Stat. (Burns, 1934) § 36-2612; Kan. Gen. Stat. (1935) § 43-116; Mich. Comp Laws (1948) § 691.464 (Wayne County); Minn. Stat. Ann (1945) § 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699 *; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Va. Code (1942) § 5985; Wis. Stat. (1947) § 255.01(6).

Employees of telephone or telegraph companies: Ala. Code (1940) tit. 13, § 3; Ariz. Code (1939) § 37-104; Calif. Code Civ. Proc. (1946) § 200(10); Colo. Stat. Ann. (1935) c. 95, § 3 †; Fla. Stat. Ann. (1944) § 40.08(2); Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ky. Rev. Stat. (1946) § 29.030; La. Code Prac. Ann. (1942) art. 532.2; Minn. Stat. Ann. (1945) § 593.04, 628.43; Miss. Code (1942) § 1764; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; N.J. Rev. Stat. (1937) §2:86-2; N.C. Gen. Stat. (1943) § 9-19 as amended 1947; Pa. Stat. (Purdon, 1930) tit. 15, § 2461; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) § 48-0-10; Va. Code (1942) § 5985; Wash. Rev. Stat. (Remington, 1932) §11358; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.02(6); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Express company workers Ariz. Code (1939) § 37-104; Calif. Code Civ. Proc. (1946) § 200(10'; Idaho Code (1947) § 2-203; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Utah Code Ann. (1943) § 48-0-10; Wis. Stat. (1947) § 255.02(6); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Bank tellers, cashiers, and bank presidents: Del. Rev. Code (1935) § 4721; Ky. Rev. Stat. (1946) § 29.030; Me. Rev. Stat. (1944) c. 103, § 2; Miss. Code (1942) § 1764; Wis. Stat. (1947) § 255.02(2).

Millers: Fla. Stat. Ann. (1944) § 40.08(2); Ga. Code Ann. (1933) § 59-112; Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699 *; N.C. Gen. Stat. (1943) § 9-19 as amended 1943; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended;

as printers, millers, ferry-boat men and bank tellers); (3) specified governmental officials and employees in government departments of particular public interest[82] (post office em-

Utah Code Ann. (1943) § 48-0-10; Wis. Stat. (1947) § 255.02(4).

Various other examples of occupations whose contributions to the community were considered vital in particular jurisdictions may be cited: In Louisiana public utility employees and *chief engineers of electric and ice plants and sugar factories* as well as commercial travelers and commission merchants are exempt from jury service. La. Code Prac. Ann. (1942) art. 532.2. *Overseers of secret manufacturing processes which they alone are competent to direct are exempt in* Rhode Island. R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700. Harvesters while actually harvesting grain, potatoes, tobacco or hay in Virginia. Va. Code (1942) § 5985. Lighthouse keepers in Massachusetts. Mass Gen. Laws (1932) c. 234, § 1 as amended L. 1935, c 257.

* See Special Note supra n. 79.
† See Special Note supra n 68.

[82] *Governmental officials,* i.e., town *and state and federal executives, etc.* Ala. Code (1940) tit. 13, § 3; Ariz. Code (1939) § 37-104; Calif. Code Civ. Proc. (1946) §§ 200(1), (2); Colo Stat Ann (1935) c. 95, § 3 †; Del. Rev. Code (1935) § 4721; D.C. Code (1940) § 11-1420; Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ill. Rev. Stat. (Smith-Hurd 1947) c. 78, § 4; Iowa Code (1946) § 607.2; Kan Gen. Stat. (1935) § 43-116; Ky. Rev. Stat. (1946) § 29.030; La. Code Prac. Ann. (1942) § 532.2; Me. Rev. Stat. (1944) c. 103, § 5; Md. Code Ann. (1939) art. 51, §§ 2,3; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) §§ 602.138, 691.464 (Wayne County also exempts customs officials); Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699 *; Mont. Rev. Code (1935) § 8893 as amended 1939, c. 203; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp. Laws (1941) § 8479; N.H. Rev. Laws (1942) c. 375, § 3; N.J. Rev. Stat. (1937) § 2:86-2; N.M. Stat. (1941) § 30-102; N.Y. Jud. Law (1948) § 503; N.D. Rev. Code (1943) § 27-0903; Ohio Gen. Code (1938) § 11419-43; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Ore. Comp. Laws Ann. (1940) § 14-108 as amended 1943; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class counties); R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700; S.C. Code (1942) § 629; Tenn. Code Ann. (1934) § 10010; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) § 48-0-10; Vt. Stat. (1947) § 1724; Va. Code (1942) § 5985; Wash. Rev. Stat. (Remington, 1932) § 95; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.02(1); Wyo. Comp. Stat. Ann. (1945) § 12-103

Firemen: Ariz. Code (1939) § 37-104; Ark. Stat. Ann. (1947) § 39-107; Calif. Code Civ. Proc. (1946) § 200(11); Colo. Gen. Stat. (1935) c. 95, § 4 †; Conn. Gen. Stat. (1949) § 7927; D.C. *Code* (1940) § 11-1420; Fla. Stat. Ann. (1944) § 40.08(2); Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-204; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Ind. Stat. (Burns, 1933) § 48-6133; Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) § 43-116; Ky. Rev. Stat. (1946) § 29.030; La. Code Prac. Ann. (1942) art. 532.2; Me. Rev. Stat. (1944) c. 12, § 74; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) § 691.464 (Wayne County) §§ 70.10, 109.10 (certain cities and villages); Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Miss. Code (1942) § 1764; Mo. Rev. Stat. Ann. (1939) § 699 *; Mont.

Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Neb. Rev. Stat. (1943) § 25-1601; Nev. Comp. Laws (1941) § 8479; N.H. Rev. Laws (1942) c. 375, § 3; N.J. Rev. Stat. (1937) §§ 2:86-2, 2:86-3; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as amended 1947; N.D. Rev. Code (1943) § 27-0903; Ohio Gen. Code (1938) § 11419-43; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Ore. Comp. Laws Ann. (1940) § 14-108 as amended 1943; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class); R.I. Gen. Laws (1938) c. 506, § 3; S.D. Code (1939) § 32.1002; Tenn. Code Ann. (1934) § 10010; Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended; Utah Code Ann. (1943) § 48-0-10; Va. Code (1942) § 5985; Wash. Rev. Stat. (Remington, 1932) § 95; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255.02(1); Wyo. Comp. Stat. Ann (1945) § 12-103.

National guardsmen and militiamen Ala. Code (1940) tit. 13, § 3: Ark. Stat. Ann. (1947) § 11-1007; Calif. Code Civ. Proc. (1946) § 200(11); Colo. Stat. Ann. (1935) c. 111, § 136 as added L. 1943, p. 433; Del. Laws (1941) c. 81, pp. 252-254; D.C. Code (1940) § 11-1420; Fla. Stat. Ann. (1944) § 250.64; Ga. Code Ann. (1933) § 86-1610 as added L. 1943, pp. 134, 138; Idaho Code Ann. (1932) § 45-406; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 129, §§ 9, 273; Ind. Stat. (Burns, 1933) § 45-1210; Kan. Gen. Stat. (1935) § 43-140 (counties over 90,000), Kan. Gen. Stat. (Supp. 1947) § 48-512 as added L. 1941, c. 275; Ky. Rev. Stat. (1946) § 29.030; Me. Rev. Stat. (1944) c. 12, § 74; Md. Code Ann. (1939) art. 65, § 52; Mass. Gen. Laws (1932) c. 33, § 53; Minn. Stat. Ann. (1945) § 192.24; Mich. Comp. Laws (1948) §§ 32.15, 691.464 (Wayne County); Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Neb. Rev. Stat. (1943) §§ 25-1601, 55-187 as amended L. 1945, c. 134; N.J. Rev. Stat. (1937) § 2:86-2; N.H. Rev. Laws (1942) c. 144, § 22; N.M. Stat. (1941) § 30-102; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as amended 1947; Ohio Gen. Code (1938) § 5195; Okla. Stat. (1937) tit. 38, § 10 as amended 1937; Ore. Comp. Laws Ann. (1940) § 14-109; Pa. Stat. (Purdon, 1930); tit. 51, §§ 76, 200 as amended 1947; R.I. Gen. Stat. (1938) c. 649, § 71; S.D. Code (1939) § 32.1002; Tenn. Code Ann. (1934) § 845.16 (Under id. § 845.22 patrons of the National Guard, persons subscribing $10.00 or more to the funds of such organization are exempt from jury duty for one year); Tex. Civ. Stat. (Vernon, 1925) § 5840; Utah Code Ann. (1943) § 48-0-10; Vt. Stat. (1947) § 1724; Va. Code (1942) § 5985; Wash. Rev. Stat. (1942) § 8597; W.Va. Code (1943) § 1264(22); Wis. Stat. (1947) § 255.02(1); Wyo. Comp. Stat. Ann. (1945) § 12-103.

Police D.C. Code (1940) § 11-1420; Ga. Code Ann. (1933) § 59-112; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 4; Ind. Stat. (Burns, 1933) § 48-6133; Ky. Rev. Stat. (1944) § 29.030; Mich. Comp. Laws (1948) § 691.44 (Wayne County); Minn. Stat. Ann. (1945) §§ 593.04, 628.43; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Nev. Comp. Laws (1941) § 8479; N.J. Rev. Stat. (1937) §§ 40:174-42, 40:174-165, 40:174-195; N.Y. Jud. Law (1948) §§ 503(3) (sheriff), 546, 599; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class); R.I. Gen. Laws (1938) c. 506, § 3; Wash. Rev. Stat (Remington, 1932) § 95; W.Va. Code (1943) § 5262.

Attendants in institutions such as almshouses, state hospitals, asylums, etc.: Ala. Code (1940) tit. 30, § 3 (two named state hospitals); Ark. Stat. Ann. (1947) § 59-209; Calif. Code Civ. Proc. (1946) § 200(7); D.C. Code (1940) § 11-1420; Fla. Stat. Ann. (1944) § 40.08(3); Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ky. Rev. Stat. (1946) § 29.030; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Law (1949) § 402.15; Mo. Rev. Stat. Ann. (1939) § 699*; Mont. Rev.

ployees, firemen, policemen, and the like); (4) women;[83]

Code (1935) § 8893 as amended L. 1939, c. 203; N.J. Rev. Stat. (1937) § 2:86-2; N.Y. Jud. Law (1948) §§ 546, 599; N.C. Gen. Stat. (1943) § 9-19 as amended 1947; Ohio Gen. Code (1938) § 11419-43; S.C. Code (1942) § 6244; Va. Code (1942) § 5985; Wash. Rev. Stat. (Supp. 1941) § 6130-39 as added L. 1939, c. 46; W.Va. Code (1943) § 5262; Wis. Stat. (1947) § 255:02(1); Wyo. Comp. Stat. (1945) § 12-103.

Mail carriers, railway mail carriers, R.F.D. carriers, and other postal employees: Calif. Code Civ. Proc. (1946) § 200(10); Ga. Code Ann. (1933) § 59-112; Idaho Code (1947) § 2-203; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Mich. Comp. Laws (1948) § 691.464 (Wayne County); Mo. Rev. Stat. Ann. (1939) § 699*; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Neb. Rev. Stat. (1943) § 25-1601: Nev. Comp. Laws (1941) § 8479; N.C. Gen. Stat (1943) § 9-19 as amended 1947; N.D. Rev. Code (1943) § 27-0903; Okla Stat (1937) tit. 38, § 10 as amended 1937; S.D. Code (1939) § 12-1002; Tenn. Code Ann. (1934) § 10010; Utah Code Ann. (1943) § 48-0-10; Va. Code (1942) § 5985; W.Va. Code (1943) § 5262; Wyo. Comp. Stat Ann. (1945) § 12-103.

Jail employees: Ala. Code (1940) tit. 13, § 3; Ark. Stat. (1947) § 46-124; Calif. Code Civ. Proc. (1946) § 200(2); Idaho Code (1947) § 2-203; Kan. Gen. Stat. (1935) § 76-2422; Ky. Rev. Stat. (1946) § 29.030; Mass. Gen. Laws (1932) c. 234, § 1; Mont. Rev. Code (1935) § 8893 as amended L. 1939, c. 203; Neb. Rev. Stat. (1943) §§ 25-1601, 83-411; N.J. Rev. Stat. (1937) § 2:80-2; N.D. Rev. Code (1943) §§ 12-4710, 12-4623; S.C. Code (1942) § 1979; Utah Code Ann. (1943) § 48-0-10; Va. Code (1942) § 5985; W.Va. Code (1943) § 5262; Wyo. Comp. Stat. Ann. (1945) § 12-103.

Fish and game wardens: N.J. Rev. Stat. (1937) § 2:86-1.

Forestry agents: Tex. Civ. Stat. (Vernon, 1925) art. 2135 as amended.

Customs house officers: Va. Code (1942) § 5985.

Coroners and overseers of the roads: Mo. Rev. Stat. Ann. (1942) § 699.*

* See Special Note supra n. 79.
† See Special Note supra n. 68.

[83] Women are exempt from jury service: Ariz. Code (1939) § 37-102 as amended L. 1945, c. 50; Ark. Stat. Ann. (1947) §§ 39-112 to 39-114; D.C. Code (1940) § 11-1418; Idaho Code (1947) §§ 2-304, 2-411; Kan. Gen. Stat. (1935) § 243-116; Ky. Rev. Stat. (1946) § 29.030; Minn. Stat. Ann. (1945) § 628.49; Mo. Const. (1945) Art. I, § 22; Nev. Comp. Laws (1931-41) § 8479; N.H. Rev. Laws (1942) c. 375, § 1 as amended L. 1947, c. 95; N.Y. Jud. Law (1948) §§ 546(7), 599(7); N.C. Gen. Stat. (1943) § 9-19 as amended L. 1947, c. 1007 (under three special conditions); N.D. Rev. Code (1943) § 27-0904; Wash. Rev. State. (Remington, 1932) § 95; Wis. Stat. (1947) § 6.015(2). In Delaware permissive exemption from jury service for women was repealed by Laws 1945, c. 253.

In order to serve on a jury women in Louisiana and New Hampshire must file a written notice of desire to serve. La. Code Pract. Ann. (1942) § 495.1; N.H. Laws (1947) c. 95. In Kansas the assessor must inquire of every woman if she wishes to serve, or not. Kan. Gen. Stat. (1935) § 43-117.

Women are exempted under special conditions such as having minor children, or illness in the family, etc.: Conn. Gen. Stat. (1949) § 7927; Neb. Rev. Stat. (1943) § 25-1691.02; N.J. Rev. Stat. (1937) § 2:86-1; Utah Code Ann. (1943) § 48-0-10.

(5) persons of certain ages;[84] (6) persons who have served once already within a certain period;[85] and (7) particular named classes because of special private hardship.[86] Persons may also be excused temporarily because of emergencies of one sort or another causing particular hardship at that time. This summary of the varieties of exemptions allowed in the several states indicates somewhat the complexities of the statutory

[84] In Massachusetts persons under twenty-five may claim exemption. Mass. Gen. Laws (1932) c. 234, § 1.

Persons over sixty are exempt: Ariz. Code (1939) § 37-104; Colo. Stat. Ann. (1935) c. 95, § 3 †; Ga. Code Ann. (1933) § 59-112; Ind. Stat. (Burns, 1946) § 4-3317; La. Code Prac. Ann. (1942) arts. 532.2, 532.19; Minn. Stat. Ann. (1945) § 593.04 provides the qualifications, disabilities and exemptions of petit jurors, which are the same as those prescribed by law for grand jurors, § 628.43 as to grand jurors; N.M. Stat. (1941) § 30-102; N.D. Rev. Code (1943) § 27-0902; Okla. Stat. (1937) tit. 38, § 10 as amended L. 1937, p. 2; Tex. Civ. Stat. (Vernon, 1925) art. 2135; Wash. Rev. Stat. (Remington, 1932) § 95; Wis. Stat. (1947) c. 255.02(7).

Persons over sixty-five are exempt: Ala. Code (1940) tit. 30, § 21; Ark. Stat. Ann. (1947) § 39-104; Fla. Stat. Ann. (1944) § 40.08(1); Iowa Code (1946) § 607.2; Kan. Gen. Stat. (1935) §§ 43-116, 43-140; La. Code Crim. Law & Proc. (1943) § 174; Mo. Rev. Stat. Ann. (1939) § 699 *; Nev. Comp. Laws (1929) § 8488; Tenn. Code (1934) § 10010.

Persons over seventy are exempt: Ky. Rev. Stat. (1946) § 29.030; Md. Code Ann. (1939) art. 51, § 3; Mass. Gen. Laws (1932) c. 234, § 1; Mich. Comp. Laws (1948) § 602.138; Ohio Gen. Code (1938) § 11419-43; R.I. Gen. Laws (1938) c. 506, § 3.

[85] Service as a trial juror within one year is ground for exemption from jury service in the following jurisdictions: Colo. Stat. Ann. (1935) c. 95, §§ 15, 53; Idaho Code (1947) § 2-203 (certain specific exceptions); Ill. Rev Stat. (Smith-Hurd, 1947) c. 78, § 148; La. Code Prac. Ann. (1942) art. 532.2; Mich. Comp. Laws (1948) § 602.138; Mo. Rev. Stat. Ann. (1939) §§ 290, 1007 (exempt from service for one year, ineligible if challenged, cf. supra n. 79); Neb. Rev. Stat. (1943) § 25-1601; S.C. Code (1942) § 630; Utah Code Ann. (1943) § 48-0-10; Vt. Stat (1947) § 724.

[86] Persons having physical disabilities: Fla. Stat. Ann. (1944) § 40.08(1); Iowa Code (1946) § 607.2; Tenn. Code (1934) § 10011. In Iowa conscientious objectors to jury service are exempt Iowa Code (1946) § 607.2. In Kansas one of the exemptions from jury service which may be claimed is inability to read, write or understand English. Kan. Gen. Stat. (1935) § 43-140 (counties over 90,000 population). The following are also exempt from jury service: Students in certain named colleges, R.I. Gen. Laws (1938) c. 506, § 3 as amended L. 1939, c. 700; Christian Science practitioners, Calif. Code Civ. Proc. (1946) § 200(14), Ore. Comp. Laws Ann. (1940) § 14-108 as amended 1943; Seventh Day Adventists on Saturdays, Kan. Gen. Stat. (1935) § 69-101; persons living more than sixty miles from the county seat, and who pay a fee of $25.00, Nev Comp. Laws (1941) § 8479; ex-Confederate soldiers at the discretion of county commissioners, N.C. Gen. Stat. (1943) § 9-19 as amended 1947.

* See Special Note supra n. 79.

† See Special Note supra n. 68.

picture and demonstrates that exemptions are most frequently accorded to those persons having the most education and experience, thus probably intensifying the difficulties attached to the problem of securing competent persons as jurors who represent a "cross-section" of the community.

(B) Manner of selection: questionnaires, interviews, etc.

In the attempt to satisfy these statutory requirements as to the qualifications and exemptions of jurors, and in order to obtain persons of sufficient intelligence and experience in life to be able to understand the various issues presented in both civil and criminal litigation, the persons selecting prospective jurors frequently need information about the background of the latter. The Committee on Selection of Jurors of the Section of Judicial Administration, as well as the Knox Committee, recommended the use of questionnaires and elimination of the unfit by personal examination.[87] Although this recommendation was not specifically adopted by the American Bar Association, its recommendation for the use of a system similar to that employed in Cleveland connotes the use of questionnaires and personal interviews as used there. The extent of precourt examination of the qualifications of jurors is pertinent to the problem of obtaining competent jurors and removing much of such burden from the court, with a resultant saving of time, and is illustrative of the duties to be undertaken by the jury commissioners if their task is not to be merely mechanical.

The officials making the selection for the jury panel, relying in part on their own knowledge, in eighteen jurisdictions[88]

[87] Cf. Appendix A at 549 and Recommendation V supra n. 23

[88] Ala. Code (1940) tit. 30, § 24; Ark. Stat. Ann. (1947) § 39-206; Colo Stat. Ann. (1935) c. 95, §§ 10, 25, 39; Del. Rev. Code (1935) § 4724; Fla. Stat. Ann. (1944) §§ 40.10, 41.01; Ga. Code Ann. (1933) § 59-106; Ind. Stat. (Burns, 1946) § 4-3301; Kan. Gen. Stat. (1935) § 43-102 (counties under 90,000 population); Md. (in Baltimore City and some counties); Mont. Rev. Code (1935) §§ 8896, 8897; Nev. Comp. Laws (1929) § 8486; N.H. Rev. Laws (1942) c. 375, § 1; N.M. Stat. (1941) § 30-109; N.Y. Jud. Law (1948) § 501 (except N.Y. City); Tenn. Code Ann. (1934) § 9988; Tex. Civ. Stat. (Vernon, 1925) art. 2106; Utah Code Ann. (1943) § 48-0-17; W.Va. Code (1943) § 5264 (Jury commissioners are usually personally acquainted with majority on list and judge from such acquaintanceship).

select names at random or from those referred to them by others [89] or from various sources, such as the assessor's roll or tax list,[90] the poll list or voter's registry,[91] the telephone and city directories, and other lists such as census reports, while attempting to secure a proportional geographical distribution of the jurors.[92]

[89] Fla. Stat. Ann. (1944) § 40.14; Kan. Gen. Stat. (1935) § 43-136 (counties over 90,000 population); Pa. Stat. (Purdon, 1930) tit. 17, § 942 (general act); Wyo. Comp. Stat. Ann. (1945) § 12-107.

[90] Colo. Stat. Ann. (1935) c. 95, § 10 as amended L. 1943, p. 39; Ga. Code Ann. (1933) § 59-106; Ind. Stat. (Burns, 1946) § 4-3304 as amended L. 1947, c. 15; Kan. Gen. Stat. (1935) § 43-102; Ky. Rev. Stat. (1946) § 29.070; Md. Code Ann. (1939) art. 51, § 6; Mich. Comp. Laws (1948) §§ 602.210, 602.151 but cf. § 691.413 (jurors in counties of upper peninsula); Mont. Rev. Code (1935) § 8897; N.Y. Jud. Law (1948) § 501 (except N.Y. City); N.D. Rev. Code (1943) § 27-09-6; Okla. Stat. (1937) tit. 38, § 2; Pa. Stat. (Purdon, 1930) tit. 17, § 1235 (Phila. County); Tex. Civ. Stat. (Vernon, 1925) art. 2094 as amended L. 1929, c. 43, art. 2107 as amended L. 1943, c. 100; Utah Code Ann. (1943) § 48-0-17; Wyo. Comp. Stat. Ann. (1945) §§ 12-107, 27-512 to 27-515.

[91] Ark. Stat. Ann. (1947) § 39-206; Calif. (in practice no statutory requirement); Conn. Gen. Stat. (1949) § 7909; Idaho Code (1947) § 2-302; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, §§ 1, 25; Iowa Code (1946) § 609.1; Me. Rev. Stat. (1944) c. 103, § 2; Mass. Gen. Laws (1932) c. 234, § 4; Mich. Comp. Laws (1948) § 691.413 (counties of the upper peninsula); Minn. Stat. Ann. (1945) §§ 593.13, 593.14; Miss. Code (1942) § 1766; Neb. Rev. Stat. (1943) §§ 25-1627, 25-1628; Nev. Comp. Laws (1929) § 8484; N.H. (usual practice); N.M. Stat. (1941) § 30-103; Ohio Gen. Code (1938) § 11419-9; Pa. Stat. (Purdon, 1930) tit. 17, § 942 (general act); R.I. Gen. Laws (1938) c. 506, § 5 as amended 1939; S.C. Code (Supp. 1944) § 608; Vt. Stat. (1947) § 1586; Wash. Rev. Stat. (Supp. 1943) § 96. In Maryland, certain counties of Missouri, New Jersey, and Oregon both the assessor's roll and the voters' registry are used. Md. Code Ann. (1939) art. 51, §§ 6, 7 (these are the general provisions, but there are many local exceptions); Mo. Rev. Stat. Ann. (1939) § 813.3 as added L. 1945, p. 815; N.J. Rev. Stat. (1937) § 2:88-4 as added L. 1945, p. 815; Ore. Comp. Laws Ann. (1940) § 14-203. In North Carolina the tax list is used together with a list of other residents prepared by the clerk. N.C. Gen. Stat. (1943) § 9-1 as amended L. 1947, c. 1007. In the selection of jurors in New York City and certain counties of Missouri the use of the telephone directory, tax records, and voters' list are specifically enumerated in the statute. N.Y. Jud. Law (1948) § 594; Mo. Rev. Stat. Ann. (1939) § 754 as amended L. 1947, Vol. 1, p. 342 (counties having 400,000 to 800,000 population).

[92] Ala. Code (1940) tit. 30, §§ 24.25; Ark. Stat. Ann. (1947) § 39-203; Calif. Code Civ. Proc. (1946) § 206; D.C. Code (1940) § 11-1402; Idaho Code (1947) § 2-302; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 31; Ind. Stat. (Burns, 1946) § 4-3304; Ky. Rev. Stat. (1946) § 29.070; Mich. Comp. Laws (1948) §§ 602.122, 691.413; Miss. Code (1942) § 1766; Neb. Rev. Stat. (1943) §§ 25-1603, 25-1614, 25-1628; N.H. Rev. Laws (1942) c. 375, § 2; N.J. Rev. Stat. (1937) § 2:88-1; N.M. Stat. (1941) § 30-109; N.D. Rev. Code (1943) § 27-0906; Ohio Gen. Code (1938) § 11419-

Before the names are placed on the final jury list or placed in a jury wheel, an investigation is made in twenty jurisdictions to determine whether the prospective juror meets the statutory qualifications, whether the juror is exempt, and whether the juror is the type of person who, in addition to meeting the required statutory qualifications, also has qualities of intelligence, experience, education, etc., that would make him a satisfactory juror.[93] Nine states investigate the prospective juror only to determine whether he meets the statutory qualifications or is exempt.[94] Two states only determine whether

9; Okla. Stat. (1937) tit. 38, § 2; Ore. Comp. Laws Ann. (1940) § 14-203; R.I. Gen. Laws (1938) c. 506, § 8; S.D. Code (1939) § 32.1005; Tenn. Code Ann. (1934) § 9987; Tex. Civ. Stat. (Vernon, 1925) art. 2110 (small counties); Utah Code Ann. (1943) § 48-0-18; Vt. Stat. (1947) § 3489; Va. Code (1942) § 5988; Wash. Rev. Stat. (Supp. 1943) 96.

In many jurisdictions all the names are taken from a source which has a proportionate geographical distribution: Ariz. Code (1939) § 37-106; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, §§ 2, 25; Iowa Code (1946) § 609.7; Me. Rev. Stat. (1944) c. 103, §§ 1, 2; Md. Code Ann. (1939) art. 51, § 6 (some counties); Mich. Comp. Laws (1948) § 602.125 (Cities under commission government); Miss. Code (1942) § 1766; N.D. Rev. Code (1943) § 27-0906; Ohio Gen. Code (1938) § 11419-9; Okla. Stat. (1937) tit. 38, § 2; Ore. Comp. Laws Ann. (1940) § 14-203; S.C. Code (Supp. 1944) § 608; S.D. Code (1939) § 32.1003; Vt. Stat. (1947) § 1586.

[93] Calif. Code Civ. Proc. (1946) § 204(c); Colo. Stat. Ann. (1935) c. 95, §§ 26, 40; Conn. Gen. Stat. (1949) § 7912; Fla. Stat. Ann. (1944) §§ 40.10, 40.12; Me. Rev. Stat. (1944) c. 103, § 2; Md. Code Ann. (1939) art. 51, § 11; Mass. Gen. Laws (1932) c. 234, § 4; Mich. Comp. Laws (1948) §§ 725.115, 725.120 (municipal courts of record); Miss. Code (1942) § 1766; Mo. Rev. Stat. Ann. (1939) § 822 as amended L. 1945, pp. 1066, 1075 (cities of more than 500,000 inhabitants); N.J. Rev. Stat. (1937) §§ 2:88-2, 2:88-3; N.M. Stat. (1941) § 30-109; N.Y. Jud. Law (1948) § 595 (N.Y. City only); Ohio Gen. Code (1938) §§ 11419-9, 11419-12; Okla. Stat. (1937) tit. 38, § 2; Pa. Stat. (Purdon, 1930) tit. 17, § 1279 (2d class act); R.I. Gen. Laws (1938) c. 506, § 16; Utah Code Ann. (1943) § 48-0-17; W.Va. Code (1943) § 5264; Wis. Stat. (1947) § 255.04(6).

In a few counties of New York an investigation is made to determine whether the juror has the extra qualifications for service on the "blue-ribbon" juries. N.Y. Jud. Law (1948) art 18B1.

[94] Ala. Code (1940) tit. 30, §§24, 29 (if person placed on jury list is disqualified, costs are charged to commission); Ark. Stat. Ann. (1947) § 39-206; Colo. Stat. Ann. (1935) c. 95 § 10; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Iowa Code (1946) § 609.2; Mo. Rev. Stat. Ann. (1939) §§ 705, 751, 773; Nev. Comp. Laws (1929) § 8484; Ore. Comp. Laws Ann. (1940) § 14-202; Tex. Civ. Stat. (Vernon, 1925) art. 2110. Note: In Oregon in counties having a population of more than 100,000 persons, there is personal examination by the jury commissioner as the juror reports for duty. Ore. Comp. Laws Ann. (1940) § 14-206.

the juror has the statutory qualifications.[95] *The investigation* or determination with respect to a juror's qualifications, exemptions and qualities is based on the personal knowledge of those selecting the jurors in ten states.[96] *California's* system of investigation authorizes a combination of personal interviews, written examinations, questionnaires and intelligence tests.[97] In *Missouri* this is done in the larger cities.[98] Questionnaires are used in the *District of Columbia* and *Connecticut*, while personal interviews are combined with the use of a questionnaire in the *Detroit* Recorder's Court and in *Massachusetts*[99] as well as in *Cleveland*. In *New York City* interviews, questionnaires, and inquiry of others are utilized.[100] Personal interviews may be relied on the five states,[101] while in five more inquiry of others is relied on solely.[102]

It is apparent from this that, while ostensibly an investigation is made in most states as to the competency of the prospective juror, in only a few has there been any attempt to do this in a scientific or businesslike fashion. For the most part reli-

[95] Kan. Gen. Stat. (1935) § 43-102 (counties under 100,000 population); Wyo. Comp. Stat. Ann. (1945) § 12-107.

[96] Ark. Stat. Ann. (1947) § 39-206; Fla. Stat. Ann. (1944) § 40.10; Kan. Gen. Stat. (1935) § 43-102 (counties under 90,000 population); Mo. Rev. Stat. Ann. (1939) § 773 as amended L. 1945, p. 1068; N.M. Stat. (1941) § 30-109; N.Y. Jud. Law (1948) § 501 (counties outside N.Y. City); Ohio Gen. Code (1938) § 11419-9; S.D. Code (1939) § 32.1003; Utah Code Ann. (1943) § 48-0-17; Wyo. Comp. Stat. Ann. (1945) § 12-107.

[97] Calif. Code Civ. Proc. (1946) § 204(d).

[98] Mo. Rev. Stat. Ann. (1939) § 822 as amended L. 1945, pp. 1066, 1075 (cities with more than 500,000 inhabitants).

[99] In Connecticut a questionnaire and inquiry of others are used when the prospective juror is not personally known. Conn. Gen. Stat. (1949) § 7912 [See comment on ineffectiveness of procedure, "Choosing the Twelve," 22 Conn. B.J. 316, 325 (1948)]; D.C. (a matter of practice); Mass. Gen. Laws (1932) c. 234, § 4; Mich. Comp. Laws (1948) §§ 725.108, 725.110.

[100] N.Y. Jud. Law (1948) 595; N.Y. City Rules of Jury System, Rules 1-3.

[101] Colo. Stat. Ann. (1935) c. 95, §§ 26, 40 (counties over 40,000 population); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 31; Mo. Rev. Stat. Ann. (1939) § 775 (cities over 100,000); Ohio Gen. Code (1938) § 11419-12; Wis. Stat. (1947) § 255.04(6).

[102] This is a matter of practice in: Ala., Me., N.D., Okla., and Utah. In Indiana the tax duplicates and schedules are examined to determine the sex, age, and identity of the prospective juror. Ind Stat. (Burns, 1946) § 4-3304 as amended L. 1947, c. 15. In Maryland and Nebraska it was reported that no special method of investigation of prospective jurors is provided or used.

ance on personal information or inquiry of others is the basis of the determination, and such traditional methods can hardly be considered efficient in these days of increasing congestion and mobility of population.

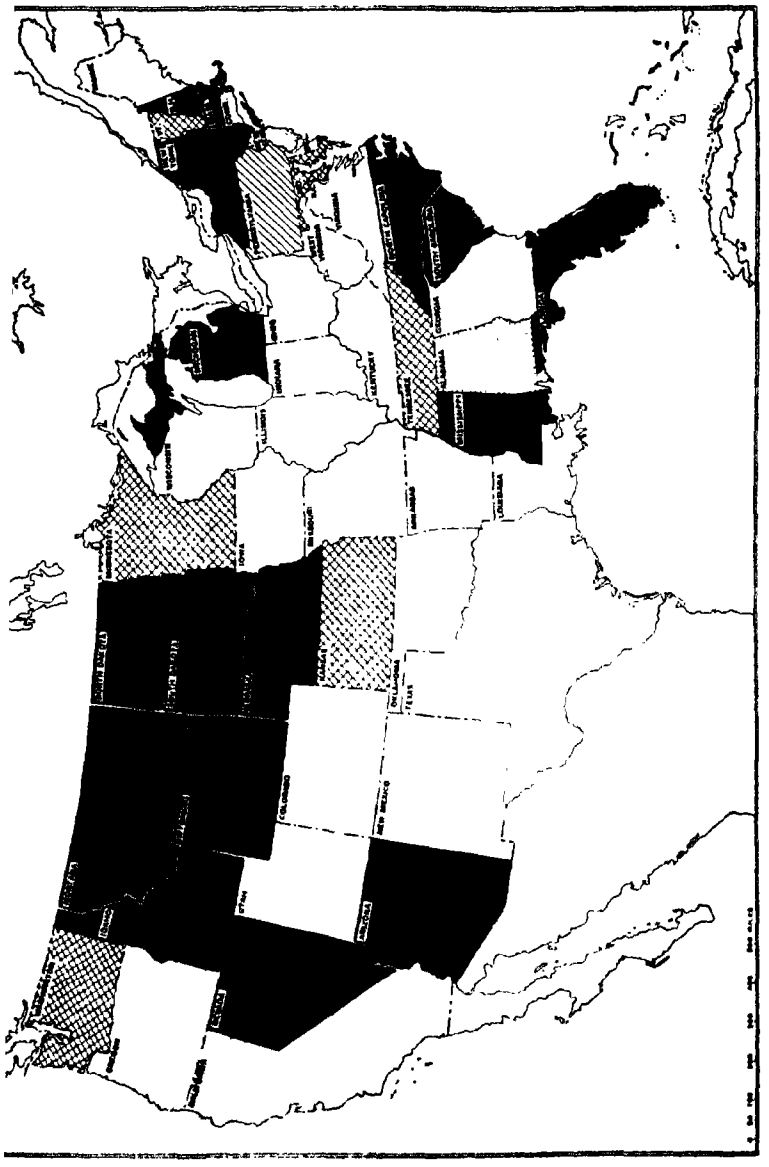
(C) Selection by whom; status of Recommendation (1):

That jurors should be selected by commissioners appointed by the courts.

Jury commissioners are used to select the names of jurors in all or at least certain areas of thirty-four jurisdictions:[103] *Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Vir-*

[103] Ala. Code (1940) tit. 30, § 8; Ark. Stat. Ann. (1947 § 39-201; Calif. Code Civ. Proc. (1946) § 204a as amended L. 1947, c. 157 (counties having a population of more than 90,000); Colo. Stat. Ann. (1935) c. 95, §§ 22,36 (counties over 40,000); Conn. Gen. Stat. (1949) § 7912 (county) but cf. § 7909 (city); Del. Code (1935) § 4723 as amended L. 1941, c. 234; D.C. Code (1940) § 11-1401 as amended 1946 (60 Stat. 931, c. 881); Fla. Stat. Ann. (1944) § 40.09 (counties with more than 150,000 population); Ga. Code Ann. (1933) § 59-101; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 24 (counties with more than 140,000 population); Ind. Stat. (Burns, 1946) § 4-3301; Iowa Code (1946) c. 608; Ky. Rev. Stat. (1946) § 29.050; La. Code Prac. Ann. (1942) art. 532.3; La. Code Crim. Law & Proc. (1943) art. 191; Me. Rev. Stat. (1944) c. 103, § 1, Mo. Rev. Stat. Ann. (1939) §§ 734, 766, see § 752 as reenacted, § 816 as added, see Special Note supra n. 79; Mich. (see Special Note infra); Neb. Rev. Stat. (1943) §§ 25-1625, 25-1626 as amended (in counties with more than 60,000 population); N.J. Rev. Stat. (1937) § 2:87-1; N.M. Stat. (1941) § 30-106; N.C. (see Special Note infra); Ohio Gen. Code (1938) §§ 11419-2, 11419-3; Okla. Stat. (1937) tit. 38, § 1; Ore. Comp. Laws Ann. (1940) § 14-201 (counties having a population of 100,000 or more inhabitants); Pa. Stat. (Purdon, 1930) tit. 17, §§ 941 (general act), 1234 (Phila. County); 1271 (2d class act), 1332 (3d class act); R.I. Gen. Laws (1938) c. 506, § 4; S.C. Code (Supp. 1944) § 607; Tenn. (see Special Note infra); Tex. Civ. Stat. (Vernon, 1925) art. 2104 as amended L. 1947, c. 83, art. 2109, cf. art. 2094 as amended L. 1929, c. 43 relating to counties with at least 58,000 population or having a city with at least 20,000 population; Utah Code Ann. (1943) § 48-0-13; Vt. Stat. (1947) § 3489; Va. Code (1942) § 5986; W.Va. Code (1943) §§ 5263, 5264; Wis. Stat. (1947) § 255.04.

Special Note: In Massachusetts the judicial council in its 24th Annual Report (1949) recommended the ap-


SELECTION OF JURORS
By jury commissioners appointed by the courts
By jury commissioners appointed by the governor
By jury commissioners selected by some method other than judicial or executive appointment
By judges or courts, counties having certain population

ginia, and *Wisconsin.* In twenty-four of these the jury commissioners are appointed by the courts as recommended: *Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, Texas, Utah, Virginia, West Virginia,* and *Wisconsin.*[104] In nine jurisdictions, however, the judges or the courts select the names of persons for the jury list,[105]

pointment of jury commissioners by the courts for certain counties. In Michigan the constitution provides that the legislature shall by general law provide for the appointment of jury commissioners in each county but such law shall not become operative in any county until a majority of the electors of the county voting thereon so decide. Mich. Const. Art. VII, § 6. The legislature has provided such a general law. Mich. Comp. Laws (1948) §§ 602.150, 602.156. This has been accomplished in Kent, Bay, Berrien, Macomb, Saginaw and St. Clair Counties, by special statutes in the upper peninsula where the county clerk, judge of probate, sheriff, and county treasurer constitute a board to select jurors. Mich. Comp. Laws (1948) § 691.411. A special statute governs Wayne County. Id. § 691.441. In North Carolina five counties out of the one hundred counties have jury commissioners. N.C. Pub. Laws (1937) c. 235, id. (1939) c. 239; id. (1941) c. 261, id. (1943) cc. 148, 204; and it has been recommended that jury commissioners be appointed in each county. See Report of the Special Committee on the Administration of Justice in North Carolina, 15 Pop. Gov't 7 (1949). In Tennessee because of dissatisfaction with the general statute (see infra n. 105) private acts providing for appointment of jury commissioners applicable to particular counties have been enacted.

[104] Refer to supra n. 103 for statutory citations. In Alabama, New Jersey and Rhode Island the jury commissioners are appointed by the governor Ala. Code (1940) tit. 30, § 10; N.J. Rev. Stat. (1937) § 2:87-1; R.I. Gen. Laws (1938) c. 506, § 4 as amended L. 1939, c. 700 (governor with consent of a majority of justices of superior court).

Special Note: In Missouri the modes of making up the jury list differ according to the unit for which it is made. The general law requires the county court to prepare the list. Mo. Rev. Stat. Ann. (1939) § 705 et seq. In counties of 60,000 to 200,000 population the circuit court judges act as jury commissioners. Id. § 734. In certain other classifications the court acting as a board of jury supervisors appoints a jury commissioner or commissioners who make up the jury list. Id. § 751 as reenacted L. 1947, Vol. I, p. 342, §§ 766, 816. In Pennsylvania, except in Philadelphia, two of the jury commissioners are elected and the third is a judge. Pa. Stat. (Purdon, 1930) tit. 17, §§ 941, 942 (general act) 1271 as amended L. 1931, P.L. 538 (2d class act).

[105] Kan. Gen. Stat. (1935) § 43-136 (counties over 90,000 population); Md. Code Ann. (1939) art. 51, § 7 (many counties are, however, exempt from this provision and local laws regulate the matter); Mo. Rev. Stat. Ann. (1939) §§ 813(2), 813(3) as enacted L. 1945, p. 815; Minn. Stat. Ann. (1945) § 593.14 (counties over 100,000 population); Ore. Comp. Laws Ann. (1940) § 14-201 (counties less than 100,000 population); Tenn. Code Ann. (1934) §§ 9984, 9988 (Note: jury se-

and this would seem to lessen the possibility of political pressures influencing the list. Contrary to the recommendation, in at least certain areas of sixteen states county officers or members of the governing board of the county do the selecting,[106] while the mayors or governing boards of municipalities choose the prospective jurors in some sections of eight states,[107] thus making the use of political pressure possible in the selection of jurors in those jurisdictions. While particularly in the states having a smaller area or population or which are predomi-

lection regulated by various private acts each applicable to special county because general statutes are unsatisfactory); Wash. Rev. Stat. (Remington, 1932) § 96 as amended L. 1943, c. 238 (judges select jurors from list prepared by county assessors, and other sources). In Vermont the assistant judges of the county court and the clerk of the court are the jury commissioners. Vt. Stat. (1947) § 3489. Similarly, in Missouri in counties of the third and fourth class, the clerk of the circuit court and judges of the county court together with the circuit court constitute the jury commissioners. Mo. Rev. Stat. Ann. (1939) § 704 added 1947. And in Philadelphia County, Pa., certain of the judges and the sheriff constitute a board for selecting jurors. Pa. Stat. (Purdon, 1930) *tit.* 17, § 1234.

[106] Ariz. Code (1939) § 37-106; Colo. Stat. Ann. (1935) c. 95, § 10 as amended L. 1943, p.390 (counties having less than 40,000 population); Fla. Stat. Ann. (1944) § 40.14 (counties with less than 150,000 population); Idaho Code (1947) § 2-301; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 1 (counties with less than 140,000 population); Iowa Code (1946) § 608.1 (counties not having a city with a population of more than 14,000); Minn. Stat. Ann. (1945) § 593.13 (counties with less than 100,000 population); Miss. Code (1942) § 1766; Mont. Rev. Code (1935) § 8896; Neb. Rev. Stat. (1943) §§ 25-1603, 25-1613 (counties with less than 60,000 population); Nev. Comp. Laws (1929) § 8484; N.Y. Jud. Law (1948) § 593 (N.Y. City only); N.C. Gen. Stat. (1943) § 9-1 as amended 1947; S.C. Code (Supp. 1944) § 607 (county auditor, county treasurer, and clerk of court of common pleas; if county has a city with more than 70,000 population, judge of county court acts instead of clerk of court); Tex. Civ. Stat. (Vernon, 1925) art. 2094 (counties over 58,000 population); Wyo. Comp. Stat. Ann. (1945) § 12-106.

[107] Kan. Gen. Stat. (1935) § 43-101 (counties with less than 90,000 population); Mass. Gen. Laws (1932) c 234, § 1 (see Special Note infra); Mich. Comp. Laws (1948) § 602.120 (applicable to most counties, see Special Note supra n. 103); N.H. Rev. Laws (1942) c. 375, § 1; N.Y. Jud. Law (1948) § 500 (outside N.Y. City); N.D. Rev. Code (1943) § 27-0909; R.I. Gen. Laws (1938) c. 506, § 9 as amended 1939; S.D. Code (1939) § 32.1003 In Connecticut the selectmen of the towns and a jury committee appointed by the mayor make up the lists of persons from which the jury commissioners make up the list of jurors. Conn. Gen. Stat. (1949) §§ 7907, 7912.

Special Note: The Massachusetts Judicial Council recently recommended the experiment of using two jury commissioners for a district composed of the counties of Norfolk, Suffolk, and Middlesex. The plan was not adopted by the legislature. See 23 Rep. Mass. Jud. Council 33-39 (1947).

nantly rural, local officials are still entrusted with the selection of the jury panel, the principle embodied in Recommendation (1) may be said to be an actuality in the majority of states, in which jury commissioners are appointed by the courts, at least in the areas of concentrated population.

(D) Selection in metropolitan centers; status of Recommendation (2):

> That in the metropolitan centers, some such system as that now in use in Cleveland, Ohio, should be adopted.

Under the key-number system, already described as the main feature of the recommended Cleveland practice, the number of jurors estimated to be needed (including those likely to be eliminated on examination) is used as the devisor of the basic list (voter's registry, etc.) and the quotient is used as a key number to secure the persons to be examined for jury service.[108] This system, which is that recommended as being used in *Cleveland* and is in use elsewhere in *Ohio,* and also in *Los Angeles* and *San Francisco,* some counties in *Nebraska,* and in *Pennsylvania* (Pittsburgh, Allegheny County)[109] and is available to the municipal courts of record in *Michigan.* From this it is apparent that despite the many seeming advantages of the Cleveland system, especially its probable elimination of the use of any political or other influence, it has not met with widespread favor.

(E) The jury list.

In two states the jury list from which the panel is drawn is merely recorded in a book: *Arkansas* and *Maine.*[110] In the remaining jurisdictions the names on the final jury list from whom the jury panel is selected are placed in a jury box or

[108] See text supra at 148.

[109] Calif. Code Civ. Proc. (1946) § 206, see 25 J. Am. Jud. Soc'y 27 (1941), 22 id. 265 (1939); Ohio Gen. Code (1938) § 11419-9; Mich. Comp. Laws (1948) §§ 725.101-725.162; Neb. Rev. Stat. (1943) 25-1627 (over 100,000 population); Pa. Stat. (Purdon, 1930) tit. 17, § 1277 as amended L. 1931, P.L. 538 (2d class act), (key number set at 50).

[110] Ark. Stat. Ann. (1947) § 39-209; Me. Rev. Stat. (1944) c. 103, § 2.

wheel.[111] From the jury wheel or book a selection is made of enough names to produce the number of jurors required for the panel by one court in thirty-four states.[112] The needs of

[111] Ala. Code (1940) tit. 30, § 20 (book also); Ariz. Code (1939) § 37-106; Calif. Code Civ. Proc. (1946) § 209; Colo. Stat. Ann. (1935) c. 95, § 12; Del. Rev. Code (1935) § 4724; D.C. Code (1940) § 11-1403; Ga. Code Ann. (1932) §§ 59-701, 59-108, 59-109 (book also); Idaho Code (1947) § 2-304; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, §§ 7, 8; Ind. Stat. (Burns, 1946) § 4-3305; Iowa Code (1946) §§ 609.15, 609.17; Kan. Gen. Stat. (1935) §§ 43-104, 43-137, 43-143 (book also); Ky. Rev. Stat. (1944) § 29.070; La. Code Prac. Ann. (1942) art. 532.4; Md Code Ann. (1939) art. 51, §§ 8,9; Mass. Gen. Laws (1932) c. 234, § 7; Mich. Comp. Laws (1948) § 602.135; Minn. Stat. Ann. (1945) § 593.10; Mo. Rev. Stat. Ann. (1939) §§ 736, 780, 827, 705 and 755 as reenacted L. 1947, § 813.4 as added L. 1945, p. 815; Mont. Rev. Code (1935) § 8899; Neb. Rev. Stat. (1943) §§ 25-1603 to 25-1605, 25-1619; Nev. Comp. Laws (1929) § 8485; N.H. Rev. Laws (1942) c. 375, § 4; N.J. Rev. Stat. (1937) § 2:88-8; N.M Stat. (1941) §§ 30-104, 30-111 (book also); N.Y. Jud. Law (1948) § 508, N.Y. City Rules of the Jury System, Rule 5; N.C. Gen. Stat. (1943) § 9-2; N.D. Rev. Code (1943) § 27-0915, 27-0910 (book also); Ohio Gen. Code (1938) § 11419-10; Okla. Stat. (1937) tit. 38, § 4; Ore. Comp. Laws Ann. (1940) § 14-205; Pa. Stat. (Purdon, 1930) tit. 17, § 942 (general act), § 1281 as amended L. 1933, P.L. 209 (2d class), § 1324 as amended L. 1937, P.L. 2782, § 1236 (Phila. County); S.C. Code (Supp. 1944) § 609; S.D. Code (1939) § 32.1008; Tenn. Code Ann. (1934) § 10037; Tex. Civ. Stat. (Vernon, 1925) §§ 2095, 2111; Utah Code Ann. (1943) § 48-0-20; Va. Code (1942) § 5990; Wash. Rev. Stat. (Supp. 1943) § 96; W.Va. Code (1943) § 5216; Wis. Stat. (1947) §§ 255.04(1), 270.15; Wyo. Comp. Stat. Ann. (1945) § 12-139.

In Connecticut the names of prospective jurors are placed in boxes and drawn by towns. Conn. Gen. Stat. (1949) § 7917. For criticism of this procedure see "Choosing the Twelve," 22 Conn. B. J. 316 (1948). Vermont also groups the cards by towns, Vt. Stat. (1947) § 1588; while in Mississippi separate boxes are used for each supervisor's district, Miss. Code (1942) § 1766.

[112] Ariz. Code (1939) § 37-108; Ark. Stat. Ann. (1947) § 39-215; Ga. Code Ann. (1933) § 59-701; Idaho Code (1947) § 2-401; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 8; Ind. Stat. (Burns, 1946) § 4-3306; Iowa Code (1946) §§ 609.3, 609.19, 609.21; Kan. Gen. Stat. (1935) § 43-107 (counties under 90,000 population); Ky. Rev. Stat. (1946) § 29.080; Me. Rev. Stat. (1944) c. 103, § 3; Mass. Gen. Laws (1932) c. 234, § 10 (except Suffolk County); Mich. Comp. Laws (1948) §§ 602.135, 602.143; Miss. Code (1942) § 1770; Mont. Rev. Code (1935) § 8902; Neb. Rev. Stat. (1943) §§ 25-1605, 25-1619, 25-1631 (civil and criminal terms filled from one list, § 29-2004); Nev. Comp. Laws (1929) § 8477; N.H. Rev. Laws (1942) c. 375, §§ 7-13; N.M. Stat. (1941) § 30-116; N.Y. Jud. Law (1948) §§ 513, 513b (except N.Y. City); N.C. Gen. Stat. (1943) § 9-3; N.D. Rev. Code (1943) § 27-0913; Ohio Gen. Code (1938) § 11419-21; Okla. Stat. (1937) tit. 38, §§ 2,3; Ore. Comp. Laws Ann. (1940) §§ 14-203, 14-301, 13-313 (Jurors drawn for one court except in counties over 200,000 population, where jurors for domestic relations court and district courts are drawn from panel for circuit court); R.I. Gen. Laws (1938) c. 506, § 32; S.C. Code (Supp. 1944) § 610; Tenn. Code Ann. (1934)

a group of courts, both civil and criminal, are filled from the same list in the other jurisdictions.[113] This is the Cleveland practice and was recommended by the Knox Committee. In those jurisdictions in which jurors are summoned for a unified court or a group of courts, the jurors are apportioned to the court in which they serve by the judge in six jurisdictions.[114] The use of a jury wheel or some other system of drawing by lot, as is used in Cleveland and as was recommended by the Knox Committee, is used in ten states.[115]

The names are drawn from the general jury wheel, box, or book by the jury commissioners in thirteen jurisdictions,[116]

§ 10037; Tex. Civ. Stat. (Vernon, 1925) art. 2111 (certain counties); Utah Code Ann. (1943) § 48-0-24; Vt. Stat. (1947) § 1589; Va. Code (1942) § 5991; W.Va. Code (1943) § 5267; Wis. Stat. (1947) § 255.04(2); Wyo. Comp. Stat. Ann. (1945) § 12-112.

[113] Ala. Code (1940) tit. 30, §§ 30, 38; Calif. Code Civ. Proc. (1946) § 209; Colo. Stat. Ann. (1935) c 95, § 13; Conn. Gen. Stat. (1949) §§ 7915, 7916; Del. Rev. Code (1935) § 4727; D.C. Code (1940) § 11-1407; Fla. Stat. Ann. (1944) § 40.21; La. Code Prac. Ann. (1942) art. 532.4 (New Orleans parish excepted); Md. Code Ann. (1939) art. 51, §§ 6, 7; Mass. Gen Laws (1932) c. 234, § 5.10 (Suffolk County); N.J. Rev. Stat. (1937) §§ 2:88-19, 2:88-20, 2:88-21 (separate panels may be used for criminal causes, § 2:91-2, 2:91-4); N.Y. Jud. Law (1948) § 607 (N.Y. City); N.D. Rev. Code (1943) § 27-0926 (counties in which there is a county court of increased jurisdiction, a jury drawn for the district court may be used by the county court); Ore. Comp. Laws Ann. (1940) §§ 14-301, 14-203, 13-313; S.D. Code (1939) § 32.1011; Tex. Civ. Stat. (Vernon, 1925) art. 2101 (counties with three or more district courts); Wis. Stat. (1947) §§ 255.03, 255.04.

But a separate jury list is used for each division of a court in the more populated counties of Kansas. Kan. Gen. Stat. (1935) § 43-136.

[114] Ala. Code (1940) tit. 30, § 30; Colo. Stat. Ann. (1935) c. 95, §§ 13, 28, 42; Conn. Gen. Stat. (1949) §§ 7920, 7921; D.C. Code (1940) § 11-1407; Fla. Stat. Ann. (1944) § 40.14; Md. (Baltimore City only).

[115] Calif. Code Civ. Proc. (1946) § 248; Ill. (Cook County holds a large number of prospective jurors and uses what is best described as a slot machine to choose the jury panel, to avoid knowledge in advance as to persons called for a particular case); Ind.; Iowa R. Civ. P. 187(a); Mass. (Suffolk County); Mont.; Ore.; Pa.; R.I. (Providence); S.D. In Texas the order in which jurors are drawn from the wheel determines the order for assignment for service. Cf. Tex. R. Civ. P. (Vernon, Supp. 1948) Rule 223. Upon request of any party a wheel may be used.

[116] Colo. Stat. Ann. (1935) c. 95, § 42 (certain counties); Del. Rev. Code (1935) § 4727; D.C. Code (1940) § 11-1407; Iowa Code (1946) § 609.24; La. Code Prac. Ann. (1942) art. 532.4; Mo. Rev. Stat. Ann. (1939) § 781 (cities over 100,000), § 828 (cities of not more than 500,000); Neb. Rev. Stat. (1943) §§ 25-1625, 25-1631 (counties of 100,000 or more population); N.J. Rev. Stat. (1937) § 2:88-9; Ohio Gen. Code (1938) § 11419-24; Pa. Stat. (Purdon, 1930) tit. 17, § 1235 (Phila. County); Tex. Civ. Stat. (Vernon, 1925) art. 2111 (small counties);

by the court clerk in eighteen states,[117] and by the judge in eight states.[118] The county clerk does the drawing in six jurisdictions,[119] and in the others various named local officials perform the task.[120]

It is pertinent to the foregoing to note that the jury list is

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W.Va. Code (1943) § 5272. In Maine the names taken from the book in which the jury list is recorded are selected by the jury commissioner. Me. Rev. Stat. (1944) c. 103, § 3.

[117] Ariz. Code (1939) § 37-109; Calif. Code Civ. Proc. (1946) § 215; Colo. Stat. Ann. (1935) c. 95, § 13 (with sheriff); Conn. Gen. Stat. (1949) § 7915; Idaho Code (1947) § 2-403 (with sheriff and probate judge in attendance); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 8; Ind. Stat. (Burns, 1946) § 4-3306; Md. Code Ann. (Supp. 1947) art. 51, § 8 (in Baltimore by sheriff); Minn. Stat. Ann. (1945) § 593.06; Mont. Rev. Code (1935) §§ 8903, 8904 as amended in 1937 and 1939; Neb. Rev. Stat. (1943) §§ 25-1605, 25-1619; Okla. Stat. (1937) tit. 38, § 4 (with sheriff); Tex. Civ. Stat. (Vernon, 1925) art. 2096 (large counties); Utah Code Ann. (1943) § 48-0-22; Va. Code (1942) § 5992; W.Va. (See 127 W.Va. Reports); Wis. Stat. (1947) § 255.04(2); Wyo. Comp. Stat. Ann. (1945) § 12-115.

[118] Ala. Code (1940) tit. 30, § 30; Fla. Stat. Ann. (1944) § 40.14; Ga. Code Ann. (1933) § 59-701; Kan. Gen. Stat. (1935) § 43-138 (counties over 90,000 population); Ky. Rev. Stat. (1946) § 29.130; Miss. Code (1942) § 1772; Nev. Comp. Laws (1929) § 8477 (with clerk); N.M. Stat. (1941) § 30-116

[119] Colo. Stat. Ann. (1935) c. 95, § 28 (certain counties); Kan. Gen. Stat. (Supp. 1947) § 43-107 (counties having less than 90,000 population); Mich. Comp. Laws (1948) §§ 602.130, 602.133 (in the presence of the sheriff and two justices of the peace); N.Y. Jud. Law (1948) §§ 513, 518, N.Y. City Jury Rules, No. 7; Ore. Comp. Laws Ann. (1940) § 14-304; Wash. Rev. Stat. (Remington, 1932) § 97 (county clerk is ex officio clerk of superior court).

[120] Maryland, Pub. Loc. Laws of Baltimore (1938) § 694 (the sheriff); Mass. Gen. Laws (1932) c. 234, §§ 18, 19 (one of the members of the city or town governing body draws the names at a meeting of the body); N.H. Rev. Laws (1942) c. 375, § 11 (the town or city clerk); N.C. Gen. Stat. (1943) § 9-3 (child not over ten years of age); N.D. Rev. Code (1943) §§ 27-0914, 27-0915 (one of a group of named county officials other than the clerk of the court); S.C. Code (1942) § 611, and § 610a as amended 1943 (named county officials); S.D. Code (1939) §§ 32.1011, 32.1008 (county auditor, treasurer, and sheriff in rotation); Tenn. Code Ann. (934) § 10037 (child not over ten years of age); Tex. Civ. Stat. (Vernon, 1925) art 2096 (sheriff and clerk or deputies in larger counties, in presence of district or county judge); Vt. Stat. (1947) § 1589 (sheriff or his deputy).

Special Note: In Pennsylvania provisions vary among the different counties: Pa. Stat. (Purdon, 1930) tit. 17, § 943 (general act, any two or more of sheriffs and jury commissioners); § 1283 as amended 1931 P.L. 538 (2d class act, sheriff in presence of members of commission); § 1326 as amended 1937 P.L. 2782 (3d class act, names are drawn in public in courtroom by any person appointed by the commissioners for that purpose); § 1240 (Phila. act, sheriff in open court, in presence of judges).

drawn for use during a jury year of twelve months in thirty-one states,[121] while the list is used for six months in two states,[122] and only for a term of court in eight states.[123] In the remaining jurisdictions the requirement as to the time of making up the list and the period for which such list is good are varying, and for the most part are for periods of less than two years.[124] This ensures a current list and, thus, that persons called for jury service will not be found to have died or moved out of the district some years before, but may also involve

[121] Ala. Code (1940) tit. 30, § 20 as amended L. 1945, p. 495; Calif. Code Civ. Proc. (1946) §§ 203, 204, 210; Conn. Gen. Stat. (1949) § 7912; Del. Rev. Code (1935) § 4724; Fla. Stat. Ann. (1944) § 40.11; Idaho Code (1947) § 2-301; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 2; Ind. Stat. (Burns, 1946) § 4-3304 as amended L. 1947, c. 15 (all except counties having more than 400,000 population); Kan. Gen. Stat. (1935) §§ 43-104, 43-105, 43-136; Ky. Rev. Stat. (1948) § 29.050, cf § 29.100; Mass. Gen. Laws (1932) c. 234, § 4; Mich. Comp Laws (1948) §§ 602.120, 602.151; Minn. Stat. Ann. (1945) §§ 593.13, 593.14; Miss. Code (1942) § 1766; Mont Rev. Code (1935) § 8896; Neb. Rev. Stat. (1943) § 25-1617 (counties having between 30,000 and 100,000 population); Nev. Comp. Laws (1929) § 8484; N.H Rev. Laws (1942) c. 375, § 1; N.Y Jud. Law (1948) § 500 (outside N.Y. City); Ohio Gen. Code (1938) §§ 11419-9, 11419-41; Ore. Comp. Laws Ann. (1940) § 14-201; Pa. Stat. (Purdon, 1930) tit. 17, § 942 (general act), § 1277 as amended L. 1931, P.L. 538 (2d class act), § 1323 as amended L. 1937, P.L. 2782 (3d class act), § 1235 (Phila. act); R.I. Gen. Laws (1938) c. 506, § 8; S.C. Code (Supp. 1944) § 608; S.D. Code (1939) § 32.1004; Utah Code Ann. (1943) § 48-0-17; Vt. Stat. (1947) § 3489; Va. Code (1942) § 5988; Wash. Rev. Stat. (Supp. 1943) § 96; W.Va. Code (1943) § 5264; Wyo. Comp. Stat. Ann. (1945) § 12-106.

[122] La. Code Prac. Ann. (1942) art. 532.6; Tex. Civ. Stat. (Vernon, 1925) art. 2109 (county courts in small counties).

[123] Ark. Stat. Ann. (1947) § 39-206; Colo. Stat. Ann. (1935) c. 95, § 13; Md. Code Ann. (1939) art. 51, § 7; Neb. Rev. Stat. (1943) § 25-1603 (counties having less than 30,000 population); N.J. Rev. Stat. (1937) § 2: 88-1; Pa Stat. (Purdon, 1930) tit. 17, § 984 (general act); Tenn. Code (1934) § 9984; Tex. Civ. Stat. (Vernon, 1925) art. 2110 (district court).

[124] List is used as follows: Ariz. Code (1939) § 37-106 (biennial); D.C. Code (1940) § 11-1405 (one month); Ga. Code Ann. (1933) § 59-106 (biannual or triannual); Ind. Stat. (Burns, 1946) § 4-3304 as amended L. 1947, c. 15 (counties with more than 400,000 population, monthly); Iowa Code (1946) §§ 608.2, 609.1 (2 years); Mich. Comp. Laws (1948) § 725.103 (biennial); Neb. Rev. Stat. (1943) § 25-1629 (counties having a population of over 100,000, until the jury list is exhausted); N.M. Stat. (1941) § 30-108a as enacted L. 1943, c. 52 (after each general election); N.C. Gen. Stat. (1943) § 9-1 as amended 1947, § 9-3 (two years).

In North Dakota a list of two hundred persons qualified to act as jurors is drawn up and the list is maintained at two hundred at all times by "completing the number after each jury term of court." N.D. Rev. Code (1943) § 27-0912.

needlessly repetitious activity if the persons drafting the list are changed frequently (as where they are elected officials of one sort or another).

(F) Summons to, and term of jury service.

After jurors have been selected from the jury list, they are summoned for jury service by a writ of summons in twenty-nine jurisdictions.[125] A notice is sent by registered mail in the other states,[126] as is authorized by the federal statute and was

[125] Ala. Code (1940) tit. 30, § 33; Ariz. Code (1939) § 37-114; Ark. Stat. Ann. (1947) § 39-210; Del. Rev. Code (1935) § 4731; D.C. Code (1940) § 11-1414; Ga. Code Ann. (1933) § 59-701; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 11; Iowa Code (1946) §§ 609.30, 609.31; Kan. Gen. Stat. (1935) §§ 43-144, 43-113 (counties over 90,000 population; the writ is only used in smaller counties if no return receipt is had from registered mail); Ky. Rev. Stat. (1946) § 29.170; La. Code Prac. Ann. (1942) art. 532.4; Md. Code Ann. (1939) art. 51, § 8; Mass. Gen. Laws (1932) c. 234, § 24; Mich. Comp. Laws (1948) § 691.453 (Wayne County); Miss. Code (1942) § 1777; Mo. Rev. Stat. Ann. (1939) § 709; N.H. Rev. Laws (1942) c. 375, § 17 (a "written notice"); N.J. Rev. Stat. (1937) § 2:90-1, 2:90-3; N.Y. Jud. Law (1948) § 536 (outside N.Y. City if resident not more than five miles from town); N.C. Gen. Stat. (1943) § 9-10; Pa. Stat. (Purdon, 1930) tit. 17, § 1091 (general act), § 1238 (Phila. County); § 1283 as amended L. 1931, P.L. 538 (2d class county), § 1336 as added L. 1939, P.L. 157 (3d class county, post cards sent with prepaid return card; if no return, a regular summons issued and served); R.I. Gen. Laws (1938) c. 506, § 18; S.C. Code (Supp. 1944) § 617 (exceptions for certain counties); Tenn. Code Ann. (1934) § 9993; Tex. Civ. Stat. (Vernon, 1925) art. 2117 as amended L. 1943, c. 100; Vt. Stat. (1947) §§ 1589-1590; Va. Code (1942) § 5992; W.Va. Code (1943) § 5270 (alternate service); Wis. Stat. (1947) §§ 255.08, 255.09. Arkansas supplements the use of the writ by telephone calls to the jurors. See Ark. Stat. Ann. (1947) § 39-211.

[126] Calif. Code Civ. Proc. (1946) § 225; Colo. Stat. Ann. (1935) c. 95, §§ 18, 19; Conn. Gen. Stat. (1949) § 7915 (alternate service at judges' discretion, usually telephoned); Del. Rev. Code (1935) § 4702 (certain counties); Fla. Stat. Ann. (1944) § 40.23; Kan. Gen. Stat. (Supp. 1947) § 43-113 (counties under 90,000 population); Me. Rev. Stat. (1944) c. 103, § 3; Mich. Comp. Laws (1948) § 602.136; Minn. Stat. Ann. (1945) § 628.46; Mont. Rev. Code (1935) § 8910; Neb. Rev. Stat. (1943) §§ 25-1606, 25-1619, 25-1631; N.M. Stat. (1941) § 30-125; N.Y. Jud. Law (1948) §§ 536, 603; N.D. Rev. Code (1943) § 27-0918; Okla. Stat. (1937) tit. 38, § 7; Ore. Comp. Laws Ann. (1940) § 14-306 as amended L. 1943, c. 132; S.C. Code (Supp. 1944) § 617 (certain counties only); S.D. Code (1939) § 32.1015; Utah Code Ann. (1943) § 48-0-26; W.Va. Code (Supp. 1947) § 5271 (alternate service).

approved by the Knox Committee.[127] In six states either of these methods may be used.[128]

The many exemptions from jury service for professional, business and governmental personnel indicate recognition of the burdens placed on the individual by jury service. The cost in time is of importance as well as the actual sacrifice of income entailed thereby. Because of this the term of jury service has been limited to relatively short periods in many jurisdictions. In eight jurisdictions service is limited to one week;[129] in thirteen service is for two weeks;[130] in three service is for three weeks;[131] and in six jurisdictions service for four weeks or a month is required.[132] In other states a juror's service is for a

[127] 28 U.S.C. (1948) § 1867. See Recommendation VIII, supra n. 23.

[128] Idaho Code (1947) § 2-409; Nev. Comp. Laws (1929) § 8477; N.C. Gen. Stat. (1943) §§ 9-10, 9-11; Ohio Gen. Code (1938) § 11419-27; Wis. Stat. (1947) § 255.09; Wyo. Comp. Stat. Ann. (1945) § 12-122. In Pennsylvania in third-class counties a post card with a prepaid return card is used. Pa. Stat. (Purdon, 1930) tit. 17, § 1336 as added L. 1939, P.L. 157, see supra n. 125. In Texas verbal notice of service is given unless notice by registered mail is directed by the judge. Tex. Civ. Stat. (Vernon, 1925) arts. 2116d, 2116e as added L. 1937, cc. 338, 339, art. 2117 as amended L. 1943, c. 100.

[129] Ala. Code (1940) tit. 30, § 38; Fla. Stat. Ann. (1944) § 40.41; Ga. Code Ann. (1933) § 59-710; La. Code Prac. Ann. (1942) art. 532 7; Mo. Rev. Stat. Ann. (1939) § 813.13 added L. 1945, p. 815; N.C. Gen. Stat. (1943) § 9-3; S.C. Code (Supp. 1944) § 610, and S.C. Code (1939) § 625; Tex. Civ. Stat. (Vernon, 1925) arts. 2117, 2118. Cf. Pa., attendance of jurors may be required for one or more weeks as court directs and varies in different courts and different counties. Pa. Stat. (Purdon, 1930) tit. 17, § 1013 (general act).

[130] Colo. Stat. Ann. (1935) c. 95, § 30 (counties of over 100,000 population); Del. Rev. Code (1935) § 4727 (the statute provides for 14 days' service, provided the juror completes the case for which he was drawn. The courts have construed the 14-day provision to mean 14 days of service rather than expiration of 14 days); Kan Gen Stat. (1935) §43-145 (counties over 90,000 population); Ky. Rev. Stat. (1946) § 29.130 (in courts of continuous session); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 10; Minn. Stat. Ann. (1945) § 593.06 (counties over 200,000 population); Mo. Rev. Stat. Ann. (1939) § 728 (counties over 50,000 population); Neb. Rev. Stat. (1943) §§ 25-1631, 25-1632 (counties over 60,000 population); N.Y. City, Rules of Jury System, Rule 11; Okla. Stat. (1937) tit. 38, § 4; R.I. Gen. Laws (1938) c. 506, § 22; Va. Code (1942) § 5995; Wis. Stat. (1947) § 255.07.

[131] Md. (Baltimore City); Neb. Rev. Stat. (1943) § 25-1619 (counties of 30,000 or more population); Ohio Gen. Code (1938) § 11419-43.

[132] Colo. Stat. Ann. (1935) c. 95, § 46 (counties between 40,000 and 100,000 population); D.C. Code (1940) § 11-1405; Ind. Stat. (Burns, 1946) § 4-3306; Mass. Gen. Laws (1932) c. 234, § 3 (Suffolk County); Mich. Comp. Laws (1948) § 725.136 (municipal courts of record); Wash. Rev. Stat. (Remington, 1932) § 97.

term of court with various limitations;[133] while in seven states jury service is for a period of one year[134] although, of course, this does not mean actual courtroom service daily. Since the purpose of limiting service is to distribute the burden and not to make it too difficult for any one person to serve as a juror, two weeks may be considered a reasonable period. Thus, in a metropolitan center such as Cleveland, where jury selection and jury service are considered well regulated, only two weeks' service is required, and the Knox Committee recommended such a limitation.[135] Jurisdictions where service for greater periods is required are subject to criticism on that score. Lengthier periods constitute too much of a burden on the individual and may be condemned as likely to result in incompetent and inefficient juries whose minds are not on their tasks because of worries about their personal affairs.

(G) General instruction of jurors.

While the instruction of jurors generally with reference to their duties and the important role they play in the adminis-

[133] Ark. Stat. Ann. (1947) § 39-225 (not longer than four weeks); Colo. Stat. Ann. (1935) c. 95, § 15 (counties under 40,000 population); Conn. Gen. Stat. (1949) § 7921 (not over eight weeks, less in discretion of judge); Fla. Stat. Ann. (1940) § 40.16 (usually one week); Iowa Code (1946) § 609.19; Kan. Gen. Stat. (1935) § 43-105 (counties under 90,000 population); Ky. Rev. Stat. (1946) §§ 29.130, 29.360; Me. Rev. Stat. (1944) c. 103, § 3; Md. (certain counties); Mich. Comp. Laws (1948) § 691.449 (Wayne County); Minn. Stat. Ann. (1945) § 593.05; Neb. Rev. Stat. (1943) § 25-1616 (counties of 30,000 to 60,000 population); Nev. Comp. Laws (1929) § 8477; N.H. Rev. Laws (1942) c. 375, § 6; N.J. Rev. Stat. (1937) § 2:88-15 (judge may designate part of term which jury shall serve); N.M. Stat. (1941) § 30-116; N.D. Rev. Code (1943) § 27.0824; Ore. Comp. Laws Ann. (1940) § 14-110 (may be discharged after four weeks); S.D. Code (1939) § 32.1015; Tenn. Code Ann. (1934) § 9984; Vt. Stat. (1947) § 1590; W.Va. Code (1943) §§ 5267, 5268; Wis. Stat. (1947) § 255.07.

[134] Calif. Code Civ. Proc. (1946) § 210 (jurors are on constant call for 90 days, after service of 40 trial days are exempt from service); Idaho Code (1947) § 2-305; Kan. Gen. Stat. (1935) § 43-105 (counties having less than 90,000 population); Mich. Comp. Laws (1948) § 602.128 (except Wayne County and municipal courts of record); Mont. Rev. Code (1935) § 8901 as amended L. 1947, c. 4; N.Y. Jud Law (1948) § 506 (outside of N.Y City); Wyo. Comp. Stat. Ann. (1945) § 12-111. In Arizona jurors serve at the convenience of the court, but a new jury must be called at least three times a year. Ariz. Code (1939) § 21-914.

[135] See Recommendation XII, supra n. 23.

tration of justice was not the subject of a specific recommendation by the American Bar Association, such instruction was recommended by the Knox Committee, and the importance of such action in contributing to the efficiency of jury trials was recognized by the committee on jury selection of the Section of Judicial Administration.[136] As suggested, after jurors appear for jury service and before they are sent to a particular courtroom, the court orally instructs them as to their obligations and duties in twenty-two states.[137] A printed pamphlet supplements the oral instructions in the federal system and in six states.[138] In one jurisdiction, however, the language used in a juror's handbook was held improper.[139] Thus, while such general counseling of jurors is attempted in many states, there are still a great number in which the significance of instruction has not been recognized.

(H) *Voire dire* examination; status of Recommendation (3):

> That the examination of jurors on their *voir dire* should be in accordance with the procedure outlined in Rule 47 of the new federal rules of civil procedure. "The Court may permit parties or their attorneys to conduct the examination of prospective jurors or may of itself conduct the examination. In the latter event the Court shall permit the parties or their attorneys to

[136] Appendix A at 546. See Recommendation XV supra n. 23.

[137] Ala. (except Montgomery County), Ark., Calif., Colo. Conn., Iowa, Kan. (a few courts) Me., Mass., Mich., Mo. (St. Louis); Mont. (many districts); Neb. (Lancaster County); N.J., Okla., Ore. (some courts); Pa. (some counties), R.I., Tenn., Tex.; Wash.; Wyo. In Delaware general instructions are given to the jury, but after they are drawn for a particular case.

[138] Calif., Conn. (Hartford County); Mich. (Detroit Recorder's Court); Ohio (some courts); Tex. (sometimes in Dallas County); Wash. See Handbook for Federal Jurors, adopted in 1943. In Montgomery County, Alabama, the Junior Chamber of Commerce distributes a jurors' handbook as part of their civic program.

[139] People v. Schoos, 399 Ill. 527, 78 N.E.(2d) 245 (1948) discussed in 38 J. Crim. Law 620 (1948). Court found that the decisive issue presented was the propriety of the action of the trial judges in distributing to prospective jurors a pamphlet described as a "Jury Primer." The court held that many of the statements in the handbook would be misleading to the laymen and that the use of the Jury Primer was reversible error because not within the common-law tradition or practice.

supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective juror such additional questions of the parties or their attorneys as it deems proper."

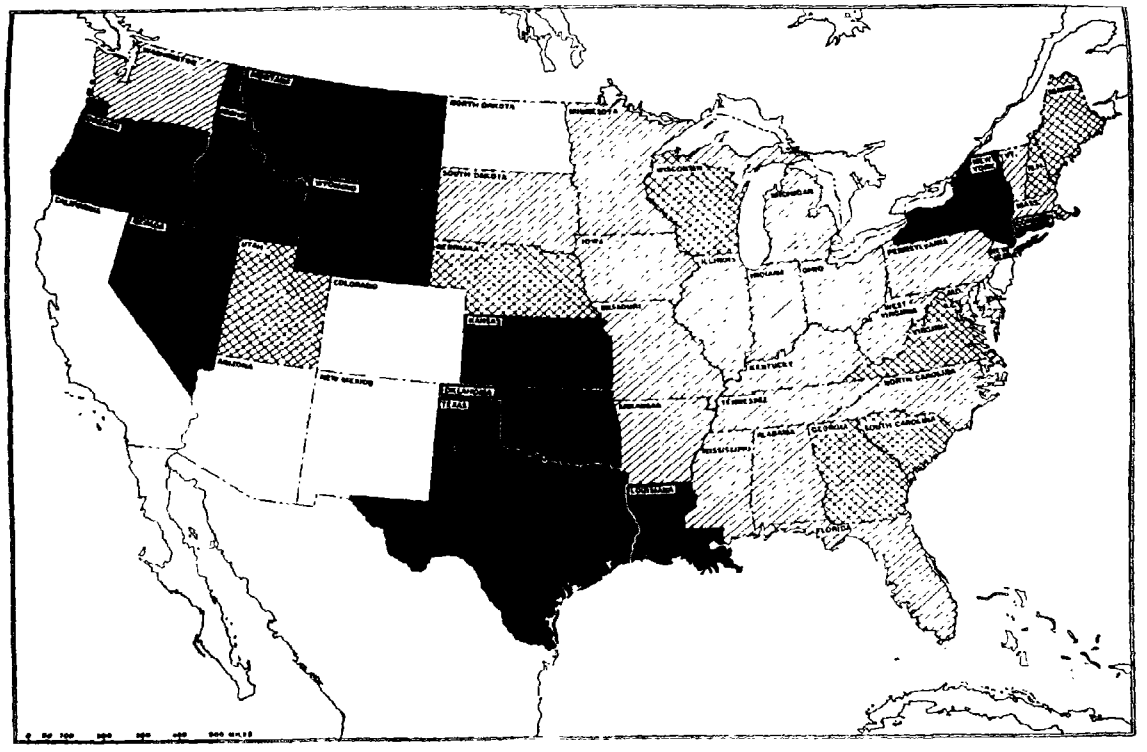
In seven states the practice as provided by Rule 47 of the Federal Rules of Civil Procedure is specifically incorporated into the court rules, and thus the recommended practice is followed: *Arizona, California, Colorado, Delaware, New Jersey, New Mexico,* and *North Dakota.*[140] Also seemingly in accord with the recommendation is the practice in those twenty-two jurisdictions where the oral questioning is conducted by the judges and attorneys.[141] The recommendation is clearly not in effect in the ten states where the judge alone questions the jurors,[142] although this may not be considered as improper and ineffective as the practice in effect in eleven other jurisdic-

[140] Ariz. Code (1939) § 21-937, see also id. § 37-123; Calif., Rules Adopted by Judicial Council for Superior Courts, effective Jan. 1, 1949, Rule 15, civil cases; Colo. R. Civ. P. 47a, see also Colo. Stat. Ann. (1935) c. 95, §§ 54, 56; Del. R. Civ. P. 47 (with some modifications); N.J. R. Civ. P., Rule 3:47-1; N.M. Stat. (1941) § 19-101 (47a); N.D. Rev. Code (1943) § 28-1404 as modified, cf. § 29-1728; semble Ill. (Cook County, Rule of Court) see also Ill. Rev. Stat. (Smith-Hurd, 1947) c. 78, § 12.

[141] Ala. Code (1942) tit. 30, §§ 38,52; Ark. Stat. Ann. (1947) § 59-226; Calif. Penal Code (1947) § 1078; Fla Stat. Ann. (1944) §§ 54.12, 54.13; Ill. Superior Ct. Rule 49, Circuit Ct. Rule 49 (judge seldom examines a juror); Ind., Iowa R. Civ. P. 187(h) (judge may question but seldom does); Ky.; Md.; Mass. Gen. Laws (1932) c. 234, § 28; Mich. Rule 37, § 1 (examination by judge only, with attorneys having the right to submit further questions, or in the discretion of the judge, examination by attorneys permitted); Minn. Stat. Ann. (1945) §§ 631.35, 631.36, Minn. Rules of Dist. Ct. Rule 27a; Miss. Code (1942) § 1802; Mo.; N.C. Gen. Stat. (1943) §§ 9-14, 9-15, Ohio Gen. Code (1938) § 13443-10 (rarely by the court); Pa. Stat. (Purdon, 1930) tit. 19, §§ 811-813 (counsel are entitled to examine prospective jurors but in some counties by rule or custom interrogation is conducted by court or clerk, see Allegheny Common Pleas Court Rule 182); S.D. Code (1939) §§ 33.1311, 34.3621 (customarily by attorneys); Tenn.; Vt.; Wash. Rev. Stat. (Remington, 1932) § 3;3; W.Va. Code (1943) §§ 5646, 5008.

[142] Ga. Code Ann. (1933) § 59-705; Me. Rev. Stat. (1944) c. 100, § 102 (In practice in major criminal cases the court permits counsel to question prospective jurors); Miss. Rules Circuit Ct. Rule X, but cf. Miss. Code (1942) § 1802; Neb. Rev. Stat. (1943) §§ 25-1631, 29-2007; N.H. Rev. Laws (1942) c. 375, § 31; R.I. Gen. Laws (1938) c. 506, § 33 as amended L. 1939, c. 700; S.C. Code (1942) § 637; Utah Code Ann. (1943) § 104-24-11; Va. Code (1942) § 6000; Wis. Stat. (1947) § 270.16.

Note: In New Hampshire the attorneys for either party may submit questions orally or in writing to the judge, and if found proper the judge submits the questions to the jurors.



VOIRE DIRE EXAMINATION OF JURORS

Provisions similar to Federal Rule of Civil Procedure, Rule 47, govern the *voire dire* examination

Prospective jurors questioned by judge alone

Questioning on *voire dire* by attorneys only

tions where the oral questioning is conducted by the attorneys *alone.*[143]

(I) Alternate jurors; status of Recommendation (4):

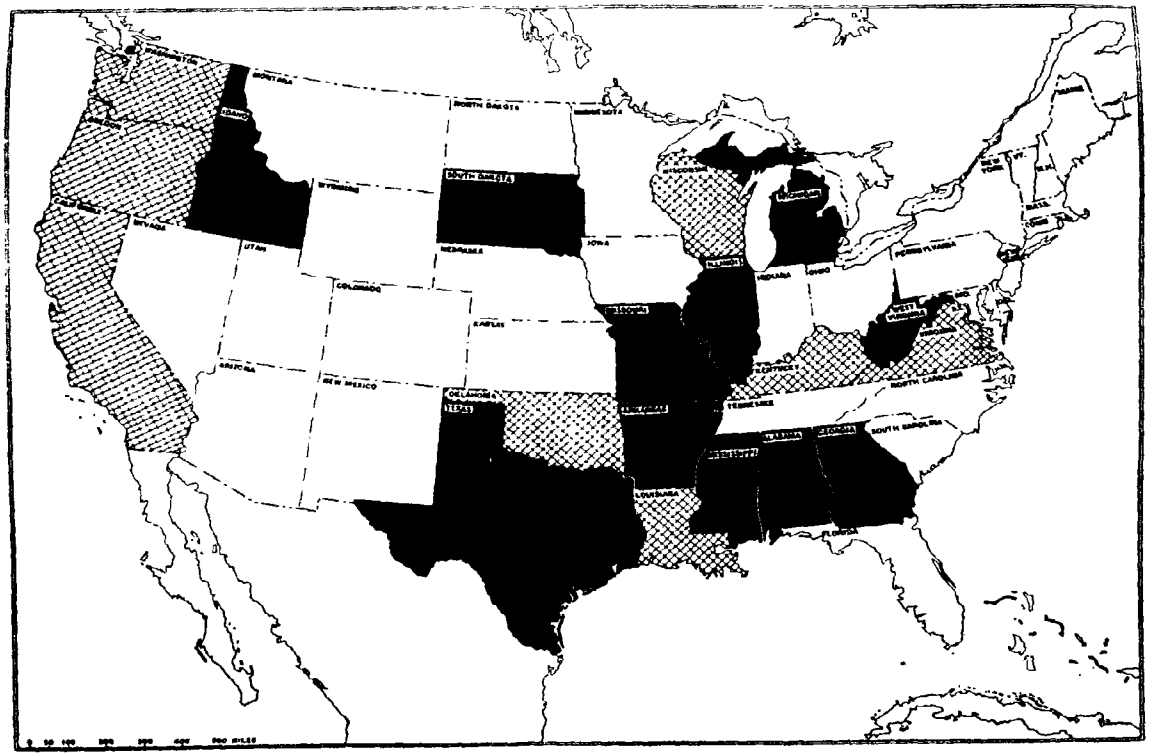
> That for prospective long trials, one or more jurors in addition to the regular panel should be selected and impanelled to sit as alternate jurors, in accordance with the practice authorized and regulated by Rule 47 of the new federal rules.

Since the adoption of this recommendation and in accord with the report of the Knox Committee, the use of alternate jurors in criminal cases in the federal courts has been increased.[144] Two thirds of the states do provide that in important cases, ones in which the trial is likely to be protracted, in the discretion of the court alternate jurors may be sworn to hear the case in addition to a regular jury of twelve. However, in some of these jurisdictions alternates may be used in felony or criminal cases only: *California, Kentucky, Louisiana, Oklahoma, Oregon, Virginia, Washington,* and *Wisconsin.*[145] The number of alternates authorized also varies. In twenty-six jurisdictions provision is made for one or two alternates drawn in the same manner as the principal jurors: *Arizona, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina,*

[143] Conn. Gen. Stat. (1949) § 7908; Idaho Code (1947) §§ 10-202, 10-204; Kan.; La., Mont., Nev., N.Y., Okla., Ore., Tex., Wyo.

[144] See Recommendation XVI, supra n. 23. Prior to the adoption of Federal Rule of Criminal Procedure 24(c) in 1946 (not more than 4 alternate jurors may be seated) a statute permitted alternate jurors in criminal cases to serve only if a regular juror died or became ill, 28 U.S.C. (1946) § 417a. For history of alternate juror provisions, and importance thereof, see Churchill, "Alternate Jurors—A Remedy for Felony Mistrials," 1 Tex. L. & Legis. 80 (1947).

[145] Calif. Penal Code (1941) § 1089 (felony cases); Ky. Crim. Code of Prac. (Carroll's, 1948) § 191 (criminal cases); La. Code Crim. Prac. (1943) § 359.1 (criminal cases); Okla. Stat. (1937) tit. 22, § 601a as added L. 1941, p. 88 (criminal cases); Ore. Comp. Laws Ann. (1940) § 29-914 (felony cases); Va. Code (1942) §§ 4902b (criminal cases); Wash. Rev. Stat. (Remington, 1932) § 2137-1 (felony cases); Wis. Stat. (1947) § 357.065 (homicide cases only).



AUTHORIZATION OF USE OF ALTERNATE JURORS

Use of alternate jurors authorized in all important cases in which trial is likely to be protracted

Use of alternate jurors authorized only in felony or criminal cases

Vermont, Virginia, Washington, and *Wisconsin.*[146] In seven states the swearing of one alternate is authorized: *Kentucky, New Hampshire, North Carolina, Ohio, Tennessee, Utah,* and *Wyoming.*[147] In three states two alternates are authorized: *Maine, Massachusetts,* and *Pennsylvania.*[148] In *California* the use of alternate jurors is authorized but no specific number is designated.[149] Generally it would seem that this recommendation is embodied in practice to some extent in the majority of jurisdictions, subject to the limitations indicated.

Conclusion

The problems of the care and comfort of jurors while awaiting assignment, and the protection afforded them against im-

[146] Ariz. Code (1939) § 21-938; Colo. R. Civ. P. 47; Conn Gen. Stat. (1949) § 7911; Del. R. Civ. P. 47; Fla. Stat. Ann. (1944) §§ 54.15, 913.10; Ind. Stat. (Burns, 1946) § 4-3325; Iowa R Civ. P. 189; Kan. Gen. Stat. (Supp. 1947) § 43-201; La. Code Crim. Prac. (1943) § 359.1 (criminal cases only); Md. Code Ann. (Supp. 1947) art. 51, §§ 23-25; Minn. Stat. Ann. (1945) § 546.095; Mont. Rev. Code (1935) § 8927.1; N.J. R. Civ. P. 3:47-2; N.M. Stat. (1941) §§ 19-101 (47b), 42-1004; N.Y. Civ. Prac. Act 449g; Neb. Rev. Stat. (1943) § 29-2004 (criminal cases only); Nev. Comp. Laws (1941) § 10961; N.D. Rev. Code (1943) § 28-1409; Okla. Stat. (1937) tit. 22, § 601a as added L. 1941, p. 88 (criminal cases only); Ore. Comp. Laws Ann. (1940) § 29-914 (felony cases only); R.I. Gen. Laws (1938) c. 506, § 32½ as added L. 1940, c. 936; S.C. Code (1942) § 626-2; Vt. Stat. (1947) § 1596; Va. Code (1942) § 4902d (criminal cases only); Wash. Rev. Stat. (Remington, 1932) § 2137-1 (felony cases only); Wis. Stat. (1947) § 357.065 (homicide cases only).

Special Note: In Georgia one or more alternates are sometimes used, although there is no statutory or other authorization—parties consenting to their use waive requirements of statutes as to juries.

[147] Ky. Crim. Code Prac. (Carroll's, 1948) § 191 (criminal cases only); N.H. Rev. Laws (1942) c. 375, § 32; N.C. Gen. Stat. (1943) § 9-21; Ohio Gen. Code (1938) § 11419-47 (permissible in all cases, rarely used in civil cases, frequently in criminal cases); Tenn. Code Ann. (1934) § 10041.1 added by Act of 1939, c. 27; Utah Code Ann. (1943) § 48-0-6; Wyo. Comp. Stat. Ann. (1945) § 12-145.

[148] Me. Rev. Stat. (1944) c. 106, § 96; Mass. Gen. Laws (1932) c. 234, § 26B as added L. 1945, c. 428; Pa. Stat. (Purdon, 1930) tit. 17, § 1153 as added L. 1935, No. 127 (on motion of parties).

[149] Calif. Penal Code (1941) § 1089 allows one or more alternates to be sworn in felony prosecutions. These alternates are kept with the other jurors until submission of the case for verdict, whereupon the regular jury retires, but the alternates are kept in the custody of the sheriff and are not discharged until the original jurors are discharged. Thus, an alternate remains available whenever a juror becomes disabled, whereas in many states the alternates are discharged when the case is submitted to the regular jury.

proper influence during the course of the trial have not been given too much attention, although the Knox Committee made a recommendation in this regard, and the committee of the Section of Judicial Administration considered these matters third in importance in contributing to the efficiency of jury trials.[150] In only five states are the accommodations for jurors "excellent" and "comfortable," [151] while in seven states the jurors' quarters are "adequate." [152] No quarters are furnished jurors awaiting service in a trial in nine jurisdictions.[153] Conditions in the remaining states vary and for the most part do not seem to be adequate.[154]

The protection afforded jurors during the course of a trial also varies considerably from state to state.[155] Twenty-nine

[150] See Recommendation X, supra n. 23, cf. Appendix A at 546. See also, "The Jury Looks at Trial by Jury," 31 J. Am. Jud. Soc'y 105-106 (1947), report of questionnaire answered by those serving as jurors in federal court.

[151] Colo., Conn., Me. (some counties); Mont. (some counties) and R.I.

[152] Ark., Del., Ind., Mass., Mo., Pa., and Wis.

Note: In Pennsylvania provisions for certain conveniences for women jurors are specified, Pa. Stat. (Purdon, 1930) tit. 17, § 913, while it is to be remarked that in Nebraska and Rhode Island women may be called as jurors only if adequate provisions are made for their accommodation, Neb. Rev. Stat. (1943) § 25-1601.01; R.I. Gen. Laws (1938) c. 506, § 37 as amended by L. 1939, c. 700

[153] Fla., Ill. (except Cook County), Iowa, Kan., Okla., Ore. (except one district); S.D., Utah, and Va.

[154] I.e.: In Idaho jurors are provided with a "small amount of comfort." "Provision for the comfort and convenience of jurors in Kentucky is inadequate, with little progress in sight." "As for the various counties of Maryland, the courthouses in a number of instances date back to the early days of the republic, and the accommodations for jurors are apt to be haphazard, incomplete or both." The courthouses in Mississippi "are ancient structures not particularly clean," the surroundings are "unpleasant" and the "jurymen not properly quartered." In Nevada "practically no attempt has been made . . . to render enjoyable the duty of acting as a juror." In Texas the jury quarters vary widely in different counties. In some they are antiquated and in others are modern. In the counties of greater population statutory provisions require a comfortably furnished room for the jury panel, Tex Civ. Stat. (Vernon, 1925) § 2102; however, the extent to which the jurors are actually made comfortable depends on local officials and the date of construction of the courthouse. The above quotations and reports are those of local attorneys, and indicate the neglect of this phase of the problem of jury service.

[155] I.e.: In California "jurors enjoy no privacy during recesses, or other periods when present in the building." "Custody is fairly vigilant in important cases" in Kentucky. South Carolina and Utah admit that there is "no proper protection during trial" and that there is a "need for additional provision for the protection of jurors." These quotations are from the state reporters answering the questionnaires

states, in the exercise of judicial discretion, allow the jurors to separate during the day, and at night with a warning not to discuss the case, and perhaps a further admonition not to form or express an opinion until the case is submitted to them for decision.[156] In criminal or capital cases thirteen states segregate the jury completely during the entire trial of a case.[157] Five jurisdictions guard the jury during the day but

on which the volume is based. See also discussions of recent cases involving separation of the jury: 21 Minn.L.Rev. 868 (1937), 18 So. Calif.L.Rev. 258 (1945).

[156] Ala. Code (1940) tit. 30, §§ 97, 997(1); Ariz. Code (1939) §§ 21-1022, 21-1024; Ark. Stat. Ann. (1947) §§ 37-1732, 37-1733, 43-2121, 43-2122; Calif. Code Civ. Proc. (1946) § 611; Conn. Gen. Stat. (1949) § 7970; Fla. Stat. Ann. (1943) §§ 918.06, 919.02; Ga. (see note infra); Idaho Code (1947) §§ 10-210, 19-2126, 19-2127 (except cases involving title or right to possession of mines or mining claims or damage thereto and murder trials); Ind. Stat. (Burns, 1942) § 9-1808, id. (Burns, 1946) § 2-2016; Iowa Code (1946) §§ 780.21, 780.22, Iowa R. Civ P. 199; Kan. Gen. Stat. (1935) § 60-2912; Ky. Civ. Code (Carroll, 1948) §§ 319, 320; Md. Code Ann. (1939) art. 51, § 24 (practice varies in different counties); Minn. Stat. Ann. (1945) § 631.09; Mont. Rev. Code (1935) § 9351; Neb. Rev. Stat. (1943) §§ 25-1109, 25-1110, 29-2022; Nev. Comp. Laws (1929) §§ 10990, 10991; N.C. Gen. Stat. (1945) § 9-17 as amended L. 1947, c. 1007, § 2; N.D. Code (1943) §§ 28-1416, 29-2127, 29-2128; Ohio Gen. Code (1938) §§ 11420-5, 13443-15, 13443-17, 13448-1; Okla. Stat. (1937) tit. 12, § 580 as amended L. 1941, § 581 (civil cases), tit. 22, § 853 as amended L. 1945, p. 471 (except capital cases); Ore. Comp. Laws Ann. (1940) § 5-306; R.I. Gen. Laws (1938) c. 506, § 34 as amended L. 1939, c. 700 (jury kept together only on motion of counsel, otherwise no statutory requirement); S.D. Code (1939) §§ 33.1320, 34.3647, 34.3649 (in discretion of court); Tex. R. Civ. P. (Vernon, Supp. 1948) Rule 284 (civil cases); Utah Code Ann. (1943) § 104-24-20; Vt. Stat. (1947) § 1727 (jury confined after cause submitted); Wash. Rev. Stat. (Remington, 1932) §§ 101, 345, 2159 (except criminal cases); Wyo. Comp. Stat. Ann. (1945) §§ 3-2402, 3-2411, 3-2412, 10-1315 (except capital cases).

Note: In Georgia it is within the discretion of the trial judge to permit the jury to separate during the trial, but after they have retired to consider a verdict it is reversible error to permit them to disperse without consent of parties. Cf. Central of Georgia Rwy. Co. v. Hall, 109 Ga. 367, 34 S.E. 605 (1899) and Prescott v Council of Augusta, 118 Ga. 549, 45 S.E. 431 (1903).

[157] Conn. Gen. Stat. (1949) § 8805 discretion of court, capital case or one involving life sentence; Idaho Code (1947) § 19-2026 (murder trials); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 38, § 745 (criminal cases); Ky. Crim Code (Carroll, 1948) art. 244 (criminal cases); La. Code Crim. Law & Proc (1942) art. 394 (capital cases); Mo. Rev. Stat. Ann. (1939) § 4071 (capital cases, separation in felony cases with consent of parties); Okla., Evans v. State, 26 Okla. Cr. 9, 221 P. 794 (1924) (capital cases); R I. Gen. Laws (1938) c. 506, § 34 (criminal cases on motion); Tex. Code Crim. Pro. (1941) arts. 623, 668 (separated by permission of court, consent of parties); Va. Code (1942) § 4902 (capital cases only); Wash. Rev. Stat. (Remingtion, 1932) § 2159 (criminal cases, separation by consent

allow them to separate and go to their homes at night.[158] Further study of these related problems of jury comfort and jury protection would seem necessary as one measure for establishing proper standards for the promotion and efficiency of jury trials generally.

Present variations among the states indicate the difficulties which must arise if competent persons are to be secured as jurors who are representative of the community. Much remains to be done for the improvement of the mode of investigating the competency of the prospective juror. The possibility for the influence of political pressure further aggravates the problem of securing able and unbiased jurors in fully one half of the states, where jurors are not selected by judicially appointed jury commissioners. Despite the success of the key-number system in Cleveland over a substantial period, it has not met with widespread popularity. The use of the jury box or wheel is almost universal, thus eliminating one of the opportunities for the exercise of improper influence in the selection of jurors. The studies of the committee on jury selection of the Section of Judicial Administration and of the Knox Committee have contributed much to the understanding of the problems involved in jury selection and service. Although their conclusions differed somewhat on specific points, basic to the recommendations of both groups was recognition of the need for improvement in the mode of jury selection.

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of parties); W.Va. Code (1943) § 6195 (criminal cases); Wyo. Comp. Stat. Ann. (1945) § 10-1315 (capital cases)

[158] D.C., Minn., Mo. (other than capital cases), Tenn. (civil cases), Va. (other than capital cases).

CHAPTER V

PRETRIAL CONFERENCES

Recommendations Adopted by the American Bar Association, July, 1938

(1) That courts in the metropolitan areas should make provision for pretrial hearings, and other courts should give consideration to the procedure with a view of adopting it if justified by local conditions.

(2) That whether the pretrial hearing should follow closely the joinder of issue, or should be postponed until shortly before actual trial, must be determined by the individual needs in each jurisdiction.

(3) That the pretrial hearing should be had before a judge.

(4) That a pretrial hearing need not involve a disclosure of the details of proof which counsel prefer not to disclose [1]

INTRODUCTION

The pretrial conference is an outstanding recent development for the improvement of trial practice. It is important as a method of simplifying the issues, providing for the amendment of the pleadings where necessary, obtaining admission as to uncontroverted facts and undisputed documents, restricting within reasonable bounds the number of expert witnesses, and considering such other matters as may aid in the disposition of the action, thus expediting the trial of the case to the advantage of everyone concerned—judge, jury, parties, witnesses, attorneys, and the public generally. Its incidental benefits include the settlement of many cases which never should go to trial, the achievement of a stabilized trial docket and, most important of all, a court which is adequately informed in advance of the trial as to the issues on which it will be called on to rule. This in turn has the desirable effect of decreasing errors of law and minimizing appeals. The general nature of the pretrial conference is an informal discussion between court

[1] **Appendix A at 506. Cf. Recommendations of Committee on Pretrial Procedure of Section of Judicial Administration. Id at 533.**

and counsel, preferably held in open court. Here the judge and the attorneys seek to state the issues in dispute between the parties, conforming the pleadings thereto, and to simplify the proofs at the oncoming trial by marking exhibits in advance wherever they can be agreed upon and stipulating all uncontroverted matters of fact. While the pretrial conference does not partake of the nature of an arbitration and ordinarily the judge will not take the lead in seeking to settle cases, an agreement of settlement which is a final disposition of the case may be reached and in fact very often is reached at such a conference, or at least the settlement of a case may be initiated.

Early experiments with the pretrial conference in Detroit and Boston led to the imitation of such procedure in various courts throughout the country.[2] The Federal Rules of Civil Procedure, which became effective in 1938, only a trifle more than a decade ago, authorizing district judges to hold pretrial hearings in their respective courts, have given marked impetus to the adoption of this new device.[3]

The four recommendations relating to pretrial conferences which head this chapter emphasize the importance of such hearings in metropolitan districts and suggest the adaptability of such procedure as a universal practice.[4] While it was considered important that a pretrial hearing should be had before a judge rather than a master, thus making possible the final disposition of cases at such hearings, no definite recommendation was made as to the stage of the case when the hearing should be held, nor was it considered desirable to require a disclosure of details of proof which counsel might prefer not to disclose.

[2] Id. at 518. See Laws and Stockman, "Pretrial Conferences," IV Handbook, National Conference of Judicial Councils 88 (1942); Crawford, "Legal Problems of the Pretrial Conference," 31 Corn.L.Q. 285 (1946); Nims, "Pretrial in the United States," 25 Can.B. Rev. 697 (1947).

[3] Fed. Rules Civ. Pro. Rule No. 16, infra n. 5. See Simpson, "The Pleading Problem," 53 Harv.L.Rev. 169 at 192-204 (1939) arguing for use of pretrial hearing in combination with summary judgment procedure.

[4] Cf. Dobie, "Use of Pretrial Practice in Rural Districts," 1 Fed. Rule Dec. 371 (1940).

Use of the Pretrial Conference

Despite the example furnished by the federal courts and the publicity given pretrial hearings through the adoption of Rule 16 of the Federal Rules of Civil Procedure,[5] at the present time the use of this device is still not established in nineteen states, either as a matter of practice, or by rule, or by statute. This group includes several of the more populous states having large metropolitan centers: *Alabama (law), California, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nevada, New York, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia,* and *Wyoming.*[6]

[5] Federal Rules of Civil Procedure: "Rule 16. Pretrial Procedure; Formulating Issues.

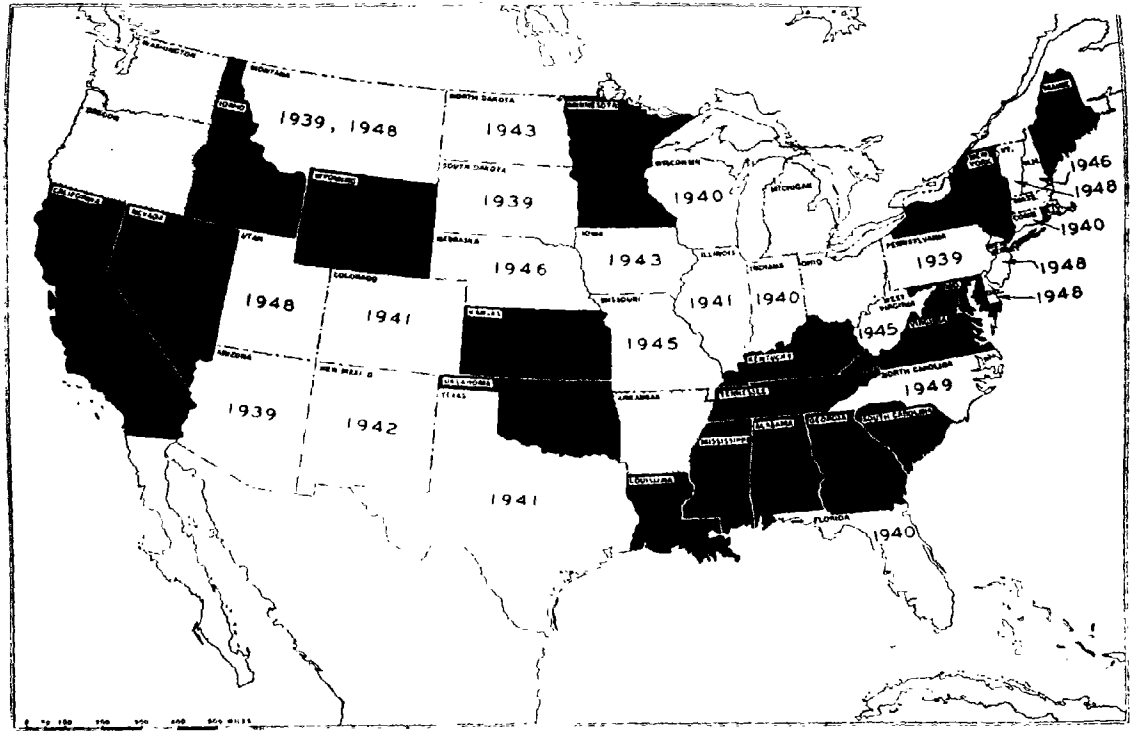
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions."

See Moore's Federal Practice at 1101 (2d ed. 1948).

[6] This number includes Alabama, where pretrial conferences are authorized in equity actions, and New York, where such conferences are used in the First Judicial District. The following is to be noted in regard to several of the above states: California, the use of pretrial procedure was introduced in two counties in 1938, and then abandoned within two years, no further attempts to introduce the system have been made; Kansas, while having no special pretrial conference provided by statute or rule, some judges do use conferences before trial to facilitate trial of the issues, and the general purposes served by such procedure are often achieved by other devices, such as frequent motion days and calls of the docket by which the court ascertains the status of cases and the issues to be tried, while motions for judgment on the pleadings are often used to dispose of cases when there are no facts to try;



PRETRIAL CONFERENCE

Use of pretrial conference authorized by statewide rule or statute, date at which authorized

Pretrial conference use authorized by local rule applicable only in some sections of the jurisdiction, particularly certain metropolitan areas

Modeled for the most part on the federal practice, the use of pretrial conferences is authorized either by rule or by statute in twenty-nine states: *Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, West Virginia,* and *Wisconsin.*[7] The adoption of such procedure is of very recent date in many of these states. Little therefore can be known of its effect in actual practice. The use of such procedure must, of course, vary from state to state.[8] Thus, in 1940 the Florida Supreme

Kentucky, no regular procedure for pretrial conferences, but some circuit judges do achieve a semblance of such proceedings through voluntary cooperation of counsel; Maine, while having no special provisions as to pretrial procedures, stipulations or agreed statements as to facts often are used to achieve the same results; Minnesota, some judges do hold informal hearings and make informal inquiries at the commencement of a trial; Oklahoma, in district courts in Tulsa and Oklahoma counties pretrial conferences patterned on federal rules were employed under local rules for about two years and then abandoned; South Carolina, bar association studying the usefulness of the procedure; Tennessee, a bill sponsored by the judicial council authorizing pretrial conferences was defeated.

[7] This number does not include Alabama and New York, which are, however, listed below. In the former the use of pretrial conferences is confined to equity actions, while in the latter state the device is utilized only in New York County. Ala. 1940, Equity Rule 38 found in Ala. Code (1940) tit. 7 at 1083; Ariz. 1939, Ariz. Code (1939) § 21-453; Ark. since 1940, local rule; Colo. 1941, Colo. Stat. Ann. (1941 Repl. Vol.) R.Civ.P. 16; Conn. 1940, Conn. Prac. Book, Rule 147a; Del. 1948, Superior Ct. Rule 16, Chancery Rule 16; Fla. 1940, Sup. Ct. Rule; Ill. 1941, Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110 § 182(a); Ind. 1940, Sup. Ct. Rule 1-4; Iowa, 1943, R.Civ.P. 135-139; Mass. 1935, Suffolk County, Superior Ct. Rule 57a; Mich. 1929, Sup. Ct. Rule 35 § 4, local rules, e.g., Wayne County; Mo. 1945, Mo. Rev. Stat. Ann. (Supp.) § 847.84, Mo. Sup. Ct. Rule 3.17; Mont. 1939, 1948, Mont. Rev. Code (Supp.) § 9327, Sup. Ct. order, effective Nov., 1948; Neb. 1946, 147 Neb. Rep. xxxv; N.H. 1946, Sup. Ct. Rule; N.J. 1948, Sup. Ct. Rule 3:16; N.M. 1942; N.Y. 1948, N.Y. County, Justices of First Dept., Rule IX; N.C. 1949, N.C. Laws (1949) c. 419; N.D. 1943, N.D. Rev. Code (1943) § 28-1101; Ohio, local rule primarily in metropolitan areas; Ore., local rule; Pa. 1939, Pa. Sup. Ct. Rule 212; S.D. 1939, S.D. Code (1939) § 33.1003; Tex. 1941, R.Civ.P. 166 (in use in Dallas District Court prior thereto); Utah, 1948, Sup. Ct. Rule; Vt. 1948, Superior Ct. Rule 3-A; Wash. 1942; W.Va. 1945, 127 W.Va. Rep.; Wis. 1940, Wis. Stat. (1947) § 269.65.

[8] E.g., Arizona, pretrial conference is little used, in Tucson there is no local rule making pretrial conference automatic, and since neither attorneys nor judges take initiative, no such conferences are held. Arkansas, there is no statewide court rule or statute, but under the rule-making power conferred on the circuit courts most of the

Court entered an order authorizing lower courts to promulgate and put in effect a rule for pretrial conferences which it had drafted. Actually, although some courts have adopted this rule, pretrial conference is not yet in general use in the state.

In accord with the first recommendation heading this chapter pretrial conferences are employed in some of the courts of a number of large cities: *Jacksonville, Florida; Chicago, Illinois; Boston, Worcester,* and *Springfield, Massachusetts; Detroit, Michigan; New York City, (New York County) New York;*

principal circuit courts throughout the state have set up very efficient pretrial hearing procedures, although not all circuit courts have done so, and the procedures vary from circuit to circuit according to the interest and energy of the particular judge [N.B.—all references in the footnotes of this chapter to Arkansas procedure relate to the practice in the 6th Judicial Circuit, Pulaski and Prairie Counties]. Florida, adoption of rule by circuit courts authorized but not generally used. Indiana, at least 39 courts have used the pretrial conference, see 22 Ind.L.J. 280, at 283 (1947). Iowa, judges are reluctant to use pretrial conferences. Massachusetts, there is a pretrial conference in all jury cases to be tried in Suffolk County Superior Court, sitting in Boston; in other counties and cities pretrial conferences occasionally held, generally when dockets are especially heavy or on request. Montana, despite 1939 statute pretrial procedure was not in general use; see Carlin v. District Court of Fifth Judicial District, 118 Mont. 127, 164 P. (2d) 155 (1945); effect of recent Supreme Court order not known, pretrial conference clinics held throughout state in 1949. Nebraska, pretrial conference rule not formally applied frequently, but informal conferences have always been held. Oregon, pretrial conference use is scant; the bar is uncooperative and only an occasional judge has experimented with it. Ohio, no statute or uniform rule for pretrial hearings, no uniformity as to pretrial conferences although they are in use in some metropolitan areas. Pennsylvania, pretrial conference is permissive and not mandatory in the separate county courts (67 counties), and some county courts have adopted a rule for such hearings in certain cases, e.g., Delaware County. Texas, in some of the more populous counties pretrial is not used at all or very infrequently, while in a few rural districts it is used very successfully, and the application of the rule varies widely throughout the state. Washington, in Seattle the Superior Court of King County, sitting en banc, adopted a rule creating a pretrial department on June 22, 1948, to pretry all cases noted on the regular trial docket, the pretrial judge examines all such files and may order the attorneys in for a pretrial conference. The scope of the conference is substantially that provided in the federal rule. The new rule went into effect on August 1, 1948, and is the first real effort in Washington to put pretrial practice on a systematic basis. Pretrial conferences have been sporadically tried in some other parts of the state. West Virginia, pretrial conference rule is not invoked by trial courts to any great extent as yet. Wisconsin, pretrial conferences are utilized extensively, particularly by judges in larger cities where a pretrial conference is held for almost, if not all, cases on the jury calendar. It is to be noted also that the rules now being drafted in Wyoming provide for pretrial conferences. See 2 Wyo.L.Rev. 174 (1948).

Cleveland, Ohio; Portland, Oregon; Pittsburgh, Pennsylvania; Dallas, Texas; and *Seattle, Washington.*[9] In four jurisdictions pretrial conferences are used only in metropolitan areas: *Massachusetts, Michigan, Ohio,* and *Pennsylvania.*

As was expected by the Section of Judicial Administration, which made no recommendation on this point, the time when the pretrial hearing is held varies according to the individual needs of the several jurisdictions. Generally it may be said that the pretrial conference should be held sufficiently in advance to allow the parties to utilize its accomplishments in preparation for trial, but not at such an early date that the parties may forget what occurs. Thus, a date for the pretrial hearing two to three weeks before trial would seem to be preferable. In Ohio the pretrial hearing is held soon after issue is joined. Seven juridictions hold the hearing shortly before trial.[10] The conference is held at any convenient time in ten states.[11] In seven states no time is set for the hearing by either the court rule or the statute, and the hearing is held any time after issue is joined.[12]

In all courts in which pretrial conferences are held in accord with the recommendations, the pretrial hearing is had before a judge. The judge who will try the case presides over the pretrial hearing in thirteen states,[13] while in four jurisdictions another judge or pretrial justice holds the hearing.[14] Either the trial judge or another judge holds the pretrial hearing in nine states.[15] In Chicago a pretrial justice holds the pretrial

[9] As to experience in the use of pretrial conference in various cities, see Fisher, "Judicial Mediation: How it Works Through Pretrial Conference," 10 U. of Chic.L.Rev. 453 (1943); 24 J. Am. Jud. Soc'y 29 (1940); 22 Mass. Jud. Coun. Rep. 98-99 (1946); 17 Mich. Jud. Coun. Rep. 22 (1947).

[10] Ark., Del., D.C., Ill. (about a month before trial), Mass., Mich., N.J. (two weeks before case is assigned for trial).

[11] Ariz., Colo., Conn., Ind., Minn., N.H., Ore., S.D., Utah, and Wis.

[12] Iowa (Iowa R.Civ.P. 135, court may set a time by making a pretrial calendar), Mo., Mont., Neb., N.M., N.D., and Pa.

[13] Ark. (majority of times), Colo., Fla., Ind., Iowa, Mich. (in courts having only one judge he conducts both), Mont., Neb., N.H., N.M., Ore., Tex. and Utah.

[14] D.C., Mass. (no set rule—usually a different judge presides at trial), Mich. (Wayne County), Ohio. This is done infrequently in Arkansas.

[15] Ariz., Conn., Del., Mo., N.D., Pa. N.J., S.D., and Tex.

conference, but in other circuits of that state the trial judge presides. In Wisconsin the trial judge holds the pretrial hearing except in the courts of Milwaukee County, where another judge presides. Attorneys for the litigants are required to be present in all jurisdictions except New Hampshire, where sometimes only counsel on one side is required to be present. In Wisconsin's Family Branch parties must be present, and in New Jersey criminal proceedings it is required that the defendant be present at the pretrial conference. It is optional whether the parties attend the hearing in seventeen jurisdictions.[16] It is also optional whether witnesses attend the hearing in five jurisdictions.[17]

Consistent with the fourth recommendation made regarding pretrial conferences, only three states require details of proof to be disclosed at the pretrial hearing.[18] Counsel may be required, however, to produce necessary documents in eight jurisdictions.[19]

It is only in the last decade that the pretrial conference has been authorized in the majority of jurisdictions. Although the use of the device is still experimental for the most part, many examples of the mode of its utilization may be cited. Thus, at the pretrial conference judge and counsel discuss amendments of pleadings and elimination of issues,[20] and the possibility of settlement is canvassed.[21] Consent judgments are discussed and sometimes entered[22] and installment payments are also discussed.[23] Limitation of the number of witnesses is sought, particularly in those states which have patterned their pretrial

[16] Ark., Conn., D.C., Fla. (but most unlikely), Ill., Ind., Mass. (not customary), Mich., Neb., N.H., N.J., N.D., Ohio, Ore., Pa. S.D., and Wis.

[17] Ark., Ill., N.D., Ore., and Wis. It is to be noted that in the District of Columbia their attendance is sometimes required.

[18] Ariz., Mich. and S.D.

[19] Ark., Ariz., D.C., Mass., Mich., Ohio, Ore., and S.D.

[20] Ark., Ariz., Colo., Conn., Del., D.C., Fla., Ill., Ind., Iowa, Mass., Mich., Mo., Mont., Neb, N.H., N.J., N.D., Ohio, Ore., Pa., S.D., Tex., Utah, and Wis.

[21] Ark., Ariz., Conn., D.C., Fla., Ill., Ind., Mass., Mich., N.H., N.J., N.D., Ohio, Pa., S.D., Tex., and Wis.

[22] Ark., Ariz., D.C., Fla., Ill., N.H., N.J., Ohio, Pa., and Wis.

[23] Ark., Conn., D.C., Fla., Ill., Iowa, N.H., and Ohio.

procedure upon *Rule 16 of the Federal Rules of Civil Procedure.*[24]

While in many jurisdictions experience in the use of this relatively new procedure has not been very extensive, it is to be noted that counsel have become accustomed to and are able to enter into stipulation of various facts, particularly in certain types of cases. In automobile tort cases, for example, the following facts have been or may be stipulated: that the vehicle is registered,[25] that the operator was licensed,[26] that the driver was an agent,[27] that photographs are accurate and hospital reports are correct;[28] that identification of the locus of the accident was agreed upon;[29] and that foreign law applies.[30]

In contract cases counsel have been urged to stipulate that the contral was oral or written,[31] that the contract was express or implied,[32] that certain credits were proper,[33] that either the Statute of Frauds or the Statute of Limitations applies,[34] that notice to produce documents is waived,[35] and that matters of public record are admitted.[36] In the District of Columbia, Iowa and New Jersey it may be stipulated that the contract itself may be admitted into evidence without formal proof.

In note cases it has been stipulated that the signatures are genuine and certain credits are proper,[37] and that delivery is

[24] This is not the case in Texas although it is provided for by the rule.

[25] Ariz., Conn., Del., D.C., Fla., Iowa, Mass., Mich., N.H., N.J., N.D., Ohio, Pa., S.D., and Wis.

[26] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mich., N.H., N.J., N.D., Ohio, Pa., and Wis.

[27] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., Mich., N.H., N.J., N.D., Pa., S.D., and Wis.

[28] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., Mich., N.J., N.D., Ohio, Ore., Pa., S.D., and Wis.

[29] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., Mich., N.H., N.D., Ohio, Ore., Pa., S.D., and Wis.

[30] Ark., Ariz., Conn., Del., D.C., Iowa, Mass., Mich., N.H., N.J., Ohio, Pa., S.D., and Wis.

[31] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., Mich., N.J., N.D., Pa., S.D., and Wis.

[32] Ark., Ariz., Conn., Del., D.C., Fla., Mass., Mich., N.J., N.D., Pa., S.D., and Wis.

[33] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., Mich., N.H., N.D., S.D., and Wis.

[34] Ark., Ariz., Conn., Del., D.C., Mich., N.H., N.J., N.D., Pa., S.D., and Wis.

[35] Ark., Conn., Del., D.C., Ill., Iowa, Mass., Mich., N.H., N.J., N.D., Ohio, Pa., S.D., and Wis.

[36] Ark., Ariz., Conn., Del., D.C., Fla., Ill., Iowa, Mass., Mich., N. J., N.D., Ohio, Pa., S.D., and Wis.

[37] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., N.H., N.J., N.D., Ohio, Ore., Pa., S.D., and Wis.

not disputed.[38] As in cases involving contracts, in the District of Columbia and New Jersey it may be stipulated that the instrument itself may be admitted into evidence without formal proof.

In insurance cases stipulations are encouraged with respect to whether the policy was properly executed, whether the premiums were paid, and as to the controlling dates.[39] Counsel are urged to stipulate whether the policy was in force [40] or whether the policy was reinstated.[41]

In tax cases stipulations may be made as to the exact amount paid,[42] that a refund was claimed, and denial of the claim was received,[43] and proof of documents may be waived.[44]

Public liability cases offer a wide field for the use of pretrial stipulations. Stipulations are allowed to the effect that the defendant either owned or controlled the premises,[45] and that the defendant was a tenant at will.[46] Clarifying the status of the plaintiff is encouraged, stipulations are permitted that the plaintiff was a business visitor [47] or that he was a guest.[48] The specific defect is a subject for stipulation,[49] and whether the stairway or area was common.[50]

In uncontested foreclosure cases stipulations are permitted that a certain decree is appropriate,[51] that a moratorium should be granted,[52] and that a certain monthly rental should be paid.[53]

[38] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., N.J., N.D., Ohio, Ore., Pa., S.D., and Wis.

[39] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., N.J., N.D., Ohio, Pa., S.D., and Wis.

[40] Ark., Ariz., Conn., Del., D.C., Fla., Iowa, Mass., N.H., N.J., N.D., Ohio, Pa., S.D., and Wis.

[41] Ark., Ariz., Conn., Del., D.C., Iowa, Mass., N.J., N.D., Pa., S.D., and Wis.

[42] E.g., Ohio.

[43] Ariz., Conn., D.C., Fla., Iowa, N.J., Ohio, Pa., and Wis.

[44] Conn., D.C., Fla., Iowa, N.J., Pa., and Wis.

[45] Ariz., Conn., Del., D.C., Fla., Iowa, Mass., N.J., N.D., Ohio, Pa., S.D., and Wis.

[46] Ariz., Conn., Del., D.C., Fla., Mass., N.J., N.D., Pa., S.D., and Wis.

[47] Ariz., Conn., Del., D.C., Fla., Mass., N.J., Pa., S.D., and Wis.

[48] Ariz., Conn., Del., D.C., Fla., Mass., N.J., N.D., Pa., S.D., and Wis.

[49] Conn., D.C., Fla., Mass., N.J., Ohio, Pa., S.D., and Wis.

[50] Ariz., Conn., Del., D.C., Fla., Iowa, Mass., N.J., Pa., S.D. and Wis.

[51] Ariz., Conn., D.C., Fla., Iowa, N.H., N.D., Ohio, S.D., and Wis.

[52] Conn., N.H., N.D., Ohio, S.D., and Wis.

[53] Conn., D.C., Iowa, N.H., N.D., Ohio, S.D., and Wis.

The provisions with respect to stenographic reporting of the hearings are very diverse. *Colorado, Michigan,* and *Pennsylvania* have no provisions for reporting. The court may direct that the pretrial hearing be reported in four states,[54] while in twelve states either the court may so direct or counsel may request a reporting.[55] In *Arizona* the hearing is reported in full only in the county superior courts. In *South Dakota* and *Utah* all proceedings at the pretrial hearing are reported.

At the conclusion of the pretrial conference the judge makes a written résumé, report or order, specifying such matters as a decision to limit the trial to certain issues, granting of leave to amend the pleadings, facts stipulated, documents admitted, and any settlement reached.[56] Twenty jurisdictions require the report by virtue of court rule or statute.[57] Statements of claims and stipulations are made by counsel in open court in the *District of Columbia* and *New Jersey;* the pretrial judge then dictates a résumé of the proceedings, which is immediately signed by counsel before leaving court. This may also be done in *Pennsylvania* in some courts. In *Massachusetts* and *Michigan* the summary of the proceedings is dictated by the judge in the presence of counsel and is sent to them after being transcribed.

The judge's written report or pretrial order may show the amendments to the pleadings permitted,[58] the possibility of settlement,[59] the stipulations of counsel,[60] and in appropriate cases an order for medical examination.[61] An estimate of the

[54] Fla., N.D., Ore., and Utah

[55] Ark., Del., Ill., Ind., Iowa, Mass., Mo., N.H., N.M., Ohio, Pa., and Wis. In Missouri the transcript becomes official only if requested by either party or ordered by the court. Mo. Sup. Ct. Rule 3.17(b).

[56] In Arkansas the court may enter an order. Under present practice in Dallas County, Texas, no order is entered unless a ruling is made on the pleading.

[57] Ariz., Del., D.C., Fla., Ill., Iowa, Mass., Mich., Mo., Mont., N.J., N.M., N.C., N.D., Ohio, Pa., S.D., Tex., Utah, and Wis.

[58] Ark., Ariz., Colo., Conn., Del., D.C., Fla., Ill., Ind., Iowa, Mass., Mich., Mo., Mont., Neb., N.H., N.M., N.J., N.D., Ohio, Ore., Pa., S.D., Utah, and Wis.

[59] Ark., Conn., D.C., Mass., Mich., N.D., Ohio, Pa., S.D., and Wis.

[60] Ark., Ariz., Colo., Conn., Del., D.C., Fla., Ill., Ind., Iowa, Mass., Mich., Mo., Mont., Neb., N.H., N.J., N.M., N.D., Ohio, Ore., Pa., S.D., Utah, and Wis.

[61] Ark., Ariz., Conn., D.C., Fla., Iowa, Mich., N.J., N.D., Ohio, Pa., S.D., and Wis.

time necessary to try the case may be included in the order,[62] and in the *District of Columbia* this information is forwarded to the Assignment Commissioner for his use.

The report made by the pretrial judge becomes part of the official file in twenty-two jurisdictions.[63] In normal cases the report is binding on the judge who tries the case in twenty jurisdictions.[64] The report is not binding on the trial judge in *Indiana,* nor is it binding in *Missouri* if a different judge tries the case, except as to agreements regarding facts.

The preceding account presents some notion of the potentialities inherent in the pretrial conference. Its value in securing stipulations of undisputed facts in many varieties of cases cannot be overestimated. Moreover, the pretrial résumé, report or order is undoubtedly of great assistance when the trial of an action is conducted.

Conclusion

Although the pretrial conference is a somewhat novel device, it has met with surprising acceptance. Thus, while the pretrial conference originated in 1929 in Wayne County, Michigan, a majority of jurisdictions now provide for its use. The greater number of this group have authorized this procedure since the recommendations of the American Bar Association were made and since the Federal Rules of Civil Procedure were promulgated. Inasmuch as the authorization of the procedure generally is of very recent date and since its use is not yet widespread, it is impossible to determine all the effects it may have on trial proceedings. The experience of Wayne County has shown the manifold possibilities of this device, especially in aiding in the final disposition of cases. The in-

[62] Ark., D.C., Fla., Mass., Mich., N.H., N.J., Ohio, Pa., Tex., and Wis.

[63] Ark., Ariz., Colo., Del., D.C., Fla., Ill., Iowa, Mass., Mich., Mo., Mont., Neb., N.J., N.M., N.D., Ohio, Pa., S.D., Tex., Utah, and Wis.

[64] Ark. (within limits the order may be changed at a later date), Ariz., Colo., Del., D.C., Fla., Iowa, Ill., Ind., Mass., Mich., Mont., Neb., N.J., N.D., Ohio, Ore., Pa., Tex., and Utah. In Michigan if the résumé is objected to by counsel, a further conference may be had and modification made if necessary.

creasing use of the pretrial conference in the federal courts "has demonstrated beyond peradventure that pretrial procedures result not only in great efficiency in the judicial processes, but in great economies in time and money for the courts, the litigants, and the public." [65]

[65] Report of the Judicial Conference of the United States at 36 (1948). As to increasing use of this procedure by federal judges, see Report of Pretrial Committee of Judicial Conference of the United States (1948).

ADDENDUM

Summary Judgment Procedure

No recommendation directed specifically at the use of summary judgment procedure was made by the American Bar Association in 1938. The Committee on Pretrial Procedure of the Section of Judicial Administration, however, concluded that the summary judgment is a valuable device supplementing the pretrial conference and that the summary judgment procedure as authorized by most states was not sufficiently broad, and suggested the adoption of a liberal rule providing for such device.[1]

The summary judgment procedure was developed to save time, effort, and expense, since through its use a final judgment might be entered immediately on a showing that there were no issues of fact requiring a formal trial. Although the early provisions for summary judgment demonstrated the utility of this device, its applicability was originally limited to a few actions only. Gradually the scope for its use was extended to an increasing number of designated actions, but it was not until the adoption of Rule 56 of the Federal Rules of Civil Procedure that summary judgment procedure was anywhere made available without restriction to particular actions.[2] Twenty-eight of the jurisdictions of the United States provide for some form of summary judgment procedure.[3] In seven of the states

[1] Appendix A at 531.

[2] Clark, "Summary Judgments," IV Handbook, National Conference of Judicial Councils 55 et seq. (1942).

[3] Ala. Code (1940) tit. 7, §§ 591-623, tit. 9, § 98, tit. 13, §§ 443-455; Ark. Stat. Ann. (1947) § 29-201; Ariz. Code (1939) §§ 21-1210 through 21-1216; Calif. Code Civ. Proc. (1941) § 437c; Colo. R.Civ.P. Rule 56; Conn. Practice Book §§ 52-57; Del. Superior Ct. Rule 56, Chancery Ct. Rule 56; D.C., Fed. R.Civ.P. Rule 56, Municipal Court Rule 16; Ill., Rev. Stat. (Smith-Hurd, 1947) c. 110, §§ 172, 181 and §§ 259.15, 259.16 (Sup. Ct. Rules), c. 95, § 22b (in foreclosure suit); Iowa Sup. Ct. Rule Civ. P. 237-240; Ky. Code Civ. Prac. (1948) §§444-449; Md. Code (1947 Cum. Supp.) 2044, Ct. of App. Rule effective Jan. 1, 1948; Mass. Gen. Laws (1932) c. 231, § 59B; Mich. Comp. Laws (1948) § 6:8.9, Mich. Court Rules (1945) Rule 30; Mo. Rev. Stat. Ann. (1939) § 3328; N.J. Superior Ct.

in contrast to the liberal federal rule,[4] use of the procedure is severely limited: *Alabama, Arkansas, Kentucky, Missouri, Oklahoma, Texas,* and *Washington.*[5] In three states the motion is limited to actions on contracts: *Massachusetts, Rhode Island,* and *West Virginia.* Eighteen jurisdictions have a more liberal form of summary judgment procedure. In seven of these, use of the procedure is limited either to certain parties or to certain actions: *California, Connecticut, Illinois, Iowa, Michigan, Pennsylvania,* and *Virginia.* A liberal rule patterned usually on the federal rule prevails in the remaining eleven jurisdictions: *Arizona, Colorado, Delaware, District of Columbia, Maryland, New Jersey, New Mexico, New York, North Dakota, Vermont,* and *Wisconsin.*

Rule 3:56; N.M. Stat. (1941) §19-101 (56); N.Y. Rules of Civ. Prac., Rule 113; N.D. Rev. Code (1943) §§ 28-0910, 28-0911; Okla. Sup. Ct. Rules 31, 32; Pa. R.Civ.P. 1037, 1071, 1084, 1098; R.I. Gen. Laws (1938) c. 524; Tex., R.Civ.P. 435 (Vernon, 1948); Vt., County Ct. Rule 9; Va. Code (1942) § 6046; Wash. (Remington, 1932) §§ 496, 524, 1739; W.Va. Code (1943) § 5524; Wis. Stat. (1947) § 270.635. Many states undoubtedly have provisions as does Louisiana, permitting plaintiff to take judgment against defendant on the pleadings if defendant's answer admits sufficient facts alleged by plaintiff. La. Gen. Stat. (1938) § 1483(4). This, however, is substantially similar to Federal Rule of Civil Procedure 12c, and is not comparable to Rule 56, which authorizes the motion or summary judgment. Cf. motions for striking out sham pleadings, e.g., Minn. Stat. Ann (1945) § 544.10. Cf. also, the closest approach to summary judgment procedure in South Carolina, which is that permitted a party prejudiced by a frivolous pleading. S.C. Code (1942) § 587. See Clark and Samenow, "The Summary Judgment," 38 Yale L.J. 423 (1929) for an earlier summation of existent summary judgment procedures.

[4] Federal Rules Civil Procedure:

"Rule 56. Summary Judgment.

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Moore's Federal Practice 210 (Supp. 1948).

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Moore's Federal Practice 3171 (1938).

[5] E.g., Ala., use of summary judgment motion confined to relief against certain named officials and is given to sureties and endorsers against their principals. Semble Ark. and Ky. In Texas the only type of summary judgment is that permitted to be taken against a surety on an appeal bond in certain situations.

CHAPTER VI

TRIAL PRACTICE

Recommendations Adopted by the American Bar Association, July, 1938

(1) That the common-law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

(2) That after the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury.

(3) That the trial judge should be at all times the governor of the trial *in the sense of actively, and firmly when necessary,* requiring that the proceedings be conducted with dignity, decorum and the avoidance of waste of time.

(4) That the provisions of the new federal rules 26 to 37 relating to discovery should be adopted in all the states.

(5) That the trial court should be authorized, in its discretion to submit specific issues to the jury to be considered in connection with a general verdict, in accordance with the practice prescribed by Rule 49 of the new federal rules.

(6) That the trial judge should have power to grant a partial new trial where in his judgment the several issues are clearly and fairly separable.

(7) That the practice of granting judgment *non obstante veredicto* be uniformly adopted, and that it be extended to authorize judgment on motion, in accordance with the original motion for a directed verdict, after the jury has disagreed and upon discharge, as provided for in Rule 50 of the new federal rules.

(8) That after the trial of a law suit has begun, dismissal without prejudice by voluntary *non-pros* be permitted only in the legally reviewable discretion of the trial judge.

(9) That in law cases involving complicated fact issues, there may well be reference to a special master or auditor in advance of a

jury trial with the submission of his report for consideration by the jury . . . ; that in equity and non-jury law cases the report should be accepted by the court as to the facts unless clearly erroneous, but nevertheless with power in the trial judge to adopt or modify or reject the report in whole or in part or, in his discretion, to receive further evidence with regard to the facts found, or to re-commit the report with instructions. In jury actions the findings of the referee, special master or auditor should be made admissible as evidence of the matters found and be read to the jury subject to the ruling of the court upon any objection in point of law which may be made to the report (see new federal rule No. 53).

(10) That the practice as to issuing preliminary injunctions should be in accordance with that outlined in the new federal rule 65 which in substance forbids the issuance of preliminary injunctions without a hearing, but permits a temporary restraining order when necessary to obviate irreparable injury.[1]

[1] Appendix A at 506. The recommendations quoted in the text are those of the Section of Judicial Administration numbered respectively (1), (2), (3), (7), (8), (9), (10), (11), and (12). The Section's recommendations (4) and (5) as to examination of jurors on the voir dire and use of alternate jurors respectively are considered in the chapter on The Selection and Service of Juries, while its recommendation (6) as to abolition of the scintilla rule is considered in the chapter on The Law of Evidence. Its recommendation (13) is of the same general import as the first two recommendations in the chapter on Managing the Business of the Courts and reads as follows:

> "That as aids in securing promptness of judicial decision, the 'administrative judge' and requirement as to periodic statistical reports should be provided for rather than rigid statutory requirements as to withholding of salaries or requiring affidavit from judicial officers." Id. at 507.

This recommendation will not be considered separately, since the findings of the latter chapter indicate the extent of its acceptance. Its recommendation (14), which is not considered separately here or apart from the chapter on Rule-making—The Judicial Regulation of Procedure, in which those states which have adopted rules patterned on the Federal Rules of Civil Procedure are indicated (infra at p. 142) reads as follows:

> "That the provisions of the new federal rules of procedure with respect to the actual trial of cases should be uniformly adopted." Id. at 508.

It is to be noted that the recommendations as approved by the American Bar Association and the Section of Judicial Administration are generally similar to those originally adopted by its Committee on Trial Practice. Id. at 538 et seq.

The recommendation discussed as (4) in text infra p. 221, was originally included as (13) of the Section of Judicial Administration's recommendations relating to the law of evidence. Appendix A at 509.

INTRODUCTION

The recommendations considered in this chapter deal with the general subject of trial practice—the conduct of a case from the time the judge takes his place upon the bench and calls a case for trial until the final judgment or decree in the particular case. The chief emphasis, however, has been placed on the manner and methods of obtaining a final decision in cases tried with a jury. Movements for procedural reform have generally devoted less attention to the subject of trial practice than to the companion topics of procedure before trial and on appeal. This lack of attention cannot be justified on the ground that there is no need for improvement in trial practice, for there are many points requiring reform, as the recommendations heading this chapter indicate.

The Committee on Trial Practice of the Section of Judicial Administration of the American Bar Association, which considered these problems in detail, believed the most important feature in every jury trial to be the *"proper function and authority of the trial judge."* [2] The committee leveled criticism particularly at the restriction of the common-law scope of judicial authority and the transformation of the judge from the governor of the trial to a mere moderator.[3] The first three recommendations at the head of this chapter all relate to this problem and are particularly directed at aiding the preservation of the jury as an important feature of civil trials and obviating criticisms of the manner in which jury trials have functioned. These three recommendations are really the foundation on which the remaining recommendations rest, and they will be considered as one. All of the other recommendations are directed at meeting particular problems of trial practice,

[2] Id. at 536. Italics theirs. Compare, Howe, "Juries as Judges of Criminal Law," 52 Harv.L.Rev. 582 (1939).

[3] See Herron v. Southern Pacific R. Co., 283 U.S. 91, 95, 51 Sup.Ct. 383, 75 L.Ed. 857 (1931), in which Chief Justice Hughes, speaking for a unanimous court, said:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides."

excluding generally problems of jury selection, matters affecting pleadings, and appellate procedure. In those recommendations where adoption of a particular Federal Rule of Civil Procedure was recommended or is pertinent, comparison of the rule with state practice is made in this chapter, but no attempt will be made to consider as a whole the federal rules with respect to the trial of cases and the comparable state practice.[4]

The Judge's Relation to the Jury, and Instruction of the Jury

(1) That the common-law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

(2) That after the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury.

(3) That the trial judge should be at all times the governor of the trial in the sense of actively, and firmly when necessary, requiring that the proceedings be conducted with dignity, decorum and the avoidance of waste of time.

Of the three recommendations under consideration here, the first and third are fundamental concepts while the second is directed specifically to one vital phase in the attainment of these fundamentals. The committee considered that criticism of the jury as a fact-finding agency has been due, to a large extent, to the fact that the jury has been given too much responsibility and the trial judge too little. The trial judge's power and practice of commenting to the jury on the evidence was an essential part of a jury trial for centuries, and the restoration and continuation of this power is considered an

[4] See Recommendation (14) supra n. 1.

essential condition to any substantial improvement in trial practice.[5]

Judge Merrill E. Otis of the United States District Court, speaking from his wide knowledge and experience, has characterized the judge's power to charge the jury in common-law trials as preserved in the federal system as follows:

> First—the power to state the really controverted issues. Second—the power to remove from the jury's consideration false issues that accidentally have crept in or purposely have been injected. Third—the power fairly to sum up and arrange the testimony offered. These are essential elements of the power. To do these things effectively they must be done orally, with freedom of repetition, freedom of illustration, and after arguments of counsel, so that the enlightenment they will give will not be utterly eclipsed.
>
> The fourth element in the power, expression of opinion by the judge as to how some issue of fact should be resolved, as to the credibility of witnesses, in actual practice is an element seldom used; it is a power reserved for that rare case when outrageous pettifoggery requires an immediate corrective, convincing and complete. Mere knowledge of the existence of that power oft-times nips pettifoggery in the tender bud.[6]

In 1927 a committee of the Commonwealth Fund, which had studied the reform of the law of evidence, considered as basic to such reform the enactment of a uniform statute providing that "The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part thereof." This statute was recommended upon "the theory that the return to the orthodox rule would greatly aid the administration of justice even without changes in the rules of evidence. It would strike a heavy blow against the 'sporting theory' of a

[5] See for general discussion of this problem. Chesnut, "Instructions to the Jury," IV Handbook, National Conference of Judicial Councils 71 (1942). Compare also auxiliary measures proposed by Committee on Improvements in the Law of Evidence, Appendix A at 560; A.L.I. Model Code of Evidence, Rule 8, at 81-85 (1942). But cf. statute authorizing rule-making by the Colorado Supreme Court but explicitly providing that no rule be made permitting the trial judge to comment on the evidence. See Chapter III supra at 104.

[6] Otis, "The Judge to the Jury," 6 Kans. City L. Rev. 1, 14-15 (1937).

lawsuit." [7] Similarly the Model Code of Evidence, prepared by many experts in the law of evidence and approved by the American Law Institute in 1942, leaves "no room for doubt as to the power of the trial judge. His historic role as a master of the trial is restored. He has complete control of the conduct of the trial."

And specifically Rule 8 provides that:

> After the close of the evidence and arguments of counsel the judge may sum up the evidence and comment to the jury upon the weight of the evidence and credibility of the witnesses, if he instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and are not bound by the judge's comment thereon.[8]

Rule 51 of the Federal Rules of Civil Procedure does not include any specific requirement as to the power of the trial judge to comment to the jury on the evidence, but is directed merely at the time of giving instructions and the time for objection to proposed instructions. This rule is based on the assumption of the judge's power to comment to the jury on the evidence, which rule, as described by Judge Otis, has always been retained in the federal courts, although subject to proper limits as stated by Chief Justice Hughes:

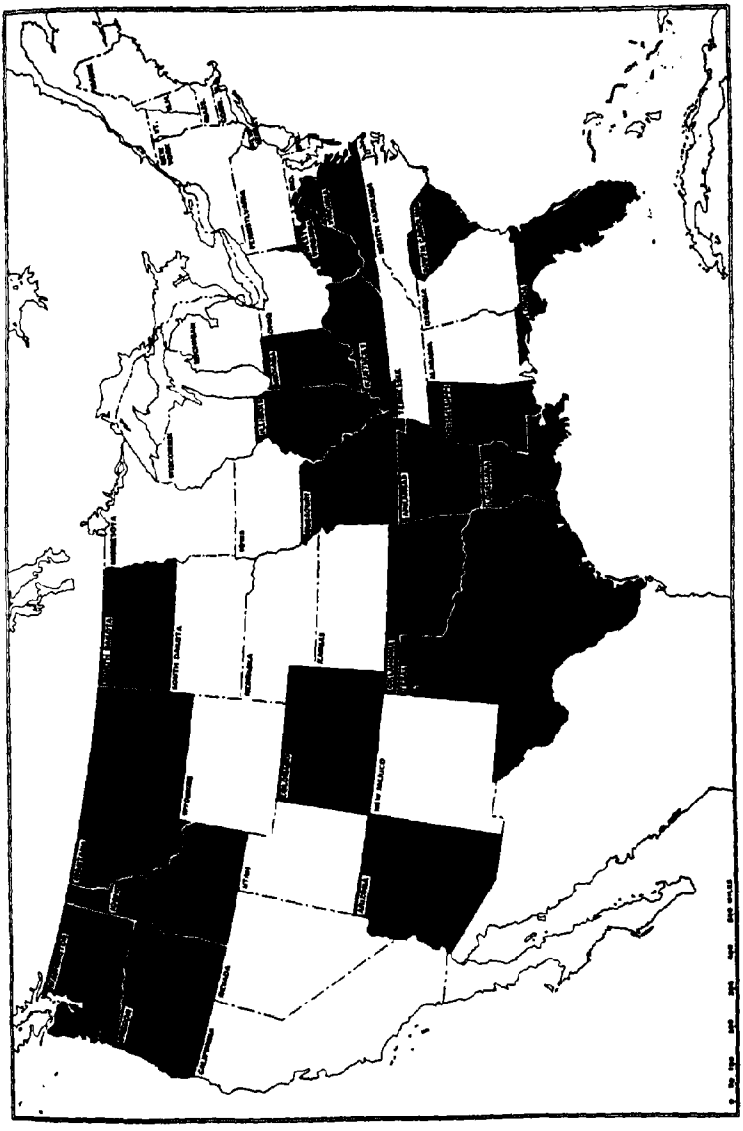
> This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguard against abuses.[9]

The states are almost evenly split on the question of summing up the evidence. In twenty-seven jurisdictions it is per-

[7] Morgan, Chaffee, Jr., Gifford, Hinton, Hough, Johnston, Sunderland, Wigmore, The Law of Evidence, Some Proposals for its Reform 9, 21 (1927).

[8] A.L.I. Model Code of Evidence 13, 15, 81 (1942).

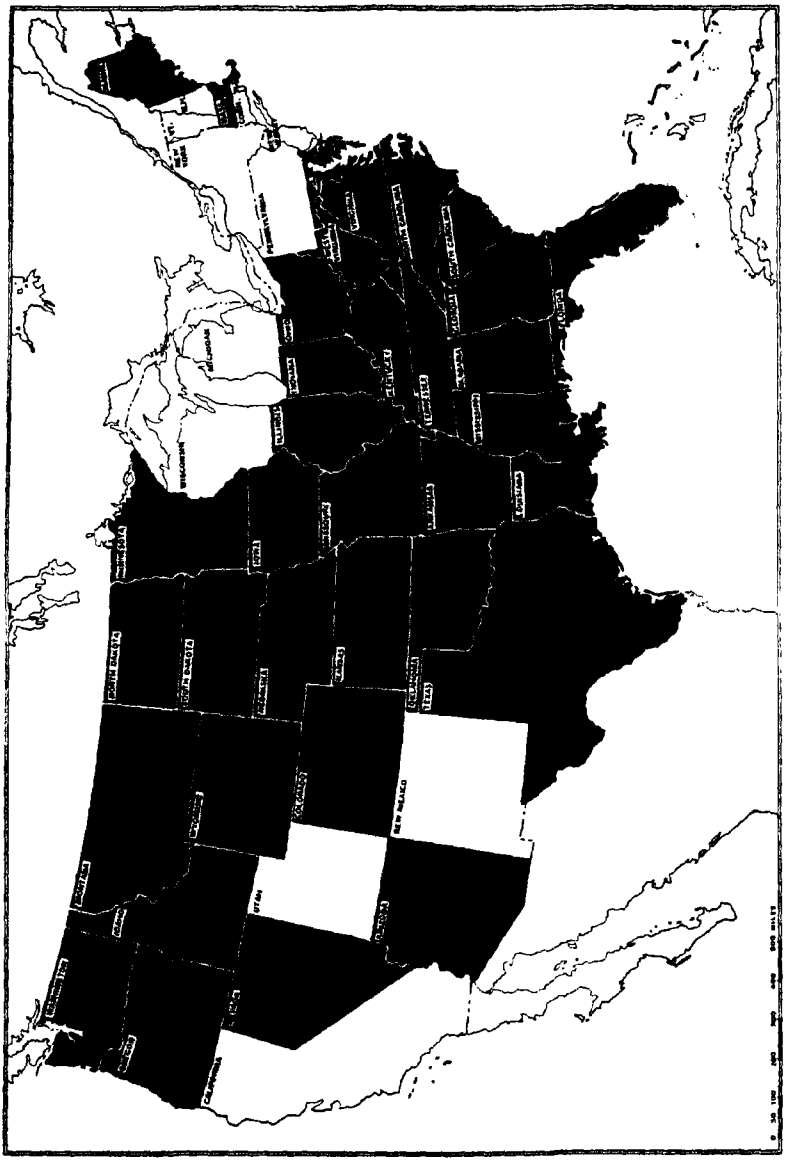
[9] Quercia v. U.S. 289 U.S. 466, 470, 53 Sup.Ct. 698, 77 L.Ed. 32 (1933).



TRIAL JUDGE'S POWER TO SUMMARIZE THE EVIDENCE

Judge permitted to sum up the evidence

Judge prohibited from summarizing the evidence



TRIAL JUDGE'S POWER TO COMMENT TO JURY ON EVIDENCE

Judge is permitted to comment on weight of evidence

Judge is not permitted to advise jury on the facts

mitted as recommended: *Alabama, California, Connecticut, Delaware, District of Columbia, Georgia, Kansas* (*rarely used*), *Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wisconsin,* and *Wyoming.*[10] This group is slightly more numerous than that in which even this is prohibited: *Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington,* and *West Virginia.* A summing up of the evidence is compulsory only in *Iowa.*

In only one quarter of the jurisdictions is the trial judge permitted to comment, as recommended, on the weight of the evidence: *California, Connecticut, District of Columbia, Michigan, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Utah, Vermont,* and *Wisconsin.* Contrary to the practice in the federal courts and to the principle of the recommendation here under consideration, the trial judge in the great majority of jurisdictions is enjoined from advising the jury on the facts, *i.e.*, commenting on the weight of the evidence: *Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia,* and *Wyoming.*

Despite the fact that these basic factors of the recommendations are not accepted, in accordance with the spirit in which these were made, the trial judge in an overwhelming majority of the states is required to instruct the jury as to the law applicable to all issues in the case, in some even though

[10] E.g., N.C. Gen. Stat. (1943) § 1-180 as amended 1949. In Nebraska judges do not sum up the evidence, but there is no statutory prohibition. See "Standardized Instructions to Juries Adopted by Association of District Judges of Nebraska," 24 Neb.L. Rev. 195, 215 (1945).

instructions are requested only as to some of the issues [11] and, or even, notwithstanding the absence of any request whatsoever.[12] Of the minority of states in which this practice is not followed, a few jurisdictions require instructions only as to those matters on which correct instructions have been submitted,[13] and in the remainder only as to those matters on which instructions calling attention to the law involved are submitted.[14]

The recommendations considered here made no specific mention of Rule 51 of the Federal Rules of Civil Procedure, but since it was proposed that the provisions of the federal rules with respect to the actual trial of cases be uniformly adopted, a comparison of its requirements and state practices will be made. Rule 51 reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. Opportunity shall be given to make the objection out of hearing of the jury.[15]

In accordance with the federal rule requests to charge in the state courts are required almost uniformly to be submitted in written form.[16] In four states, however, they may be oral—

[11] Colo., Conn., Ga., Iowa, Kan., Mich. [but failure to instruct on a point cannot be assigned as error in absence of request, Sup. Ct. Rule 37(9)], Mont., and N.H.

[12] Ala., Ariz., Del., D.C., Fla., Ind., Iowa, La., Me., Mass. (main issues), Mo. (felony cases), Neb., Nev., N.M. (unless waived), N.Y., N.C., Okla., Ore., Pa., R.I., S.C., S.D., Tenn., Utah, Vt., W.Va., and Wyo.

[13] Ark., Calif., Idaho, Md. (discretionary to give additional instructions), Minn., Miss., Mo. (other than felony cases), N.J., Tex., and Va.

[14] Ill., Ky., Ohio., Wash., and Wis.

[15] Moore's Federal Practice 3112-3113 (1938).

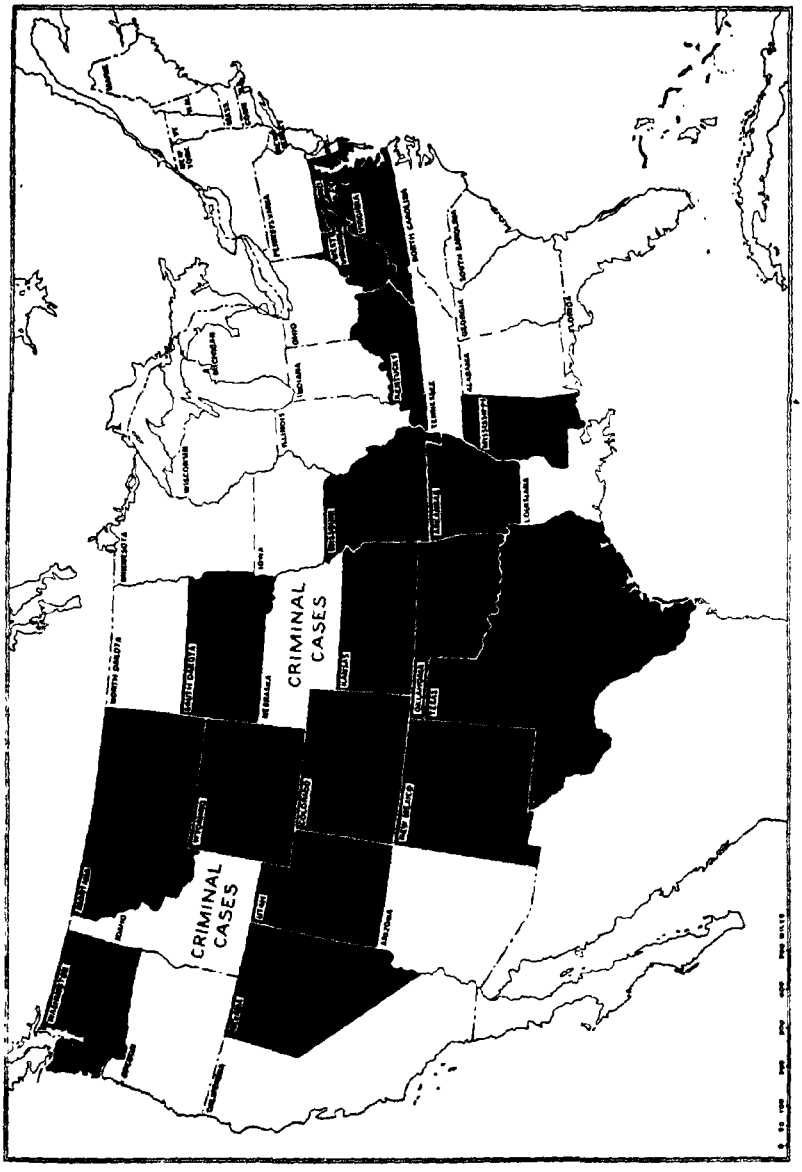
[16] Ala., Ariz., Calif., Colo., Conn., Del., D.C., Fla., Ga., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Mass., Mich., Minn., Miss., Mo., Mont., Neb., N.H., N.J. N.M., N.C., N.D., Ohio, Okla., Ore., Pa., R.I., S.D., Tex., Utah, Vt., Va., Wash., W.Va., Wis., and Wyo.

Arkansas, Nevada, New York, and *South Carolina*[17]—and in two others the requests may be either written or oral or both—*Maryland* and *Tennessee*.[18] Also in line with the practice prescribed by the federal rule, the great majority of the states call for submission of requests to charge prior to argument: *Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah* (*in court's discretion, may accept them later*), *Vermont, Washington, West Virginia, Wisconsin,* and *Wyoming.* Six states permit them to be proffered after argument—*Alabama, Florida, Nevada, New York, Rhode Island,* and *Tennessee*—while in four no predetermined point is observed, but time for submission is fixed by order of the court—*Louisiana, Maine, North Dakota,* and *South Dakota.* So long as the requests are offered before the return of the jury in *Georgia* and *Virginia,* they are considered timely. At the other extreme *California* prescribes that, as to issues raised by the pleadings, requests to charge must be made before commencement of the trial, although as to issues later developing, requests may be submitted up to the commencement of argument.

Twenty-two jurisdictions require instructions to the jury to be in writing: *Alabama* (*charges given on request of parties*), *California, Colorado, Idaho, Illinois, Iowa, Kansas* (*criminal cases*), *Michigan* (*if no court stenographer*), *Mississippi, Missouri, Montana, Nebraska* (*civil cases unless waived*), *New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee* (*felony cases*), *Texas, Utah, Virginia, Washington,* and *Wyoming.* This may be waived and instructions given orally by consent of the parties in eight of them: *California, Idaho, Nebraska* (*civil cases*), *North Dakota,*

[17] In South Carolina the judge need not charge a request submitted orally.

[18] In Tennessee, in felony cases, requests to charge must be written; civil cases, discretion of judge controls.


CRIMINAL CASES
CRIMINAL CASES
CRIMINAL CASES
CHARGE TO JURY—TIME GIVEN
After counsel have concluded their argument
Prior to counsel's argument

Oklahoma, South Dakota, Utah, and *Virginia.* In all of this group of states the written instructions when given must be taken into the jury room, except in *Mississippi* and *New Mexico.*

Oral instructions to the jury seem to be the rule in many jurisdictions. While in only eleven is the giving of instructions orally mandatory—*Alabama, Connecticut, Delaware, District of Columbia, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania,* and *Rhode Island;* in eighteen others it is permissive—*Arizona, Arkansas, Florida, Georgia, Indiana, Kansas (civil cases), Kentucky, Louisiana, Maryland, Michigan (oral where there is a court stenographer), Minnesota, Nevada, North Carolina, Ohio, Oregon, South Carolina, Tennessee,* and *Vermont.* In a number of states of this latter group, however, contrary to the more approved practice, instructions may be required to be in writing under special circumstances. Where, for instance, either party makes a request in writing, the court must reduce the instructions to writing—*Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Minnesota, Ohio,* and *Tennessee;* or, where written requests to charge are made which are approved by the court, the requests must be read—*Arizona, Kansas,* and *Pennsylvania.* In *Florida* oral instructions are not permitted in capital cases, and in *Tennessee* all instructions to juries in felony cases must be in writing.

In accordance with the federal practice and as recommended specifically, the courts in more than half of the states instruct the jury after final argument: *Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho (criminal cases), Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska (criminal cases), New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont,* and *Wisconsin.* The courts, however, in the remaining states give instructions, contrary to the approved practice, before final argument: *Arkansas, Colorado, Idaho (civil cases), Kansas, Kentucky,*

Maryland, Mississippi, Missouri, Montana, Nebraska (*civil cases, further instructions may be given after argument*), *Nevada* (*if further instructions necessitated by reason of argument, may then be given*), *New Mexico, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, West Virginia,* and *Wyoming.* In each group a few states permit instructions to be given prior to final argument [19] or after final argument,[20] upon special application to the court.

Discovery

(4) That the provision of the new federal rules 26 to 37 relating to discovery should be adopted in all of the states.

The principal means for securing the prompt disposition of controversies on their merits, provided by the federal rules, are to be found in the provisions for liberal pretrial discovery of testimony and pretrial inspection of documentary evidence. These uses of discovery have been enumerated; first, to narrow the issues, secondly, to obtain evidence for use at the trial; and, finally, to receive information as to the existence of evidence that may be used at the trial.[21] English and Canadian experience as well as that of several of the states prior to the adoption of the federal rules had demonstrated the advantages to trial practice of a preliminary examination of the evidence of both parties.[22] The federal rules for obtaining discovery authorize the use of depositions before and pending action or pending appeal, interrogation of the parties, production of documents and things for inspection, copying or photographing, requests for physical and mental examination of persons, and admissions of facts and genuineness of documents.[23] As has been said, the subject needs "no further exposition in support of the

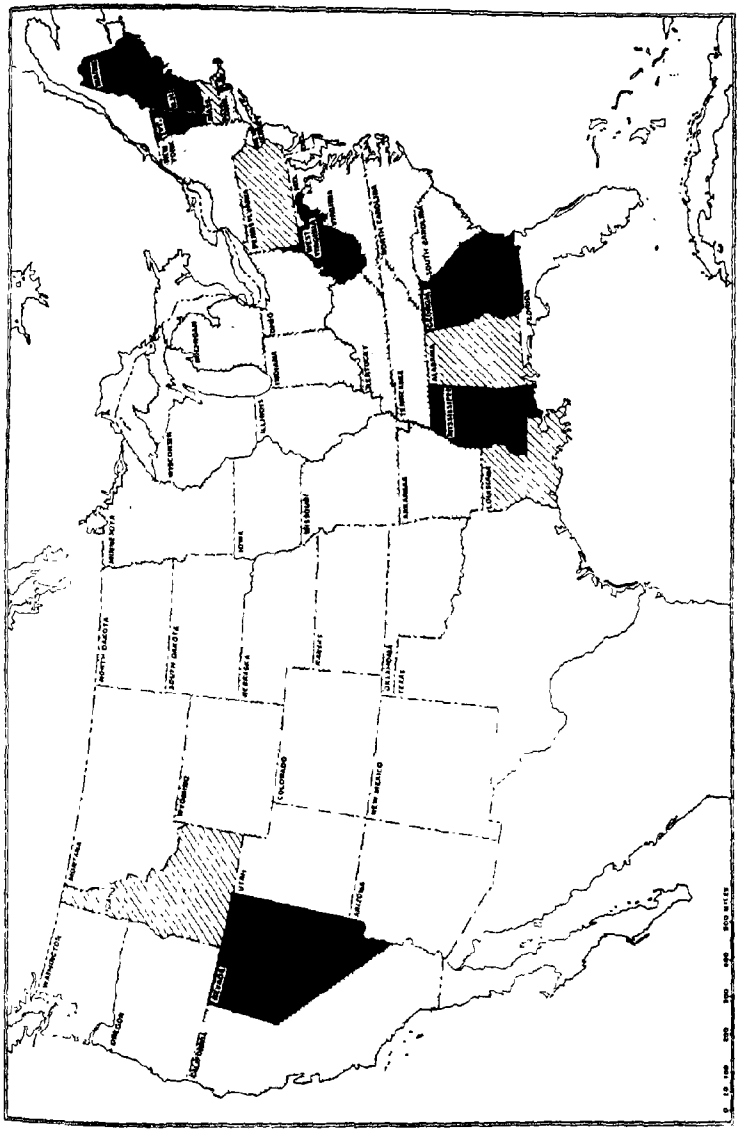
[19] Calif., Idaho (civil cases), Mass., and Vt.

[20] Ky., Md., and Nev.

[21] Holtzoff, "Instruments of Discovery Under Federal Rules of Civil Procedure," 41 Mich.L.Rev. 205 (1942). Cf. also reasons cited in Moore, op. cit., supra n. 15, at 2443-2445.

[22] See Ragland, Discovery Before Trial (1932).

[23] Moore, op. cit. supra n. 15, at 2435 et seq. See Federal Rules of Civil Procedure, Rules 26 to 37.


DISCOVERY
Jurisdictions having rules of discovery substantially similar to Rules 26 to 37 of the Federal Rules of Civil Procedure
Provisions as to discovery very limited
No special rules or statutes authorizing discovery—common-law rules, etc.

rules," [24] since the right to discovery goes to the essence of a trial as a search for truth as contrasted with the now outmoded view of the trial as a "mere sporting contest." [25]

Rules of discovery substantially similar to Rules 26 to 37 of the Federal Rules of Civil Procedure, as recommended, have been adopted in *Arizona, Colorado, Delaware, Florida, Illinois, Iowa, Maryland, Montana, New Jersey, New Mexico, Oregon, South Dakota, Texas, Utah, Washington,* and *Wisconsin.*[26]

Provisions for discovery, some of which are quite liberal, some of which antedate the federal rules, some of which are patterned on the federal rules in part, and some of which are more limited, have been adopted in many other jurisdictions: *Arkansas, California, Connecticut, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee* (*equity*), *Virginia,*[27] and *Wyoming.* Very limited discovery is permitted in *Alabama, Idaho, Louisiana,* and *Pennsylvania.* In *Massachusetts* discovery is limited in practice to written interrogatories.[28] Common-law rules as to discovery prevail in *Vermont,* while in *West Virginia* no discovery is permitted.

While many of the states had liberal provisions for pretrial discovery prior to the federal rules, the example set by the federal rules has aided here in further liberalization of state procedure.

[24] Committee on Improvements on the Law of Evidence, Appendix A at 575.

[25] Root, "Public Service by the Bar," 41 A.B.A.Rep. 355, 364 (1916), see Foreword, A.L.I., Model Code of Evidence (1942).

[26] Federal Rules of Civil Procedure, Rules 26 to 32 inclusive, and 34, have been adopted in Florida. Fla. Stat. Ann. (1944) § 91.30, Fla. Common Law, Rule 54. The Iowa Rules of Civil Procedure 121-134 and 140-166 are patterned on the federal rules but embody many variations based on local practice.

[27] Discovery in Indiana may be had by oral examination of the opposite party, or by submission of written interrogatories on any issue presented by the pleadings. In Kansas discovery is limited to documentary evidence. Rules of discovery in Michigan are not patterned on federal rules, but the same results are obtained generally by many of them.

[28] Oral depositions may be taken only under the traditional circumstances, i.e., a witness must be sick or infirm, about to leave the state, or more than 30 miles from the place of trial.

SUBMISSION OF SPECIFIC ISSUES TO JURIES

(5) That the trial court should be authorized, in its discretion to submit specific issues to the jury to be considered in connection with a general verdict, in accordance with the practice prescribed by Rule 49 of the new federal rules.

The Committee on Trial Practice which studied this problem emphatically distinguished the recommended practice of submitting issues of fact to the jury directly by questions and taking their verdict in the form of answers in connection with a general finding for one of the parties on the whole case, from the so-called "special verdict." [29] Under the special verdict practice the jury does not render any general verdict; it simply finds certain facts, either in statement or "yes-or-no" form, and the court enters the appropriate judgment on the basis of the conclusions reached by the jury. In contrast to the special verdict the recommended practice for the submission of special issues to the jury was not intended as a substitute for the general verdict but as an addition to serve as a check on the correctness of the general verdict. The committee did not believe this practice should be generally adopted for all cases, but considered it extremely helpful in complex cases. It is to be noted that there are two forms of the special verdict. One is that evolved at common law and which was not satisfactory, since when employed it was required that all facts material to the verdict must be found by the jury. The special verdict as authorized under the federal rules has been changed into a more useable procedural device patterned on the examples developed in North Carolina, Texas, and Wisconsin. The use of the special verdict remains purely within the discretion of the judge, although arguments in favor of its wider use have been urged.[30] The form of the questions to be used presents

[29] Appendix A at 540. See generally, Green, "A New Development in Jury Trial," 13 A.B.A.J. 715 (1927); McCormick, "Jury Verdicts Upon Special Questions in Civil Cases," IV Handbook, National Conference of Judicial Councils 108 (1942); Morgan, "A Brief History of Special Verdicts and Special Interrogatories," 32 Yale L.J. 475 (1923).

[30] See discussion of Judge Frank and authorities cited in Skidmore v. Baltimore & Ohio R. Co., 167 F. 2d, 54 (1948).

the most difficult point of practice. When such questions are used, however, complicated instructions on law, required when a general verdict is to be rendered, become unnecessary.[81]

Rule 49 of the Federal Rules of Civil Procedure, provides for the special verdict as well as for the recommended practice of submitting special interrogatories to be answered by the jury along with the general verdict:

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
>
> (b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwith-

[81] Moore, op. cit. supra n. 15, at 3097-3099.

> standing the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.[32]

Apart from a small group of states—*Alabama, Florida, Georgia (law cases), Louisiana, Maryland, Mississippi, Missouri (as a matter of practice not used), Texas,* and *Virginia*—the prevailing practice in accord with the recommendation and with Federal Rule 49(b) is to permit the submission of special interrogatories when a cause is submitted to the jury for a general verdict. Of those jurisdictions which follow the recommended practice, the great majority permit the submission of special interrogatories only in the discretion of the judge: *Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania,*[33] *South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin,* and *Wyoming.* The remainder of them make the submission of special interrogatories mandatory, on request of both parties in *Maine,* or on request of either party in seven states: *Georgia (equity), Illinois, Indiana, Kansas, New Mexico, Ohio,* and *Rhode Island.*

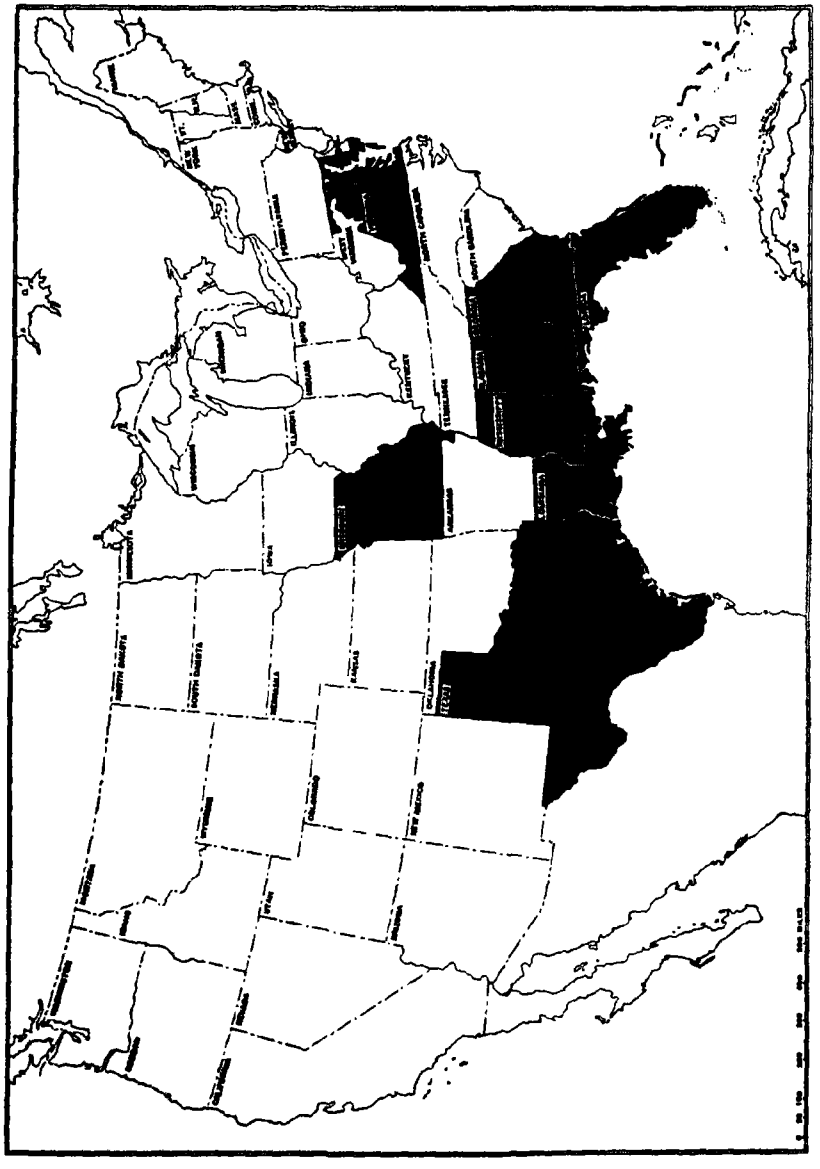
In sixteen states, where special interrogatories are submitted to the jury for answer with a general verdict, they *must* call for findings of *ultimate* facts;[34] in twenty-two jurisdictions they *may* call for findings of ultimate facts.[35] If the special finding of fact by the jury of an ultimate fact in answer to an interrogatory is in conflict with the general verdict, most states

[32] Id. at 3095 et seq.

[33] In Pennsylvania, where special findings would be advantageous, readily comprehensible, and susceptible of brief reply, a refusal to submit will constitute reversible error.

[34] Calif., Conn., Ill., Ind., Iowa, Kan., Me., Neb., Nev., N.J., N.Y., Ohio, Okla., Ore., Pa., and W.Va.

[35] Ark., Ariz., Colo., D.C., Ga., Idaho, Ky., Mass., Mich., Minn., Mont., N.H., N.C., N.D., R.I., S.C., S.D., Utah, Vt., Wash., Wis., and Wyo.



GENERAL VERDICTS AND SPECIAL INTERROGATORIES

Submission of special interrogatories, with

Special interrogatories not submitted to jury

require the court to base its judgment on the answer to the interrogatory, notwithstanding the general verdict.[36] As is the practice under the federal rule, a few others leave this to the discretion of the court.[37] Also, as under the federal rule, some states permit the court to return the case to the jury for further consideration of its answers and verdict, either with additional instructions,[38] or in a few states without additional instructions.[39] Furthermore, in accord with the federal rule, fifteen states allow the court to order a new trial under such circumstances.[40] In North Carolina, if the inconsistent findings are not corrected by the jury before it is dismissed, a new trial is compulsory.

Where the finding of an *evidentiary* fact by the jury in answer to a special interrogatory reveals error in the general verdict, the practice usually is to allow the court to use the answer as a basis for granting a new trial[41] or to return the case to the jury for further consideration of its answers and verdict.[42]

A verdict which finds the ultimate facts without applying the law—a special verdict—forms no part of the practice in nine of the states:[43] *Florida, Illinois, Indiana, Kansas, Kentucky, Mississippi, New Mexico, Rhode Island,* and *Virginia.* In accord with the federal rule, special verdicts are required to be found in most states at the discretion of the court: *Arizona, California, Colorado, Delaware, Georgia, Idaho (all actions other than for money only), Maryland, Massachusetts, Michi-*

[36] Ark., Calif., Idaho, Ill., Ind., Iowa, Kan., Mass., Mich., Minn., Mont., Neb., Nev., N.H., N.J., N.Y., N.D., Ohio, Okla., Ore., S.C. S.D., Tenn., Utah, Vt., Wash., W.Va., Wis., and Wyo.

[37] Colo., Ky., N.D., and R.I.

[38] Colo., Conn., D.C., Ky., Idaho, Iowa, Me., Mass., N.J., N.C., N.D., Pa., R.I., S.D., and Vt.

[39] Colo., Iowa, Ky., Mass., N.C., N.D., Pa., R.I., and Vt.

[40] Ariz., Colo., Idaho, Ill., Iowa, Kan., Minn., N.H., N.J., N.D., Okla., Pa. (mandatory unless court sets aside verdict and enters judgment on whole record non obstante veredicto), R.I., Vt., and Wyo.

[41] Ariz, Conn., D.C., Idaho, Ky., Mass, Minn., Mont., N.Y., N.C., N.D., Okla., R.I., S.D., Vt., Wis., and Wyo.

[42] Ariz., Colo., Conn., Ga., Idaho, Iowa, Ky., Me., Mass., Minn., Neb., N.H., N.J., N.C., N.D., Ore., Pa., R.I., S.D., and Vt.

[43] In Kansas a special verdict may be taken in cases tried by the court with an advisory jury.

gan, Minnesota, Missouri (except certain cases),[44] *Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin,* and *Wyoming*. And in a few cases they are mandatory where requested by both parties—*Connecticut, Maine, New Hampshire,* and *North Dakota*—or merely by one of the parties—*Georgia, Iowa, Michigan, Ohio, West Virginia,* and *Wisconsin*—while some states permit the filing of a special verdict at the option of the jury—*Alabama (limited actions), Arkansas, California (certain actions only)*,[45] *Connecticut, Idaho (actions for money only), Louisiana, Minnesota (certain actions), Nebraska, New Hampshire, North Carolina (certain actions), Oklahoma, Oregon Pennsylvania, South Dakota, Washington (certain actions),* and *Wyoming (certain actions)*.[46]

In seven states a special verdict consists of statements of facts found;[47] in fifteen others, of answers to written questions;[48] and in sixteen it may consist of either statements of facts or of answers to questions.[49] When a jury returns a special verdict in *statement form* which does not find all the necessary facts, most courts which practice this method send the jury back for further consideration.[50] and a few will order a new trial.[51] The same approximate proportions exist where the special verdict is in *answer form* and it does not find all facts called for by the questions. The majority of the states require a return to the jury for further consideration,[52] a few require a

[44] I.e., except for actions for recovery of money or specific real property.

[45] Calif. Code Civ. Proc. (1941) § 625.

[46] Calif., Minn., N.C., Wash., and Wyo. In cases of recovery of money only or recovery of specific real property.

[47] Ala., Calif., La., Nev., Okla., S.D., and Utah.

[48] Del., Ga., Idaho, Me., Mass., Mich., N.H., N.Y., N.C., Okla., Ore., S.C., Tenn., Tex., and Wis.

[49] Ariz., Ark., Colo., D.C., Iowa, Md., Minn., Mont., N.J., N.D., Ohio, Okla., Pa. (must set forth all facts necessary for a judgment, a single finding insufficient), Tenn., W.Va., and Wyo.

[50] Ala., Ark., Conn., Del., D.C., Idaho, Minn., Neb., Nev., Ore., Pa., Vt., and Wyo.

[51] Mont., N.Y., S.D., and W.Va. In Ohio, it has been held that such a situation calls for a judgment against the party having the burden of proof, although where the verdict is defective and a judgment cannot be rendered thereupon, a new trial will be ordered.

[52] Ark., Del., D.C., Ga., Idaho, Iowa,

new trial,[53] and only two enter judgment against the party having the burden of proof.[54]

In those jurisdictions in which written questions are used, where all controverted facts are not submitted for decision, there is a fairly even division as to whether a new trial must be had,[55] or, as is the federal rule, a jury is deemed to have been waived as to matters not submitted,[56] and the omitted facts found by the judge,[57] or the omitted facts are deemed found by the judge in accordance with his judgment.[58]

Partial New Trials

(6) That the trial judge should have power to grant a partial new trial where in his judgment the several issues are clearly and fairly separable.

The Committee on Trial Practice believed that the power of the trial judge to grant a partial new trial should exist, but that it should be exercised sparingly in actual practice and then only where the several issues are clearly and fairly separable. Their suggestion to accord this power to the trial judge was based on the practice as regulated by Rule 59 of the Federal Rules of Civil Procedure.

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.[59]

Me., Mass., Minn., Mo., Neb., Nev., N.H., N.C., Ore., Pa., S.C., S.D., Tex., and Vt.

[53] Mass., Mich., Mont., N.Y., and W.Va.

[54] Ohio and Wyo.

[55] Ga., Me., Mass., Mont., Neb., Nev., N.H., N.Y., N.C., S.D., W.Va. and Wyo.

[56] Ariz., Colo., D.C., Iowa, Md., Mich., Ohio, Wash., and Wis.

[57] Ariz., Colo., Del., D.C., Idaho, Iowa, Md., N.J., N.D., Ohio, S.C., Tenn., Tex., Utah, and Vt.

[58] Ariz., Colo., D.C., Ind., Iowa, Md., N.J., Mich., N.D., Tex., and Wis.

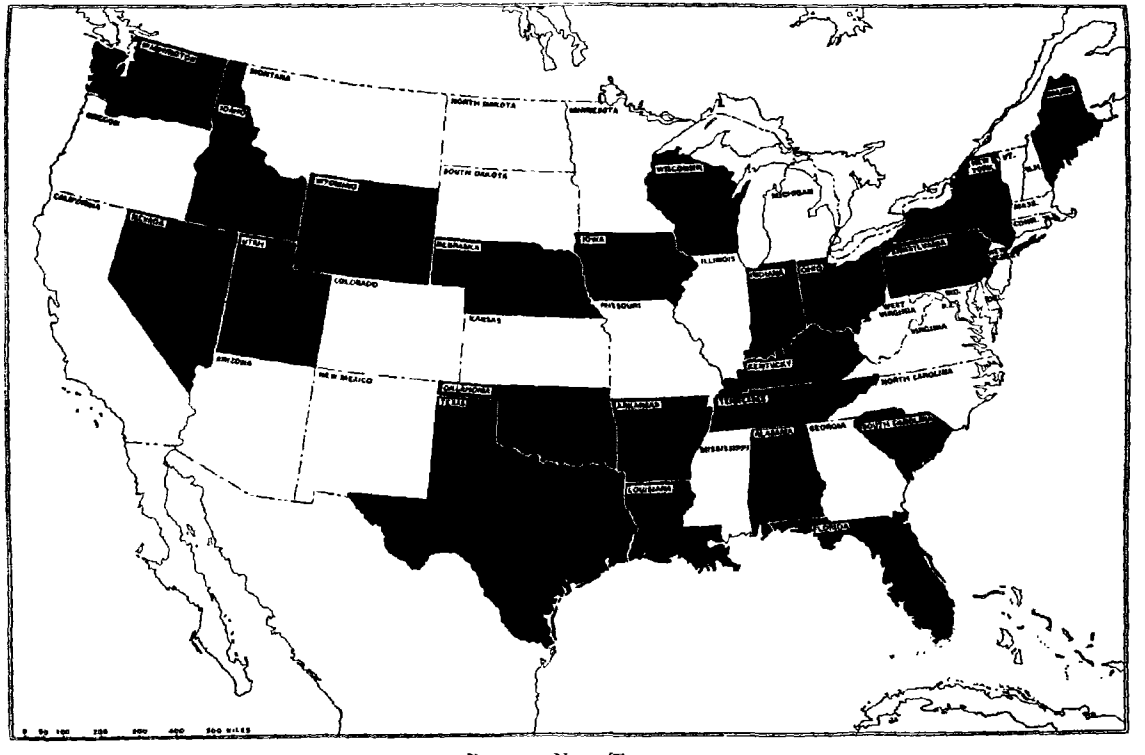
[59] See Moore, op. cit. supra n. 15 at 3242 et seq.

This rule is merely declaratory of prior federal decisions under which the judge's discretionary power had been utilized to order partial new trials to determine any unsettled issues.

Where on a motion for a new trial an error of law or fact, including newly discovered evidence, is found which prejudicially affected some of the issues decided by the jury and a new trial is to be granted, although in many instances the practice is to order a new trial on all issues, twenty-six jurisdictions permit the court to order it limited to the issues affected by the error: *Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, South Dakota, Vermont, Virginia,* and *West Virginia.* Twenty-two states, contrary to the recommendation, require that the new trial must be ordered on all issues: *Alabama, Arkansas, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin,* and *Wyoming.*

If the court concludes that the damages awarded by the jury are excessive, as an alternative to awarding a new trial or even a partial new trial on that question alone, the court in almost all jurisdictions is empowered on motion for a new trial to require the plaintiff to remit the excess as a condition to denying a new trial.[60] Only four jurisdictions do not permit a reduction in the amount of the verdict and make mandatory a new trial under such circumstances: *Kentucky, North Carolina, West Virginia,* and *Wyoming.* Three states, however, refuse to recognize an inadequacy of damages as a ground for a new trial: *Montana, Nevada,* and *Utah.* When damages are considered inadequate, the majority of states require that

[60] Ala., Ariz., Ark., Calif., Colo., Conn., Del., Fla., Ga., Idaho, Ill., Ind., Iowa, Kan., La., Me., Md., Mass., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N. H., N.J., N.M., N.Y., Ohio, Okla., Ore., Pa., R.I., S.C., S.D., Tex., Utah, Vt., Va., Wash., and Wis.



PARTIAL NEW TRIALS

Court permitted to order new trial limited to issues affected by the error

New trial must be ordered on all issues

the court grant a new trial,[61] though a substantial minority permit the court to order an increase in the amount of the verdict if the defendant consents: *Arizona, Colorado, Delaware, District of Columbia, Kentucky, Massachusetts, Mississippi, New Jersey, New Mexico, Rhode Island, Virginia, Washington,* and *Wisconsin.* Only one state, *Ohio,* permits the court to order an increase without the consent of the defendant.

Judgment Non Obstante Veredicto

(7) That the practice of granting judgment *non obstante veredicto* be uniformly adopted, and that it be extended to authorize judgment on motion, in accordance with the original motion for a directed verdict, after the jury has disagreed and upon discharge, as provided for in Rule 50 of the new federal rules.

The procedure recommended herein is that embodied in Rule 50 of the Federal Rules of Civil Procedure:

> (a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.
>
> (b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for

[61] Ala., Conn., Fla., Ga., Idaho, Ill., Ind., Iowa, Kan., Me., Md., Mich., Mo., Neb., N.H., N.Y., N.C., Pa., S.C., S.D., Tex., Vt., W.Va., and Wyo.

a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.[62]

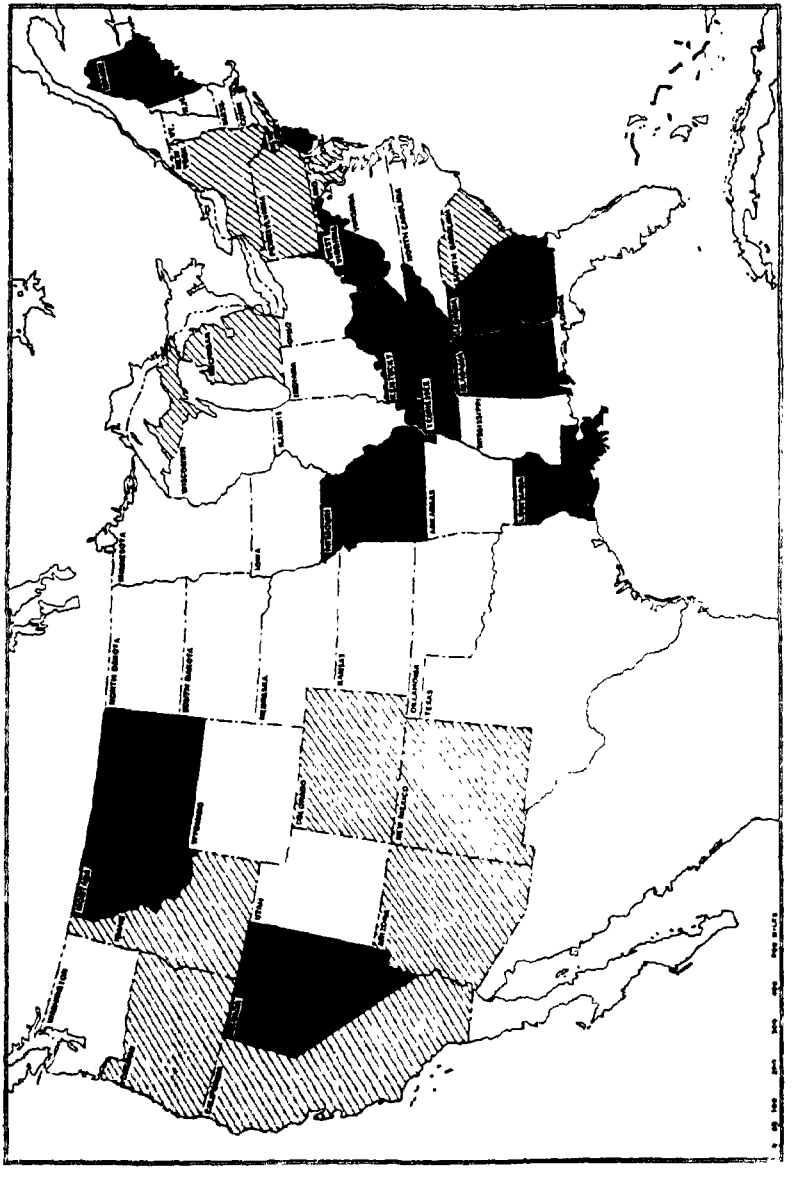
At common law judgment *non obstante veredicto* did not involve consideration of the evidence but could be entered only when the pleadings were insufficient to constitute a bar or defense. As presently developed the practice of granting judgment *non obstante veredicto* is a time-saving device. It is applicable where, at the close of the trial, a party moves for a directed verdict which is not granted by the court, in consequence of which a jury verdict is returned, and thereafter in a limited time the party moving for a directed verdict renews his application and the trial judge thereupon concludes the verdict should have been so directed. Such a judgment is rendered after the necessary decision of the question of the sufficiency of the evidence, without the formality of a new trial, on the theory that there was no question for the jury as a matter of law.[63] Such procedure of entering judgment in accord with a prior motion for a directed verdict is not an infringement on the constitutional guarantee of trial by jury.[64]

While in the majority of jurisdictions the recommended practice prevails, some states permit the granting of a judgment notwithstanding the verdict only if a motion for a directed verdict has been previously made and denied or reserved: *Arizona, California, Colorado, Idaho, Maryland, Michigan, New Mexico, New York, Oregon, Pennsylvania, Rhode Island,* and *South Carolina.* A majority allow the granting of such judgments irrespective of whether such motion has been made: *Arkansas, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Massachu-*

[62] Moore, op. cit. supra n. 15, at 3240 et seq.

[63] Appendix A at 541.

[64] See Galloway v. United States, 319 U.S. 372, 388, 63 Sup.Ct. 1077, 87 L.Ed. 1458, 1470 (1943).



JUDGMENT NON OBSTANTE VEREDICTO

Judgment *non obstante veredicto* allowed irrespective of whether motion for directed

Judgment *non obstante veredicto* allowed only if a motion for directed verdict previously made, denied or reserved

setts, Minnesota, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and *Wyoming.* The states are about evenly split on the question of whether the jury must have reached a verdict before such a judgment may be granted. In one group a judgment notwithstanding the verdict may be granted only where the jury has reached a verdict,[65] and in the other it is immaterial whether the jury has reached a verdict or has been unable to agree.[66]

Judgments notwithstanding the verdict find no place in the practice of *Georgia, Louisiana, Maine, Montana,* and *West Virginia,* and, while recognized in *Tennessee* they are seldom used. Provision for such judgments has not as yet been incorporated into the *New Jersey* Rules of Practice. In *Kentucky, Missouri* and *Nevada* the judgment notwithstanding the verdict has only the limited common-law use of permitting the plaintiff to attack a verdict which is inconsistent with the pleaded admissions of the defendant, while in *Alabama* the common-law use has been made available to the defendant also.

Except for a small minority of states,[67] in accordance with the federal rule, motions for a directed verdict do not constitute a waiver of a jury verdict.[68] Contrary to the federal rule, however, in a majority of the states the trial judge must decide a motion for a directed verdict before submitting the case to the jury.[69] The remaining jurisdictions permit the judge to

[65] Calif., Conn., D.C., Del., Fla., Idaho, Ind., Iowa, Neb., N.M., N.C., Ore., R.I., S.C., Utah, Vt., Va., and Wyo.

[66] Ariz., Colo., Ill., Kan., Ky., Md., Mass., Mich., Minn., Miss., N.H., N.Y., Ohio, Okla., Pa., Tex., Wash., and Wis.

[67] Ark., Miss., Ore., and Wis. In Idaho and Wyoming a jury trial is waived only if the motion for a directed verdict is made by both parties, while in Michigan, Ohio, and South Dakota the right to a jury verdict may be reserved while making such a motion.

[68] Ala., Ariz., Colo., Conn., D.C., Del., Fla., Ga., Idaho, Ill., Ind., Iowa, Kan., Ky., Me., Md., Mass., Mo., Mont., Neb., N.H., N.M., N.Y., N.C., N.D., Okla., Pa., R.I., S.C., Tenn., Tex., Utah, Vt., Wash., and Wyo. The practice of moving for a directed verdict does not prevail in Louisiana, Nevada, or Virginia.

[69] Ark., Calif., Conn., Del., Fla., Idaho, Ind., Ky., Maine, Minn., Miss., Mo., Mont., Ohio, Okla., R.I., S.C. [contrary practice permitted but disapproved, see Bozard v. City of Orangeburg, 197 S.C. 447, 15 S.E. (2d) 642, 645 (1941)] S.D., Tenn., Tex., Utah, Wash., and W.Va.

submit the case, reserving the motion for decision either at or before the time of the rendition of the verdict[70] or after discharge of the jury.[71]

Where, in those jurisdictions so permitting, the decision on a motion for a directed verdict has been reserved until after the jury has been discharged, the greater number of states allow the court to enter judgment in accordance with the motion for a directed verdict, notwithstanding the verdict rendered by the jury.[72] In some states the court is deemed to have submitted the action to the jury subject to a later determination of the *legal* questions raised by the motion.[73]

When a motion for a directed verdict has been erroneously denied and the jury has disagreed or has found in favor of the party against whom the verdict should have been directed, many states, in accordance with the recommendation, permit the *trial* court to enter judgment on the motion for a directed verdict, notwithstanding disagreement of the jury or the verdict rendered by the jury.[74] Several states, on the other hand, limit the power of the trial court to ordering a new trial.[75] Some of these jurisdictions permit the appellate court to order judgment entered in accordance with the motion for a directed verdict, notwithstanding the verdict rendered by the jury; some only if a motion for judgment notwithstanding the verdict is made in the lower court,[76] and the others regardless of whether or not such motion was made in the lower court.[77]

[70] Ala., D.C. Ga., Mass. (if motion for directed verdict made at close of plaintiff's evidence), N.Y., N.C., Vt., and Wyo.

[71] Ariz., Colo., D.C., Ill., Iowa, Kan., Md., Mass., Mich., Neb., N.H., N.M., N.Y., N.D., Ore., Pa., Wis., and Wyo. In Pennsylvania in order to move for a judgment notwithstanding the verdict, a written point must have been submitted to the court at the trial requesting binding instructions.

[72] Ariz., Colo., Ill., Iowa, Kan., Md., Mass., Mich., Neb., N.H., N.Y., Ore., Pa., Wis., and Wyo.

[73] Colo., D.C., Mass., Mo., N.M., and N.D.

[74] Ariz., Ark., Calif., Colo., D.C., Idaho, Ill., Kan., Md., Mass., Mich., Minn., Miss., Mo., Neb., N.H., N.M., N.Y., N.D., Ohio, Ore., Pa., S.C., S.D. Tenn. (as part of motion for new trial), Tex., Vt., Wash., Wis., and Wyo.

[75] Conn., Ind., Ky. (judgment non obstante veredicto may be granted only where result is demanded by pleading), Me., Mont., Utah, and W.Va.

[76] Calif., Colo., D.C., Idaho, Ill., Kan., Mich., Minn., Mo., N.C., N.M., Pa., and Wyo.

[77] Ariz., Ark., Del., Fla., Ill., Iowa, Kan., Md., Mass., Mich., Miss., Neb., N.H., N.Y., N.D., Ohio, Okla., Ore., R.I., Tex., Vt., Wash., and Wis.

VOLUNTARY NON-PROS

(8) That after the trial of a law suit has begun, dismissal without prejudice by voluntary *non-pros* be permitted only in the legally reviewable discretion of the trial judge.

It was the view of the Committee on Trial Practice that the practice of dismissal without prejudice by voluntary *non-pros* constituted an abuse of legal procedure in the majority of cases, at the same time wasting judicial effort and burdening defendants unduly. It is to be noted that there is a distinction between a voluntary dismissal which is termed alternatively a discontinuance or a *non prosequitur* or a nonsuit, and a true dismissal which involves a final judgment of the court.[78] The condemned practice is that which prevails where it is possible for the plantiff to nullify an anticipated adverse result after trial by simply submitting to a voluntary *non-pros*, leaving the plaintiff free to reinstate the suit at a later date when the defendant would be unable to plead *res judicata*. The committee made its recommendation, approved by the American Bar Association, that after trial has begun, dismissal without prejudice be permitted only in the legally reviewable discretion of the trial judge.[79] As noted by the committee, the subject is regulated by Rule 41(a) of the Federal Rules of Civil Procedure, the provisions of which restrict the right to dismissal without prejudice by voluntary *non-pros* even further than does the recommendation:

> Rule 41(a) Voluntary Dismissal: Effect Thereof.
>
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the

[78] See general discussion 3A Ohlinger's Federal Practice 32-36 (1939).

[79] Appendix A at 541-542.

dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

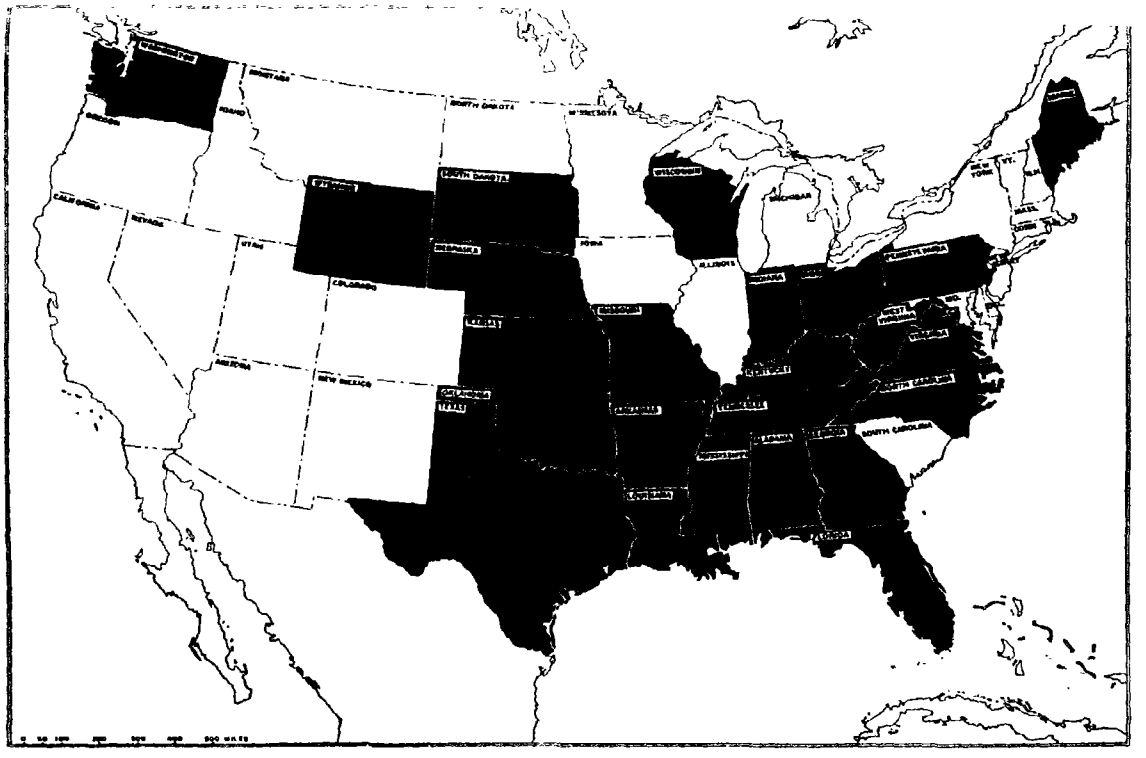
(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.[80]

In a majority of states, contrary to the recommendation and the federal rules, a plaintiff may dismiss his action or enter a voluntary nonsuit as a matter of right at various stages of the trial. Of this majority the greater number permit voluntary dismissal or nonsuit as of right at any time prior to submission of the case to the court or jury: *Arkansas, Florida, Indiana, Kansas, Kentucky, Maine, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Virginia, Wisconsin,* and *Wyoming.* In four states it may be had at any time before the jury retires for deliberation: *Alabama, Tennessee, Texas,* and *West Virginia.* In seven it may be had before the rendition of the court's decision or the jury's verdict: *Georgia, Indiana* (*nonjury cases*), *Louisiana* (*nonjury cases*), *North Carolina, Pennsylvania* (*a nonsuit*), *South Dakota,* and *Texas* (*nonjury cases*). *Washington* permits a plaintiff to dismiss his action or to enter a voluntary nonsuit as a matter of right at the trial after the close of his case; he must act before the defendant enters upon his defense.

In accordance with the recommendation the plaintiff may have a dismissal or nonsuit in sixteen states as of right at any time prior to the commencement of trial: *California, Connecticut, Idaho, Illinois, Iowa,*[81] *Maryland, Massachusetts,*

[80] Moore, op. cit. supra n. 15, at 3034 et seq. as amended.

[81] In class action no dismissal without court permission.



VOLUNTARY NON-PROS

After a trial has begun, dismissal without prejudice permitted only in legally reviewable discretion of trial judge

Dismissal without prejudice by voluntary *non-pros* permitted as a matter of right at various stages after trial has begun

Minnesota, Montana, Nevada, New Hampshire, North Dakota, Oregon, Rhode Island, South Carolina, and *Utah.* In seven other jurisdictions a voluntary dismissal may only be had, as under the federal rules,[82] before an answer is filed: *Arizona, Colorado, Delaware, Michigan, New Jersey, New Mexico,* and *Vermont.* In *New York* such a dismissal may be had only up to the time of the defendant's appearance.

Also similar to the approved practice embodied in the federal rules, dismissal may be had by stipulation between the parties in six states at any time prior to the submission of the case to the court or jury,[83] before the decision or verdict is rendered in three other jurisdictions,[84] and at any time prior to judgment in fifteen jurisdictions.[85] Finally, of this group where the right to a voluntary dismissal after commencement of trial is limited, a plaintiff may dismiss his action or enter a voluntary nonsuit only by leave of court in six states prior to submission to court or jury,[86] in one jurisdiction before the decision or verdict of the court or jury,[87] and in six other states at any time preceding the entry of judgment.[88]

Two fairly common, although limited, safeguards found in many of the states in one form or another are, first, that dismissal will be denied or conditioned if it would tend to prejudice the defendant as, for example, where defendant has previously filed a counterclaim or cross-action; and, second, the requirement that all costs be paid by plaintiff.[89] A third restriction, much more rare, and analogous to that set forth in the Federal Rules of Civil Procedure,[90] limits the number of times a cause may be voluntarily dismissed without prejudice.[91]

[82] Or motion for summary judgment made.

[83] La., Minn., Mo., Mont., N.H., and N.C.

[84] Mich., Ohio, and S.C. In Pennsylvania an action can be discontinued even after a verdict if the defendant does not object.

[85] Ariz., Calif., Colo., Ga., Idaho, Md., Mass., N.H., N.J., Nev., N.M., N.Y., Ore., R.I., and Utah.

[86] Calif., Mich., Minn., N.Y., N.D., and S.C.

[87] N.H.

[88] Conn., Ill., Mass., Ore., Nev., and Vt.

[89] E.g., Minn., Nev., N.D., and S.C.

[90] Rule 41(a)(1).

[91] E.g., Minn., Mo., and N.J.

REFERENCE TO AND REPORTS OF MASTERS

(9) That in law cases involving complicated fact issues, there may well be reference to a special master or auditor in advance of a jury trial with the submission of his report for consideration by the jury . . . ; that in equity and nonjury law cases the report should be accepted by the court as to the facts unless clearly erroneous, but nevertheless with power in the trial judge to adopt or modify or reject the report in whole or in part or, in his discretion, to receive further evidence with regard to the facts found, or to recommit the report with instructions. In jury actions the findings of the referee, special master or auditor should be made admissible as evidence of the matters found and be read to the jury subject to the ruling of the court upon any objection in point of law which may be made to the report (see new federal rule No. 53).

While reference of certain matters to special masters or referees or auditors has been common practice in equity, as recognized by the Committee on Trial Practice, this has not been generally customary in law, especially in jury cases. The function of the master is to hear only those matters which would unduly burden the court or jury. In the committee's opinion not only would juries well be aided by such references, but it was desirable that there be uniformity as to the status in court of the report of a master or referee with respect to its finality.[92] The recommendation parallels Rule 53 of the Federal Rules of Civil Procedure:

(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. . . .

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon par-

[92] Appendix A at 542.

ticular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. . . .

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. . . .

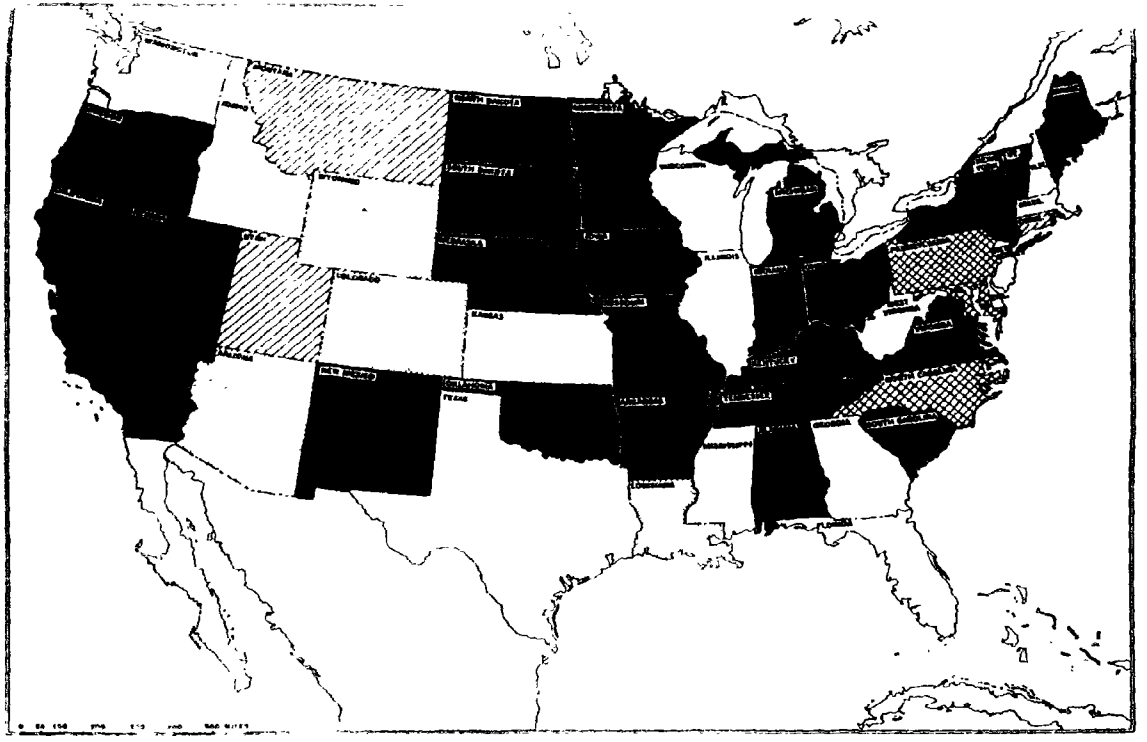
(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.[93]

As recommended, fifteen jurisdictions make the master's findings[94] merely *prima facie* and rebuttable evidence of the facts found and conclusions reached in a trial by jury: *Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Kansas, Massachusetts, Mississippi, New Hampshire, New Jersey, Texas, Washington, West Virginia,* and *Wisconsin.* In four states his findings are merely admissible into evidence *Arizona, Colorado, Louisiana,* and *Wyoming.* Contrary to

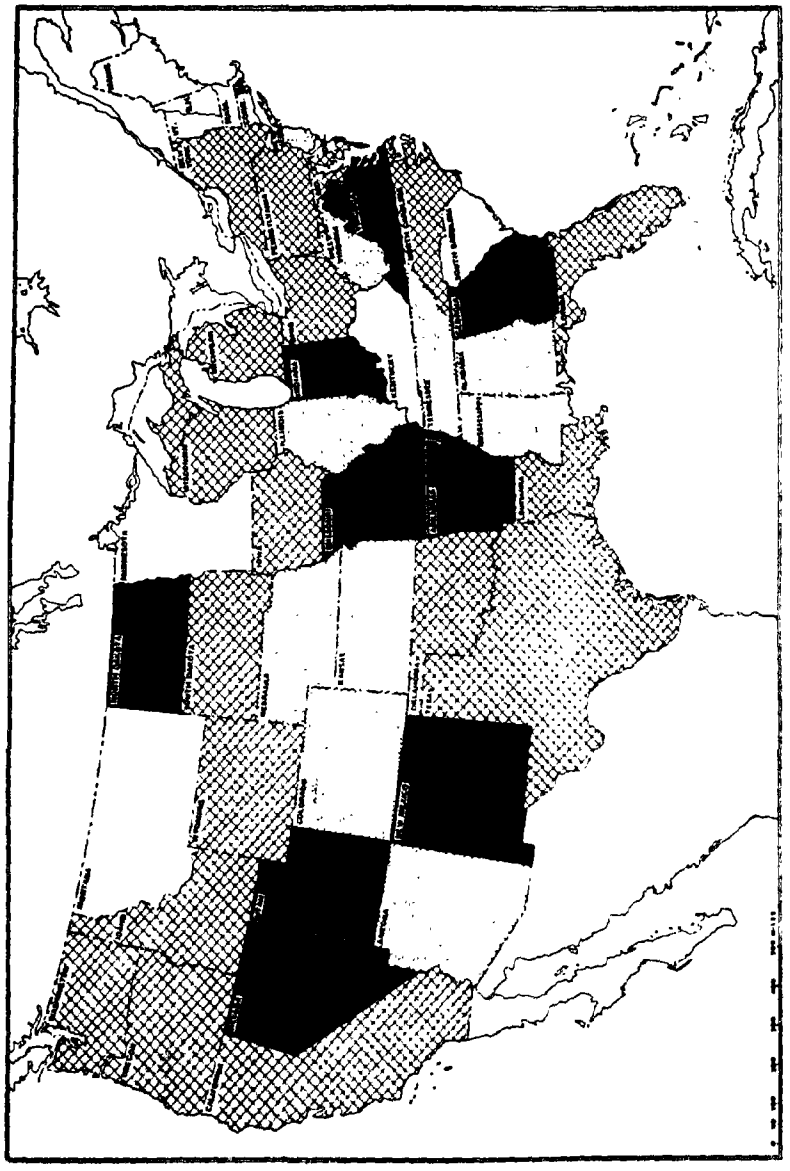
[93] Moore, op. cit., supra n. 15, at 3121 et seq.

[94] Minn., findings of referees in trial by jury have whatever effect parties agree they should have.



REFERENCE TO AND REPORTS OF MASTERS—JURY TRIALS

- Master's findings *prima facie* and rebuttable evidence of facts found in jury trials
- Master's findings are admissible into evidence in jury trials
- Master's findings of fact in jury trials are binding and cannot be rebutted
- Master's findings inadmissible as evidence in jury trials
- [illegible] not applicable or used


REFERENCE TO AND REPORT OF MASTERS—TRIAL BY THE COURT
Master's findings accepted unless supported by no substantial evidence
Master's findings of fact are persuasive only
Procedure is not utilized

the recommendation, where issues of fact are referred to a master or an auditor for hearing, his findings of fact are, on trial by jury, binding and cannot be rebutted in three states: *Connecticut, Montana,* and *Utah.* Four states have made the master's or auditor's finding inadmissible in evidence before a jury: *Maryland, North Carolina, Pennsylvania,* and *Rhode Island.* For a variety of reasons this particular procedure is not applicable in a number of other states.[95]

In accordance with the recommendation, on trial by the court without a jury, in ten jurisdictions the findings must be accepted unless supported by no substantial evidence: *Connecticut, Delaware, District of Columbia, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Hampshire, South Carolina,* and *Vermont.* Eleven states require acceptance of the findings unless they are against the weight of the evidence: *Alabama, Arizona, Colorado, Illinois, Kansas, Mississippi, Nebraska, New Jersey, Rhode Island, Tennessee,* and *West Virginia.* In trial by the court without a jury the master's or auditor's findings of fact are persuasive only, contrary to the recommendation and the federal rule, in many jurisdictions: *California, Florida, Idaho, Iowa, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Washington, Wisconsin,* and *Wyoming.* Other states do not seem to utilize such procedure in trials by the court.[96]

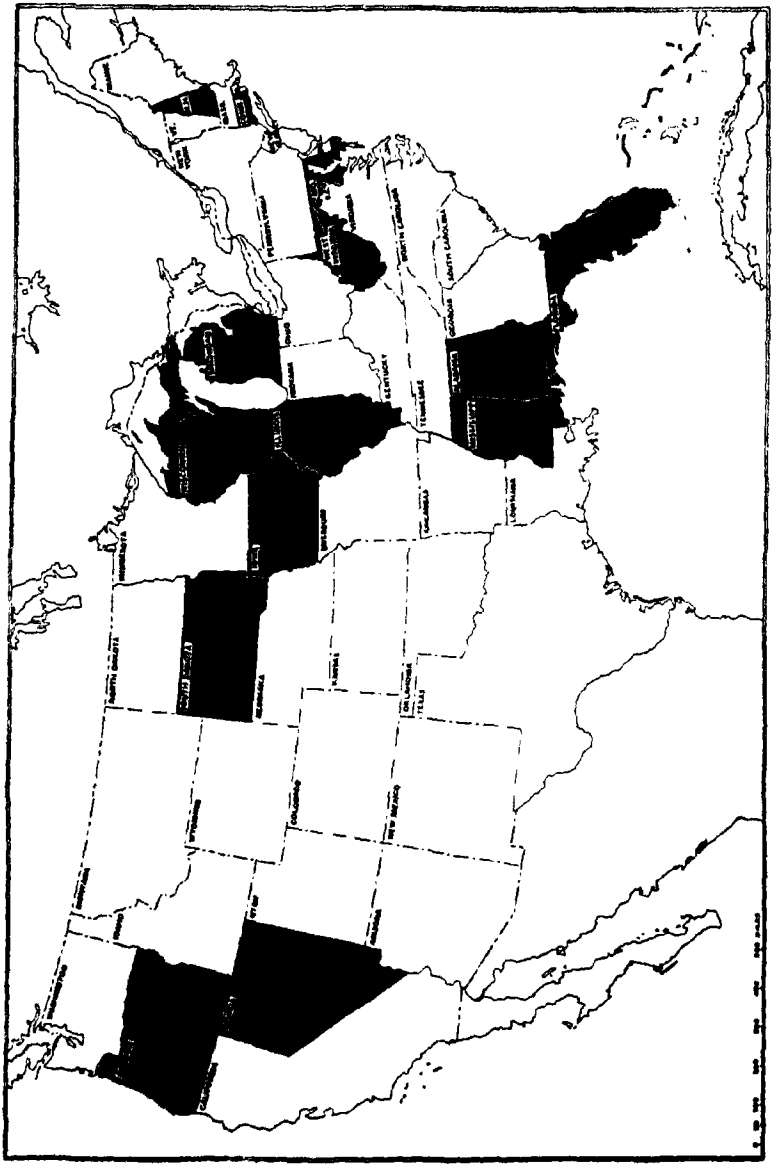
Preliminary Injunctions

(10) That the practice as to issuing preliminary injunctions should be in accordance with that outlined in the new Federal Rule 65 which in substance forbids the issuance of preliminary injunctions without a hearing, but permits a temporary restraining order when necessary to obviate irreparable injury.

This recommendation, based on criticism of the too liberal granting of preliminary injunctions *ex parte* and without notice

[95] Ala., Ark., Calif., Ind., Iowa, Ky., Me., Mich., Minn., Mo., Neb., Nev., N.M., N.Y., N.D., Ohio, Okla., Ore., S.C., S.D., Tenn., Vt., and Va.

[96] Ark., Ga., Ind., Mo., Nev., N.M., N.D., Utah, and Va.


PRELIMINARY INJUNCTIONS
Preliminary injunction not ordered without notice permitted
Entry of preliminary injunction without notice permitted

to adverse parties,[97] embodies Rule 65 of the Federal Rules of Civil Procedure:

> (a) Preliminary; Notice. No preliminary injunction shall be issued without notice to the adverse party.
>
> (b) Temporary Restraining Order; Notice; Hearing; Duration. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. . . . In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; . . .[98]

Similar to the recommended practice embodied in the federal rules, the overwhelming majority of states permit the entering of a temporary restraining order pending a hearing on a preliminary injunction, without notice, so long as application has been made in proper form: *Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington,* and *Wyoming*. Only a relatively few jurisdictions permit the entry of a preliminary injunction without notice, contrary to the recommendation and the federal rule: *Alabama, Connecticut, Florida, Illinois, Iowa, Maryland, Michigan, Mississippi, Nevada, New Hampshire, Oregon, South Dakota, West Virginia,* and *Wisconsin*.

Conclusion

The first three recommendations considered in this chapter are of the utmost importance not only for the improvement

[97] Appendix A at 542.

[98] Moore, op. cit. supra n. 15, at 3313 et seq.

of trial practice, but for the betterment of the administration of justice as a whole. The functions and authority of the trial judge, his relation to the jury and his powers in conducting a trial are of particular significance also in the selection of the jury, in their examination on the *voir dire,* and in the application of the law of evidence. These three recommendations, however, as well as those relating to the limitation of voluntary *non-pros* and the acceptance of masters' reports are embodied only in the practice of a minority of the states.

Of the ten recommendations relating to trial practice, five, of relatively minor importance, are followed in the practice of a majority of the states. In many states, as recommended, liberal provisions for pretrial discovery have been made, partial new trials may be ordered by the trial judge, special interrogatories may be used, the practice of granting judgment *non obstante veredicto* in accordance with a motion for a directed verdict is permitted, and, though a temporary restraining order is allowed when necessary, a preliminary injunction may not be issued without a hearing. Such procedural improvements, while valuable, are of lesser importance, however, as compared with those regarding the judge's relation to and instruction of the jury.

Thus, although half of the recommendations as to trial practice are followed in a majority of the states, much remains to be done in this field. This is indicated by the fact that the basic common-law concept of the judge as the governor of the trial has not been restored in many of the states in which such judicial power was restricted as a result of the fear and distrust of its arbitrary use engendered by the impact of Jacksonian democracy. Consequently, today in only a few of the states has the judge power to comment on the weight of the evidence. The continuing implementation of the various other recommendations considered in this chapter is significant, of course, but emphasis must be placed on the prime need to accord to the judge his proper place and power in the conduct of a trial because this is the *sine qua non* of all other improvements in trial practice and, indeed, in the proper administration of justice as a whole.

CHAPTER VII

TRIAL COURTS OF LIMITED JURISDICTION: TRAFFIC COURTS AND JUSTICE OF THE PEACE COURTS

INTRODUCTION

In 1938 the American Bar Association's Section of Judicial Administration did not concern itself immediately with the problems of courts of first instance having limited jurisdiction. One of the recommendations approved at that time, however, but directed primarily at improving appellate practice, was to the effect that appeals from local courts by way of full retrial in a higher court should be avoided as far as possible.[1] The status of this recommendation insofar as it relates to the practice of having a trial *de novo* in a superior trial court, following a trial in a local court, is considered in the chapter on appellate practice.[2] As part of this recommendation it was also suggested that as a means of improving the quality of local courts:

> The abolition of justice of the peace courts should be seriously considered, substituting therefor municipal courts or courts with wider territorial jurisdiction, properly organized and housed, having trained and salaried judges, competent clerks, office equipment sufficient for keeping proper records, and sitting, so far as practical, at such times and places as the needs of a community indicate.[3]

This recommendation that the quality of local trial courts, including traffic courts and justice of the peace courts, be improved could appropriately and with equal effect have been submitted as a part of the recommendations relating to trial practice, the rule-making power, or managing the business of

[1] Appendix A at 510.
[2] See text infra at 389.
[3] Appendix A at 510.

the courts. Its position in the report on appellate practice merely illustrates that it is quite impossible to consider any phase of improvement in the administration of justice without considering the fundamental problem of the functioning of the trial courts of limited jurisdiction. On the whole, the importance of such courts has received scant recognition from the main body of the legal profession. Thus, except for isolated instances, the bar associations and the law schools have not concerned themselves with these courts, but have left it to political and social scientists to urge the remedying of their obvious defects.[4]

Fortunately, a few months after the approval of the recommendations that are considered in this volume, the grant of a fund from the Automotive Safety Foundation made possible an exhaustive study of the nation's traffic courts sponsored jointly by the National Conference of Judicial Councils and the National Committee on Traffic Law Enforcement.[5] From December, 1938, to September, 1940, George Warren of the Trenton, New Jersey bar, counsel to the National Committee on Traffic Law Enforcement, visited every state in the nation, observed the municipal courts in operation in seventy-six cities, evaluated information received from an additional sixty cities, compared the laws governing courts enforcing traffic regulations, studied the available material written on the subject, and tabulated the information derived from answers to 13,000 questionnaires sent out by him.

In September, 1940, a monograph prepared by Warren,[6] containing fifty-seven specific recommendations relating to the improvement of traffic courts, was approved by the National Committee on Traffic Law Enforcement, the National Conference of Judicial Councils, and the Section of Judicial Ad-

[4] E.g. Moley, Our Criminal Courts (1930), Politics and Criminal Prosecution (1929).

[5] Suggestion made as to necessity for nationwide study of traffic courts and the establishment of standards for uniform handling of traffic cases, see Report of Proceedings of the Boston Meeting of the Section of Insurance Law, A.B.A., at 33, 34, 35 (1936).

[6] National Committee on Traffic Law Enforcement, A Report to the National Conference of Judicial Councils, Section of Judicial Administration, Criminal Law Section, Junior Bar Conference, to be Presented to the Annual Meeting of the American Bar Association, September, 1940.

ministration, the Section of Criminal Law, the Junior Bar Conference, and the House of Delegates of the American Bar Association.[7] Thereafter the National Safety Council, and the International Association of Chiefs of Police added their seal of approval. Warren on *Traffic Courts,* based on this monograph of 1940, was published in December, 1942, as the fourth volume in the Judicial Administration Series and was edited by Dean Roscoe Pound for the National Conference of Judicial Councils. It was the first book on the subject and its fifty-seven specific recommendations [8] still present the best blueprint for improving traffic courts. The Section of Judicial Administration of the American Bar Association [9] has continued to support this program, much of which can be applied with equal benefit to improving the disposition of all other classes of cases by trial courts of limited jurisdiction. Unlike the American Bar Association's 1938 program of minimum, essential recommendations, this was intended as, and is, a complete program designed for maximum effectiveness and improvement of these courts. Thus, it was stated in the foreword:

> It is hoped that the volume will be the means of inducing far-reaching improvements in the work of dealing prudently with the complicated problem of traffic law violations. It is also hoped that it may stimulate further studies of other courts of first instance to the end that improvement in the administration of justice in these important tribunals may aid in increasing that sound respect for law on which our process of government and our way of living necessarily depend.[10]

It is the purpose of this chapter to measure the impact and the degree of acceptance of these fifty-seven recommendations on the present effectiveness of the administration of the nation's traffic laws in trial courts of limited jurisdiction.[11] The

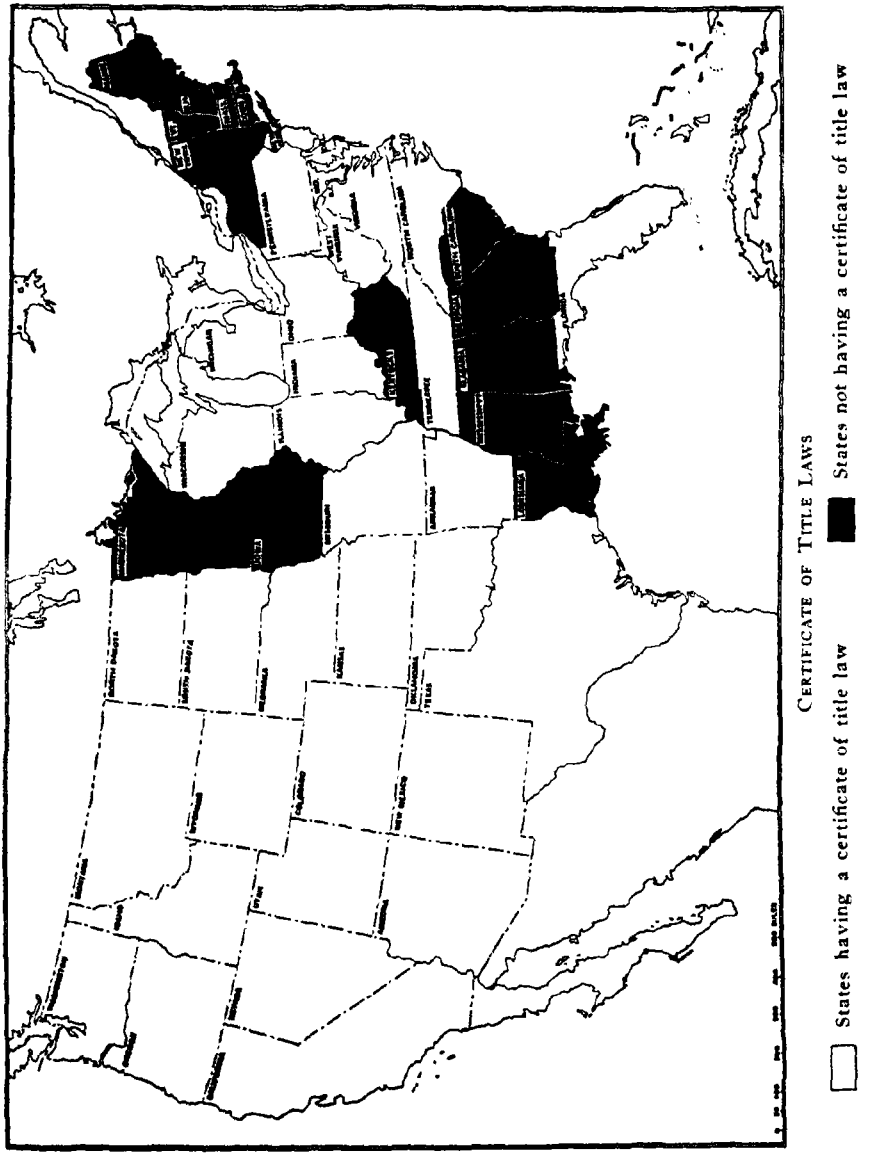
[7] See 65 A.B.A. Rep. 102 (1940). See also Report of the Section of Judicial Administration, id. at 337.

[8] Appendix C. See also Fisher, People's Court (1947).

[9] A.B.A. Handbook, The Improvement of the Administration of Justice 89 et seq. (1949).

[10] Warren, Traffic Courts xi (1942).

[11] After the publication of Warren on Traffic Courts, promotion of the program in the first instance was assumed by the Junior Bar Conference of the American Bar Association. 68 A.B.A. Rep. 406 (1943). Working through committees and advisers in each state,


CERTIFICATE OF TITLE LAWS
States having a certificate of title law
States not having a certificate of title law

progress and facts reported in this chapter are based upon field visits by representatives of the American Bar Association, traffic court conferences, written reports from committee members and state advisers, and answers received from many cities of varying sizes reporting in the 1947 and 1948 Traffic Court Award Contests authorized by the American Bar Association.[12] In the interest of simplification and of such brevity as is possible, the fifty-seven recommendations contained in Warren's book have been consolidated into nine general headings under which the progress in the states generally, and more particularly in the cities, will be considered.

Uniform Traffic Laws and Ordinances

(A) The states

Since the fundamental problems arising from traffic cases throughout the country are not only similar but cross state lines, uniformity of the basic laws pertaining to such cases is requisite to cope adequately with the fifty million motorists operating forty million motor vehicles in and through forty-nine jurisdictions. The need for uniform and speedy justice is self-evident. Traffic cases arise for the most part because motor vehicles are not stationary. Motor vehicles do not remain within one locality or one jurisdiction, hence the crying need that motorists receive the same treatment throughout the country. Traffic cases do not for the most part require judicial subtlety. Such refinements are not pertinent to the achievement

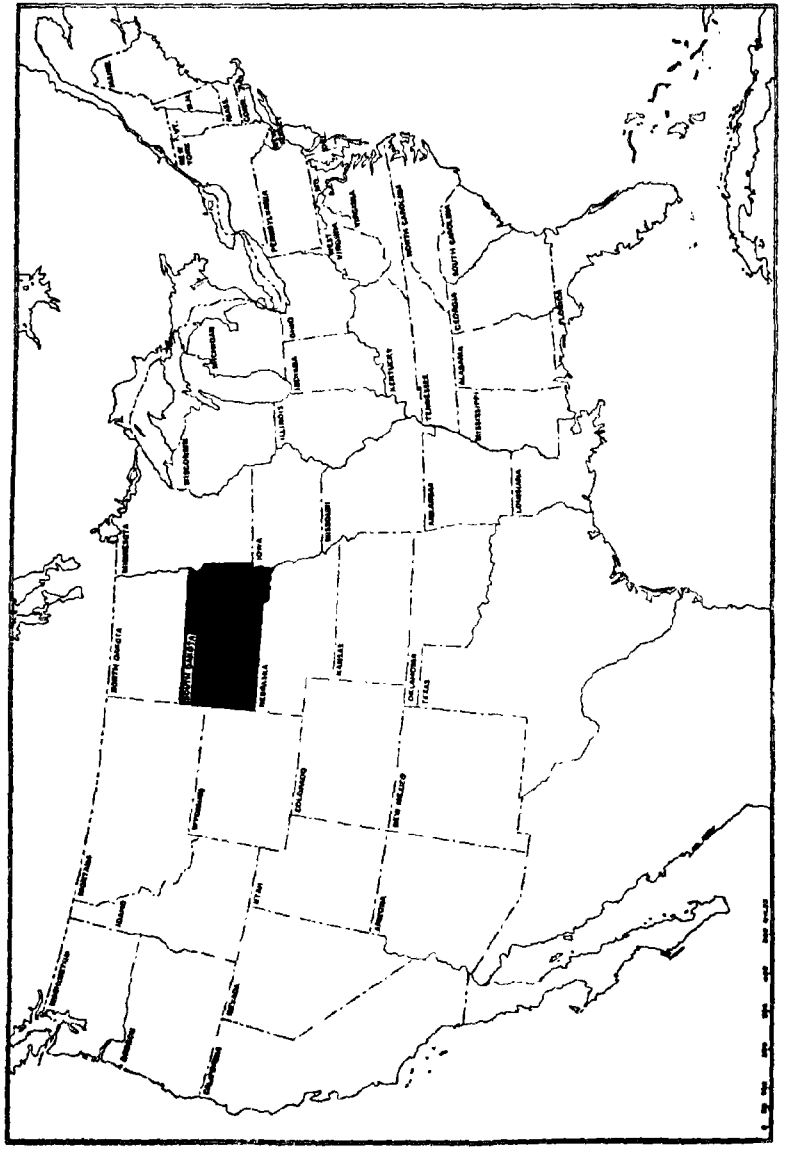
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and with the joint sponsorship of the National Safety Council more than 300 one-day traffic court conferences have brought together over 15,000 persons interested in the programs. Economos, "The National Program of State Traffic Court Conferences," 28 J. Am. Jud. Soc'y 56 (1944). See also 67 A.B.A. Rep. 54 (1942) for the names of the members of the first Committee on Traffic Courts of the Junior Bar Conference.

[12] 1948 Contest Information

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Cities eligible to report	16	34	52	117	217	692
Cities reporting	14	29	41	74	124	305

See 72 A.B.A. Rep. 119 (1947) for original resolution relating to the contest.


DRIVER'S LICENSE LAWS
State not requiring license for drivers
States having driver's license laws

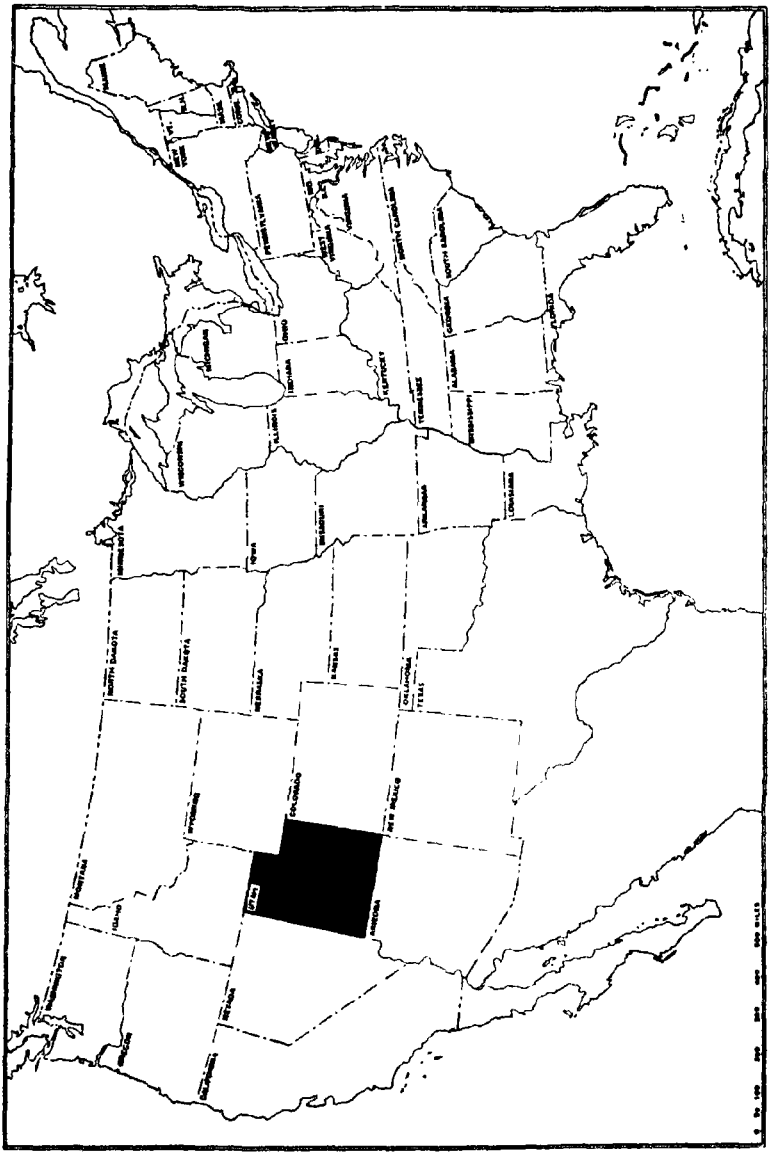
of justice in cases which are primarily concerned with simple issues of facts. The trial court should not be hampered by poorly drafted regulations or regulations which are now antiquated because of new conditions constantly developing from the improvement in the motor vehicle and the roads on which they pass.

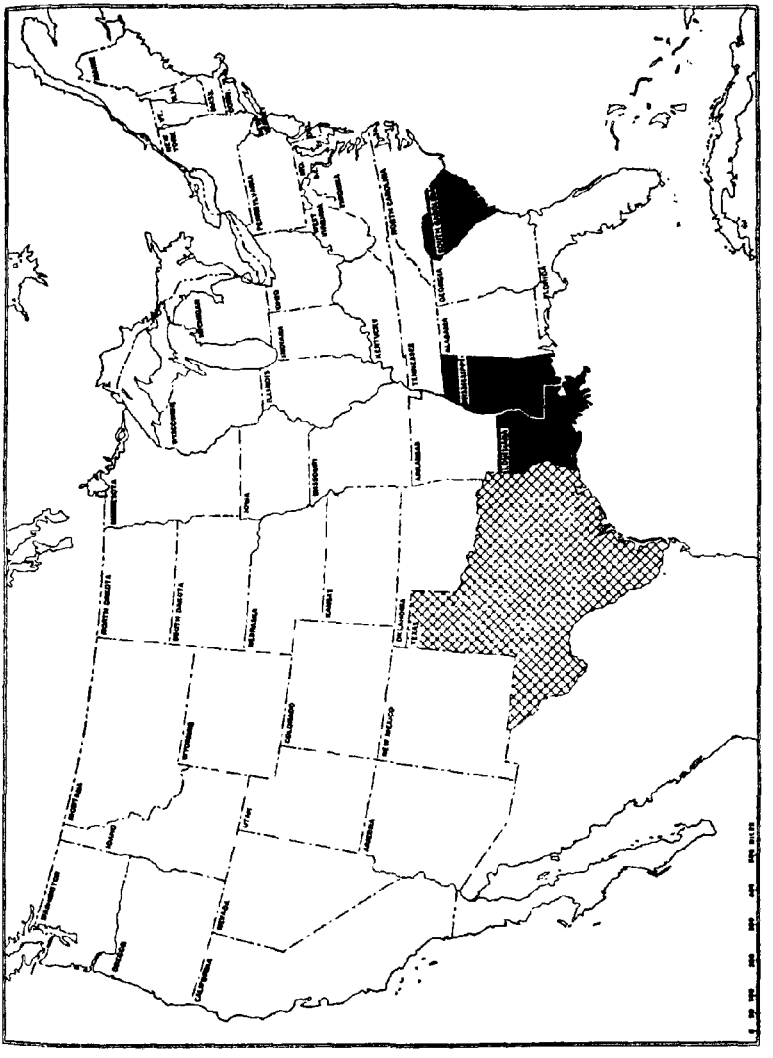
Although there has been sporadic agitation for uniform traffic laws ever since the 1924 Street and Highway Safety Conference, there has been greater insistence upon uniformity since 1942. The Uniform Vehicle Code [13] now consists of five acts divided in such manner as to cover certain phases of regulation in their entirety. The several acts are entitled: Act I. Uniform Motor Vehicle Administration, Registration, Certificate of Title and Anti-Theft Act; Act II. Uniform Motor Vehicle Operators' and Chauffeurs' License Act; Act III. Uniform Motor Vehicle Civil Liability Act; Act IV. Uniform Motor Vehicle Safety Responsibility Act; and Act V. Uniform Act Regulating Traffic on Highways.

Every state has adopted some part of the Uniform Vehicle Code, but *Michigan* alone has codified its motor vehicle laws using the Uniform Code as a model. The most encouraging sign in this field is the making of comparative analyses of state motor vehicle laws with the Uniform Vehicle Code as has been done in *Arizona*, *Colorado*, *Illinois*, *Iowa*, *New Jersey*, and *Wisconsin* and is now being done in sixteen other jurisdictions.[14] Legislation patterned after the Code was introduced in practically all of the forty-four states in which

[13] The Uniform Vehicle Code was originally prepared in 1925 and 1926 by the National Conference on Street and Highway Safety in cooperation with the National Conference of Commissioners on Uniform State Laws. This code was revised in 1930, 1934, 1938, and 1944, but the National Conference of Commissioners on Uniform State Laws failed to participate in the revisions in 1930, 1934 and 1938. Following the 1944 revision, the N.C.C.-U.S.L. appointed a committee to report on the revised uniform vehicle code. The committee reported to the 1946 annual meeting of the commissioners at Philadelphia and they endorsed the code as revised. Thereafter the uniform vehicle code was again revised in 1948. Again the commissioners appointed a committee and endorsed the revisions at their annual meeting in Seattle in September, 1948.

[14] Calif., D.C., Ga., Ind., Kan., Ky., Miss., Mont., N.Y., N.D., Ohio, Oreg., R.I., S.D., Wash., and Wyo. A limited analysis has been made in Oklahoma, South Carolina, and Texas. Act V has been comparatively analyzed in Idaho.


SERVICE OF PROCESS ON NONRESIDENT OPERATORS
States enacting section providing for service of process on nonresident operators
State not enacting section providing for service of process on nonresident operators


SAFETY FINANCIAL-RESPONSIBILITY LAWS
States having a safety financial-responsibility law
State providing for compulsory safety financial-responsibility only for commercial vehicles where inspection lanes operate

legislative bodies assembled in 1949.[15] The present status of acceptance of the Code after such meetings is reported as follows:

Act I.—A certificate of title law is now embodied in the statutes of the following: *Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin,* and *Wyoming.*[16]

Act II.—The *District of Columbia* and all the states except *South Dakota* have a driver's license law. In 1949 eight states, *Colorado, Kansas, Nebraska, Nevada, Ohio, Oklahoma, South Carolina,* and *Wisconsin,* amended their licensing statutes to conform more fully with Act II.

Act III.—The section providing for the service of process on nonresident operators has been adopted in the *District of Columbia* and in all states except *Utah.*[17]

Act IV.—Forty-four states and the *District of Columbia* have a safety financial-responsibility law. During 1949, *Arkansas, Oklahoma,* and *Nevada* passed resolutions on this subject.[18] The states which do not have a financial-responsibility law are *Louisiana, Mississippi, South Carolina,* and *Texas. Texas* does provide, however, for compulsory safety-financial responsibility for commercial vehicles but only where inspection lanes are operating.

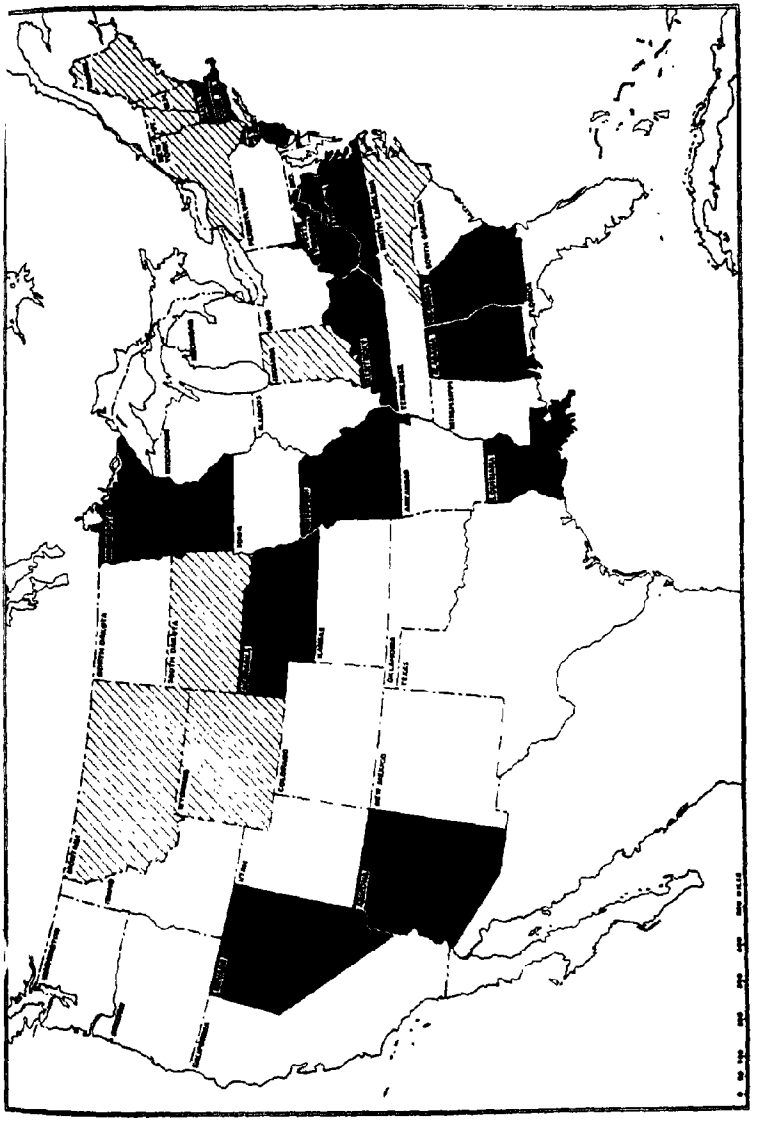
Act V.—The following twenty-four states have adopted virtually the entire uniform act regulating traffic on the highways:

[15] As to earlier progress cf. Economos, "Uniform Traffic Laws," 21 State Government 248 (1948).

[16] Tennessee's statute enacted in 1949 goes into effect on March 1, 1951. Three of the states having such laws, Delaware, New Jersey, and Pennsylvania, took steps to have their statutes conform more fully with the provisions of Act I. The fifteen states that do not have such laws are: Alabama, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Rhode Island, South Carolina, and Vermont. In New York such legislation will be proposed in the 1950 legislature. N. Y. Times, Aug. 1, 1949, p. 13, col. 2.

[17] The other three parts of Act III established the responsibility of public agencies operating their own vehicles, established the liability of owners of vehicles for rent, and recognizes the doctrine of imputed negligence.

[18] See Ark. Sen. B. No. 347, March 28, 1949; Nev. H.B. No. 286, March 23, 1949; Okla. H.B. No. 163, March 23, 1949. In addition to a financial responsibility law Massachusetts has a law providing for compulsory insurance.


UNIFORM CODE—ACT V
States adopting virtually all the uniform act regulating traffic on highways
Conforming legislation embodying one or more sections of the act enacted
Uniform act regulating traffic on highways not enacted

Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Mississippi, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, and *Wisconsin.*[19] In addition conforming legislation embodying one or more sections of the act has been enacted in nine additional states: *Indiana, Maine, Montana, New Hampshire, New York, North Carolina, South Dakota, Vermont,* and *Wyoming.*

(B) The cities

The Model Traffic Ordinance,[20] which was prepared in 1928 for the National Conference on Street and Highway Safety, has been revised from time to time and presently is receiving attention and study from the National Committee on Uniform Traffic Laws and Ordinances. This model ordinance should be considered as the basis to which all city ordinances should conform. In each jurisdiction comparative studies of local ordinances and the model ordinance are necessary before such conforming action can be taken. Out of the 579 cities reporting to the 1947 National Traffic Safety Contest, 220 stated that they were planning to make this comparative analysis and in 1948 forty cities did make such studies. Steps were being taken in 156 cities to enact amendments to bring the local ordinances into greater uniformity with the model. On the whole, it can be stated that probably no city has adopted the entire Model Traffic Ordinance, but many cities, however, have adopted several of its important features. It is obvious that there is increasing recognition as to the necessity for uniformity in municipal traffic regulations. Further progress in this field is required, if the courts are to fulfill their potential effectiveness for traffic court justice.

[19] It is to be noted that in 1949 Colorado, Idaho, Kansas, Michigan, North Dakota, Washington, and Wisconsin enacted legislation conforming their statutes to Act V. The fifteen states which have not adopted statutes similar to Act V are Alabama, Arizona, Connecticut, Georgia, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Rhode Island, Virginia and West Virginia.

[20] See Warren, op. cit. supra n. 10 at 13-18.

JUDGES AND PROSECUTORS

(A) The states

Warren on *Traffic Courts* reported that most jurisdictions do not require legal training of any kind for service on the traffic court bench.[21] The situation in this respect has been changed only in *Missouri* by constitutional amendment[22] and in *New Jersey* by legislation enacted upon a grant of authority in the constitution to vary the inferior courts and their jurisdiction. Missouri still has laymen acting as magistrates, but this judicial position eventually will be restricted to lawyers. New Jersey's county district courts have a complete set of legally trained judges,[23] and the municipal court judges[24] are required to be lawyers except in those instances in which they have had actual experience prior to December 31, 1948, as recorders, police judges, or justices of the peace. Of course, this means that ultimately all municipal judges will be members of the bar.

Despite the comparative lack of legislation to require legal training, there has been a notable increase in the number of young lawyers who are seeking such judgeships presently held by laymen. Thus, although direct action toward improvement in this problem has not been forthcoming, the indirect action resultant from competition of young lawyers for such positions may lead in some degree to the elimination of lay judges.

All prosecutors have been and continue to be legally trained. Their efforts are of great importance to these courts. All too frequently the prosecutor may find himself the only official in the courtroom possessing a legal background. Under these circumstances his responsibility is increased. The burden of maintaining the proper balance in proceedings conducted by a lay judge, especially when a defendant is not represented by counsel, rests upon the prosecutor if the administration of

[21] Ibid. at 88.

[22] Mo. Const. (1945) Art. V, § 25. Cf. projected California amendment, infra this chapter at 308-309.

[23] N.J. Rev. Stat. (Supp.) § 2:1 B-2 enacted as L. 1948, c. 265 § 2.

[24] Id. § 2:8A-20 enacted as L. 1949, c. 82.

justice is to be effective. Whether he handles one case a week or a hundred a day, he must never lose sight of the fact that to the individual at the bar of justice his is the all-important case.[25]

Despite the failure to require all judges to be legally trained, it is to be noted that the further quest of judges and prosecutors for specialized information in traffic law enforcement is a sign of recognition of the need for more specialized education. Thus, in 1947 and 1948 the Northwestern University Traffic Institute and the American Bar Association conducted regional conferences of traffic court judges and prosecutors at the Law Schools of New York University, Northwestern University, Tulane University, and the University of California. These series of conferences were so successful that they were repeated at the same universities in 1949.[26]

In 1948 a statewide traffic court judges and prosecutors conference was held at the University of *Illinois* Law School (two days) and another is to be held in the fall of 1949, which will include subjects pertaining to other phases of the criminal jurisdiction of courts of first impression. In 1948 a three-day traffic court judges and prosecutors conference in *New Jersey* was the first held at the call of the chief justice and associate

[25] Warren, op. cit. supra n. 10 at 99, states that an able and efficient prosecutor in a traffic court can expedite procedure and be helpful in many ways; he can segregate the short cases from the lengthy and serious ones; control the presentation of evidence on both sides, relieve the judge of burdensome and extraneous duties, so that the court can concentrate on deciding the issues.

[26] Fisher, "The Policy of Traffic Courts and Better Drivers," Traffic Quarterly 273, 276 (July, 1948). The first conference was held at New York University School of Law in June, 1947; the second at Northwestern University Law School in October, 1947; the third at the University of California School of Jurisprudence in February, 1948; and the fourth at Tulane University Law School, April, 1948. A second series was held in June and October, 1948, at New York University and Northwestern University respectively; and in 1949 meetings were held in February, April, and June at the University of California, Tulane University, and New York University respectively; and one was scheduled to be held in October of that year at Northwestern University Law School. Other such conferences were held in February and August, 1949, at the University of Southern California School of Law and University of Montana School of Law respectively; while one was scheduled to be held in September, 1949, at Yale University School of Law.

justices of a supreme court, supported by the governor;[27] and another is to be held in September of 1949 under the sponsorship of the Supreme Court and attorney general. Other statewide conferences were held in 1949 in *Michigan, Pennsylvania,* and *West Virginia.*[28] Twenty-one states held twenty-seven one-day statewide traffic court conferences in the two years ending in 1947,[29] and in eleven states fifty-three district conferences were held during the same period.[30] Prospects for the future in this part of the traffic program are excellent. The value of such conferences as a matter of education for the dissemination of information regarding the latest ideas in the field, and the consequent improvement in the administration of traffic laws cannot be overestimated.[31]

[27] See 71 N.J.L.J. 433 (1948).

[28] The Michigan Traffic Court Conference was held in Detroit on May 20, 1949; the Pennsylvania Traffic Court Conference was held in Harrisburg, Feb. 2, 1949; on June 22, 1949, the Mayor's Highway Safety Conference of Pittsburgh, devoted entirely to traffic courts, met in Pittsburgh; the West Virginia Safety Conference met in Charleston on April 7, 1949. In addition, the Fourth Annual District of Columbia Traffic Court Conference was held on April 21, 1949, in Washington.

[29] Ala., Ariz., Ark., Calif., Fla., Kan., Mass., Minn., Mich., Miss., Neb., N.H., N.J., N.Y., Ohio, Ore., S.D., Tex., Wash., W.Va., and Wis.

[30] Ala., Ark., Ill., Kan., Minn., Miss., Neb., Ohio, Pa., Utah, and Wis.

[31] The importance of longer conferences is illustrated best by the following excerpts from letters received from the conferees:

> "I feel I am much better qualified to sit on the bench, not only in traffic matters, but other matters, as a result of having attended this conference."
>
> "An exceedingly useful, interesting and educational conference."
>
> "Very helpful. Gave me many ideas which I put into effect upon my return. Gave me a true perspective of the traffic problem and its seriousness from the standpoint of law enforcement."
>
> "I have had the opportunity to put into effect some of the ideas suggested at the conference, and I must report that the results are startling to say the least. Since returning from the conference, I have had an average of at least eight out of every ten people that were convicted of traffic violations not only thank me for the treatment they received in court, but assure me that they will be more careful in the future."
>
> "Our interest at the conference was largely with Driving While Intoxicated and kindred cases, and I will say that we learned a lot, including some of the Texas Law on the subject which we had not previously been introduced to."
>
> "Very good. I was pleased to see emphasis put on the importance of having the offender go out of the court with the right frame of mind, feeling that he had a fair trial."

(B) The cities

Contrary to the recommendations in Warren on *Traffic Courts*,[32] the judges presiding in courts exercising jurisdiction of traffic violations in cities having a population over 500,000 are rotated periodically, except in Milwaukee which has a single-judge district court for these matters. Among cities of

ROTATION OF JUDGES

Population	200,000-500,000	100,000-200,000	50,000-100,000
1947			
No. of cities eligible to report	34	48	107
No. of cities reporting	33	37	76
No. of cities in which judges presiding in courts exercising jurisdiction over traffic cases are rotated	16	18	16
1948			
No. of cities eligible to report	34	52	117
No. of cities reporting	29	41	74
No. of cities in which judges presiding in courts exercising jurisdiction over traffic cases are rotated	11	12	9

this size in accord with the view that traffic cases should be segregated from consideration with other criminal cases, Detroit has two full-time judges and five referees exercising jurisdiction over traffic cases. Baltimore has a full-time traffic court with a chief magistrate and six associate magistrates, who devote, however, only part of their time to their judicial duties and are permitted to engage in private practice. The chief city magistrate of New York assigns to traffic cases those magistrates best fitted for this work. The Chicago Municipal Court chief justice often keeps the same judge in the traffic court for several months, even though all other judges rotate monthly. In San Francisco the presiding judge takes the part-time traffic court for a full year, while he assigns other judges quarterly to the full-time traffic court. In Buffalo the judges rotate weekly in the violations court, while judges sitting in the traffic court rotate monthly. Philadelphia and Pittsburgh still use laymen as magistrates and assign one to traffic periodically.[33] As to the

[32] Op. cit. supra n. 10 at 94-96.

[33] These laymen are usually active political party leaders.

cities having a population of less than 500,000, it is interesting to note the contrast between the reports for 1947 and 1948. The improvement indicated is indeed quite remarkable.

The eleven cities in 1948 in the population group between 200,000 to 500,000 were: Oakland, California; Atlanta, Georgia; St. Paul, Minnesota; Kansas City, Missouri; Omaha, Nebraska; Rochester, New York; Cincinnati, Columbus, and Toledo, Ohio; Portland, Oregon; and Providence, Rhode Island.[34] The twelve cities in 1948 with a population of 100,000 to 200,000 were: Hartford, Waterbury, and New Haven, Connecticut; Des Moines, Iowa; Cambridge, Fall River, Somerville, and Springfield, Massachusetts; Duluth, Minnesota; Yonkers, New York; Canton, Ohio; and Salt Lake City, Utah.[35] The nine cities in 1948 in the population group of 50,000 to 100,000 were: Fresno, and Pasadena, California; New Britain, Connecticut; Evanston, and Oak Park, Illinois; Sioux City, and Waterloo, Iowa; Hamtramck, Michigan; and Lancaster, Pennsylvania.[36]

A serious matter recently brought to light is the exercise of the power of assignment of judges to the court considering traffic cases by persons other than the judiciary, as shown by the 1948 traffic contest reports. Thus, mayors, city commissioners, city clerks, and village boards are presently holding the power of assignment in a number of cities. Clearly, this function should not be exercised by anyone not associated with the judicial system if the independence of the traffic

[34] The cities listed in the population group between 200,000 and 500,000 for 1947 were: Long Beach and Oakland, Calif.; Denver, Colo.; Indianapolis, Ind.; Minneapolis and St. Paul, Minn.; Kansas City, Mo.; Omaha, Neb.; Rochester, N.Y.; Cincinnati, Columbus, Dayton, and Toledo, Ohio; Providence R.I.; Houston, Tex.; and Richmond, Va.

[35] The 18 cities in the population group between 100,000 and 200,000 for 1947 were as follows: Richmond, Calif.; Bridgeport, Hartford, New Haven, and Waterbury, Conn.; Des Moines, Iowa; Cambridge, Fall River, Lowell, Lynn, New Bedford, Somerville, and Springfield, Mass.; Flint, Mich.; Duluth, Minn.; Yonkers, N.Y.; Canton, Ohio; and Salt Lake City, Utah.

[36] The 16 cities in the population group between 50,000 and 100,000 in 1947 were Fresno, Pasadena, and Santa Monica, Calif.; New Britain, Conn.; St. Petersburg, Fla.; Augusta, Ga.; Evanston and Oak Park, Ill.; Waterloo and Sioux City, Iowa; Portland, Me.; Hamtramck and Saginaw, Mich.; Mount Vernon, N.Y.; Lancaster and Wilkes-Barre, Pa.

judge is to be a reality. An integrated statewide system of courts would best eliminate this objectionable feature in traffic courts.

ASSIGNMENT OF JUDGES TO COURT CONSIDERING TRAFFIC CASES

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Assignment of Judges by:						
Presiding judge or chief justice	12	9	7	8	3	22
Mayor	1	4	4	1	16	16
Governor			3	1	14	15
Governor and Senate	1					
City Council		5	3		11	
Mayor and City Council				6		
State Legislature			3	3	1	7
Director of Public Safety		1				2
Municipal Court Clerk			1			
City or County Judge			4			
City Manager				1	3	6
Village President				1		
City Charter				2		
City Commission				3	5	26
State Attorney					1	
Federal Judge						1

In 1948 it was found that the practice revealed by the Warren report [47] of not assigning prosecutors to courts hearing cases involving traffic violations continued to prevail in many places.

PROSECUTOR REGULARLY ASSIGNED TO COURT HEARING TRAFFIC CASES

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Yes	11	23	30	50	70	137
No	5	5	9	20	45	147

PROSECUTOR WHEN ASSIGNED FAMILIARIZES HIMSELF WITH CASES

Yes	10	20	32	56	94	165
No	1	5	3	4	7	39

In almost three quarters of the cities reporting a prosecutor was available for duty. The New England states, particularly Massachusetts, rely on police officers to act as court officers to represent the arresting officer in the prosecution of traffic cases.

[47] Op. cit. supra n. 10 at 97.

This situation prevails in Boston Municipal Court. Prosecutors are not employed in traffic cases in Baltimore, Philadelphia, and Pittsburgh. In only a few instances did those prosecutors who do work on such cases state that they did not familiarize themselves with the cases before trial.

There are still far too many courts which do not have the benefit of a prosecutor's presence in the trial of traffic violations. Although there has been improvement since 1942, there remains a need for an intensive drive to convince the governing officials particularly of our smaller municipalities of the advantages of having prosecutors present in every trial of a traffic violation. A prosecutor will restore the traditional aspects of a trial and allow the judge to concentrate on the case before him without making it necessary for him to question the parties and the witnesses and otherwise participate in the trial. With the services of a prosecutor available the judge will have time to devote himself primarily to a decision of the issues before him. The public will also benefit, because the prosecutor will be able to correct any erroneous views on the part of the defendants involved in traffic cases. His presence is essential; it is a distinct advantage under any conditions.

Courtroom Facilities

The deplorable condition of courtrooms in which traffic cases were being tried, as indicated by Warren's survey,[38] induced the American Bar Association committees to devote considerable time to calling attention to the need for improved physical facilities for these courts. As a result there have been improvements in the intervening years.[39] Among the early con-

[38] Id. at 80: "The faults found include dirt and odors, poor physical arrangement, inadequate sitting, lack of dignified appearance, and absence of proper facilities for the trial of accident cases."

[39] Improvement in Courtrooms

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Cities eligible to report	16	34	52	117	217	692
Cities reporting	14	29	41	74	124	305
Cities reporting courtrooms improved in 1948	9	8	14	26	33	98

verts in the order in which they joined in this campaign were Seattle, Washington; Portland, Oregon; Kansas City, Missouri; Cheyenne, Wyoming; Tulsa, Oklahoma; Birmingham, Alabama; Louisville, Kentucky; Dallas and Fort Worth, Texas; Olympia, Washington; Lexington, Kentucky; Chicago, Illinois; Topeka, Kansas; Charlotte, North Carolina; Wilmington, Delaware; Charleston, West Virginia; Syracuse, New York; Manchester, New Hampshire; Hammond, Indiana; and Grand Rapids, Michigan. In 1947 improvements in the courtrooms were made in several cities: Riverside, California; Boise, Idaho; Rockford, Illinois; Midland, Michigan; Plainfield, New Jersey; Williamsport, Pennsylvania; Huron, South Dakota; and Richland, Washington. There would probably have been more improvements if the current high cost of construction had not induced many municipalities to refrain from taking active steps to remedy the situation. Several cities have reported that new courtrooms are to be constructed and that renovation or remodeling of old courtrooms will be undertaken: Newton, Iowa; Evanston, Illinois; El Dorado, and Lawrence, Kansas; Endicott, Hempstead, and Johnson City, New York; Cincinnati and Mansfield, Ohio; Lawton and Norman, Oklahoma; Sherman, Texas; and Charleston, West Virginia.

The American Bar Association Traffic Court Contest in 1948 revealed that 476 cities out of 587 reporting believed that their courtrooms present a dignified appearance.

STATUS OF COURT ROOMS

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	Over 10,000
No. of cities eligible to report	16	34	52	117	217	692
No. of cities reporting	14	29	41	74	124	305
Cities believing their courtrooms present a dignified appearance	13	24	34	60	102	243

On the surface this indicates a tremendous improvement over the conditions existing at the time the Warren survey was made in 1938-1940. The present conditions in the courtrooms, however, do not support this optimism. The fallacy lies in the lack

of any guide or standard to be used as a measuring stick as to what is considered adequate. Thus, a comparison of the physical facilities of the courtrooms among the thirteen cities having a population of 500,000, reporting a dignified appearance, with conditions in the traffic court of Washington, D. C., would necessitate a revision of these favorable reports. Of the thirteen cities reporting that their courtrooms presented a dignified appearance, only four have facilities comparable to those of the traffic court of Washington, D. C., and in three of these only some of the courtrooms assigned to traffic cases would be in this category. Unfortunately, the unsatisfactory courtrooms have the largest number of court calls [40] and are therefore seen by a far greater number of citizens than will eventually find themselves in the better traffic courtrooms. The same comparisons and the same proportions could probably be made of the courtrooms utilized by the smaller cities which also had reported that their courtrooms present a dignified appearance.

A manual for the construction of traffic courtrooms, containing architectural requirements and suggestions as to the type of equipment, furniture, lighting fixtures, acoustical ceilings, is very much needed. It should aid many city officials in forming decisions on what steps to take to improve the physical appearance of their courts. A manual of this type was prepared for the use of architects designing federal courtrooms,[41]

[40] Some of the critical comments that were received in the American Bar Association Traffic Court Contest are as follows:

"No dignity in police court. He acts wherever space can be found."

"Have no regular courtroom. Court is held in jail recreation room."

"In the old city hall at police station. We need new station and new courtroom."

"Old court house and not too well kept."

"Courtroom is about 40 to 50 years old and has not been adequately maintained. Bonds have been voted to build a new court but estimates and construction bids were all too high."

"Is too small to seat attendants and witnesses unless spectators were excluded. Could be kept cleaner."

"Just a small cubby hole off the police station without facilities to accommodate witnesses or spectators."

"Court held in office of Chief of Police at Police Headquarters."

"Badly in need of repairs, such as painting, some of the windows will not close completely, etc."

"Old building built in 1912. Needs paint, floor in bad shape. Better than some courtrooms, but not what it should be."

"Office of Chief of Police used as courtroom, no courtroom available."

[41] United States Courts, a manual prepared by the Office of Supervising

and the material in that guide would be useful in compiling a manual for traffic courtrooms. An excellent beginning in this direction can be made from a list of minimum courtroom specifications made available by Chief Justice Phil S. Gibson of the Supreme Court of California.[42] His list contains the following suggestions: The courtroom should be in a well-kept building; it should be conveniently located in a quiet portion of the building; its size should be in proportion to the needs induced by the activity of the court; there should be separate entrances for spectators and prisoners, located for convenience and safety; special care should be taken with regard to acoustics; ventilation, lighting, and wall decoration should receive thoughtful attention; the audience and the court should be physically separated by a railing; adequate furnishings should be provided, such as an elevated bench, accommodations for the clerk, the bailiff, witnesses, and counsel, a sufficient number of fixed seats for spectators, a jury box of the proper size; adjacent office space for the judge, a room for deliberations of the jury, and a clerk's office separate from the courtroom and readily accessible to the public should be provided.

The obligation of the states to direct their municipalities or counties to provide proper courtrooms for traffic courts has not been accepted, nor has there been any widespread agitation in this direction, although that need is obvious. The proper administration of justice demands that the states assume their responsibility for setting up adequate standards for courtrooms, but in a few states the legislature places the burden on county governments to furnish courtrooms and supplies.

Architect, Public Works Administration, Federal Works Agency, Washington, D.C., second edition, Aug. 1, 1946, approved by the Committee to Consider Post-War Building Plans for the Quarters of the United States Courts, appointed by the chief justice of the United States.

[42] See President's Highway Safety Conference, Committee on Enforcement, Subcommittee on Traffic Courts 7 (1949). See also 15th Mich. Jud. Coun. Rep. 113 (1945).

Traffic Court Procedure

The elimination of one clerical step in procedure by making the traffic violation ticket serve as the complaint for court use, as recommended, has received steadily increasing acceptance. Thus, 280 cities have adopted this streamlined procedure and will serve as examples for the many cities which have not yet seen fit to make use of this device.[43]

During the recent war years while the police forces of all municipalities were greatly reduced in number there was greater attention paid to the designation each month of certain days which each police officer was to use as his days at court. This recommended practice is now an actuality in 152 cities. Inasmuch as the urgent need for this plan does not exist in small cities, there has been less compulsion for its adoption by them. The acceptance of officer court days has been confined to cities of large population. Nine cities of the 13 reporting having a population over 500,000, 16 cities of the 27 having a population of between 200,000 and 500,000, and 17 cities of the 40 having a population of 100,000 to 200,000 operate under this system.[44]

One of the tests used in determining the amount of public acceptance of traffic law enforcement is based on the percentage of violators who fail to appear the first time their case is called. The percentages on this subject vary greatly. Thus, 7.15% of the defendants failed to appear at their first hearing in cities having a population of over 500,000. In those cities having a population of between 200,000 and 500,000, the per-

43 Traffic Violation Ticket Used as a Complaint

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Yes	8	18	22	36	56	140
No	6	10	17	28	59	137

This is true also of New Jersey on a statewide scale. See N.J. Rules of Practice, Rule 8:10-1.

44 Compare, 27 cities having a population of 50,000 to 100,000 have officers' days in courts, 41 do not; 33 cities with a population of 25,000 to 50,000 do have officers' days in courts, 82 do not; 50 of the cities having a population of 10,000 to 25,000 have officers' days in courts and 220 do not.

centage of nonappearance was higher, 14.1%. The percentages of defendants failing to appear at the first hearing in the other groups were as follows: 4.5% of the defendants in cities having a population of 100,000 to 200,000; 6.33% of defendants in the cities having a population of 50,000 to 100,000; and 8.2% of the defendants in cities having a population of 25,000 to 50,000. The percentages as to cases continued after the defendant's first appearance are comparable: 7.2% in cities having a population over 500,000; 11.4% in cities having a population of 200,000 to 500,000; 10.8% in cities having a population of 100,000 to 200,000; 6.49% in cities having a population of 50,000 to 100,000; and 8.3% in cities having a population of 25,000 to 50,000. These figures tell their own story of disrespect for law.

In 1948 in addition to these problems, some courts had to contend with requests for jury trials. Defendants residing in 10 of the 14 cities having a population of over 500,000 are entitled to be tried by a jury. In other groups the right is found to exist in 17 cities having a population of 200,000 to 500,000; in 24 cities having a population of 100,000 to 200,000; in 49 cities having a population of 50,000 to 100,000; in 72 cities having a population of 25,000 to 50,000; and in 193 cities having a population of 10,000 to 25,000. The average number of requests was highest in those cities having a population over 500,000, 3.25%; while in those cities having a population of 200,000 to 500,000 it was .72%.[45]

On the whole, although some procedural aspects have been reformed, the nation's traffic courts are far from attaining that degree of improvement in the administration of justice which the importance of their work demands.[46]

[45] According to the 1947 contest report, among those cities having a population of 10,000 to 25,000, one city had a most unusual situation—it had requests for jury trials in all the traffic cases.

[46] A glaring example of what is still occurring in the courts trying traffic cases was reported in the Cedar Rapids News shortly after Feb. 16, 1949. A college student arrested for speeding at 12:30 A.M. was told to appear at police headquarters at 7:45 that morning. Upon doing so he was asked by a police captain whether he was guilty, and upon his replying that he was, immediately another man stepped forth and informed him that the minimum he could be fined was $10 plus costs. The student, who had not been

Separation of Traffic Cases for Trial

(A) The states

In sixteen states the establishment of separate traffic courts is permitted: *California, Colorado, Delaware, Iowa, Maryland, Michigan, Minnesota* (under home rule charter), *New Jersey, New Mexico, New York* (first-class cities only), *Ohio, Oregon, Rhode Island, Texas* (local legislation pertaining to San Antonio enacted in 1947), *Vermont,* and *Wisconsin. Arizona* and *Pennsylvania* report that there is no prohibition against establishing such a court. The recommendation in Warren's book [47] that the ideal traffic court organization would be on a statewide basis with various district courts and a circuit operating from each district, to date has not been adopted in any state. Prospects for its adoption are slight, although there is an undercurrent of interest in the proposal.[48]

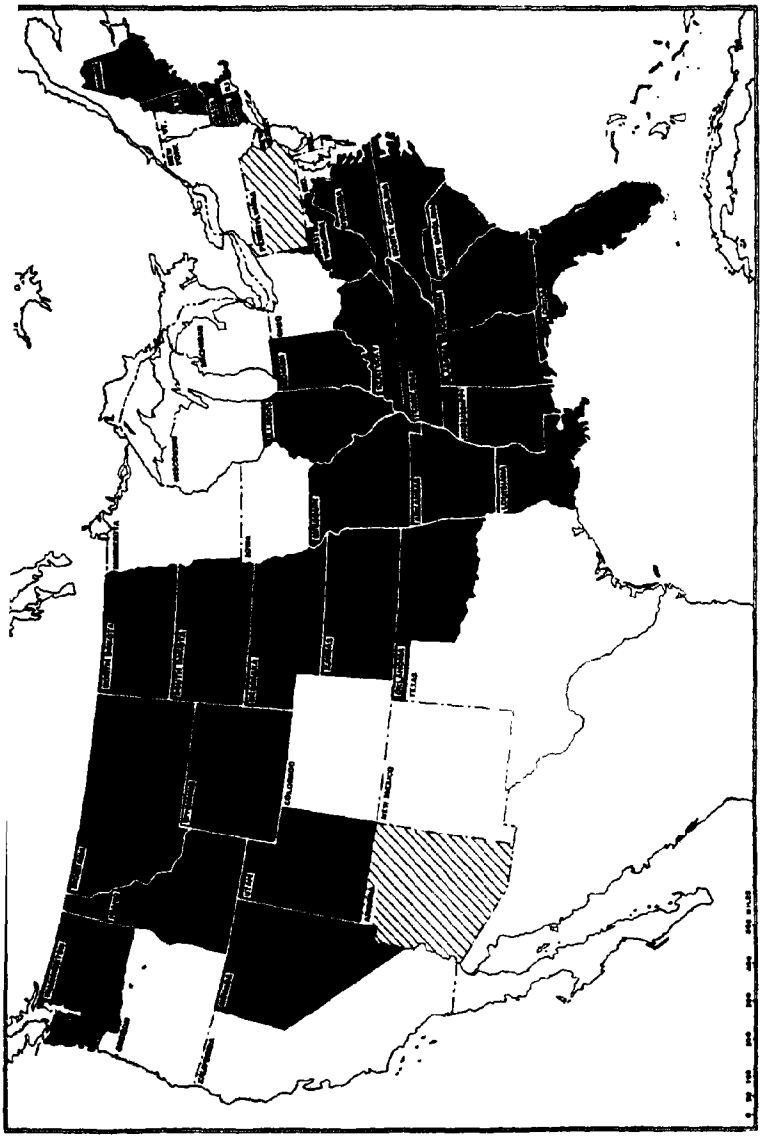
In providing separate sessions for the trial of traffic cases the courts may set aside a certain definite hour each day for their trial. If the "jail" docket is called at 9:00 in the morning, then the traffic case docket may be set for hearing at 11:00 or in the afternoon or vice versa, just far enough apart so that the two groups will not meet. If the number of cases does not warrant this procedure for each day of the week, then it may be advisable to do this once or twice a week to fit the local situation. Some judges may prefer to set aside one day each week for a traffic court session or, if the volume requires, to have two or more traffic court days each week. Whatever plan is adopted, it is important that it be designated a "traffic court session." The mere existence of such sessions has been known to have a salutary effect on violators.

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informed he was being tried, paid the fine of $10 and $1.50 for costs under protest. While the Safety Commissioner informed the student upon his complaint that traffic court would in the future be held in the courtroom as it should be, the judge in charge maintained that when persons pleaded guilty they would be permitted to sign a waiver and pay the fine without a formal court hearing. There was no indication, however, as to whether the circumstances under which their pleas are to be made would be different from the circumstances complained of and allegedly corrected.

[47] Op. cit. supra n. 10 at 237.

[48] Thus, an act is being drafted in Puerto Rico to provide territorial traffic courts.


ESTABLISHMENT OF SEPARATE TRAFFIC COURTS
Establishment of separate traffic courts is permitted
No prohibition against establishing separate traffic courts
Establishment of separate traffic courts not permitted

(B) The cities

The names and types of courts exercising jurisdiction over traffic violations are most diverse and vary primarily according to the size of the city. These names include traffic, municipal, magistrate, police, recorder, justice, mayor, city, district, corporation, criminal, trial justice, superior, special sessions, circuit, general sessions, county, and aldermen.[40] Although only a few courts devoting themselves exclusively to the trial of traffic cases are known as traffic courts, there are many other courts that devote full time to the trial of such cases or have special sessions devoted exclusively to them and more courts are now devoting substantial time in separate sessions exclusively for the trial of traffic cases than ever before.

[40] NAME OF COURTS TRYING TRAFFIC CASES (1948)

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Cities eligible to report	16	34	52	117	217	692
Cities reporting	14	29	41	74	124	305
Traffic	3	1	1	1	..	2
Municipal	8	13	10	28	39	63
Police	.	5	8	5	28	67
City	1	1	7	9	26	32
District	1	3	8	12	17	46
Justice	.	3	3	3	8	36
Corporation	.	4	2	3	1	5
Recorders	1	1	..	6	3	18
Magistrate	1	.	..	2	3	4
Criminal	1	.	..	..	..	2
County	.	1	5	4	3	10
Trial Justice	..	..	..	..	1	..
Mayor	.	..	..	..		14
Town	..	.	.		7	6
Superior	.	1		2	2	5
Court of Special Sessions	.	.	1	1	..	1
Circuit	.	..	1	1	3	1
Court of General Sessions	.	.	1	..	..	1
Juvenile	..	2	2	..	2	1
Borough	..	..	..	..	..	1
Alderman	..	..	..	..	..	1
Night Police	..	1	..	..	..	..
Common Pleas	..	..	2	..	..	1
Traffic Bureau	..	..	..	..	1	..
U.S. Commissioner	..	..	..	..	..	1
Probate	.	.	..	..	..	1

TRIAL OF TRAFFIC CASES

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Full-time traffic courts	14	19	9	12	27	75
Special sessions for traffic	7	15	29	49	52	121
Traffic court violations bureaus	13	27	33	51	73	118
No violations bureau	2	1	7	19	44	174

In addition to an increase in the number of specialized courts or courts having specialized sessions, there are also, as indicated, a large number of traffic court violations bureaus in operation. The figures reported represent a substantial increase in the number of violations bureaus being maintained over those being used during the previous years. An examination of the reported figures reveals also that many traffic violations bureaus are under the jurisdiction of police departments, court clerks, and other city officials. A violations bureau, if it is to be effective, must be under the complete supervision and jurisdiction of a judge, inasmuch as it is merely a convenience afforded by the court to violators who desire to plead guilty without appearing in court and thus pay a fine predetermined by the judge for that purpose.[50]

JURISDICTION OVER VIOLATIONS BUREAU

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Judge	8	13	11	20	19	26
Judge with police	.	..	..	1	6	2
Clerk	3	6	8	9	5	17
Police	1	8	13	16	43	61
Commissioner of Public Safety	..	.	..	1	..	..
Mayor	..	..	..	..	..	2
City Marshal	..	..	..	.	..	2
City Treasurer	..	..	..	..	..	1
No Answer	2	.	..	..	..	..

Recognition that the violations bureau is part of the judicial process demands that the court be given its rightful jurisdiction over the bureau. Consistent with this reasoning is the allowance to the judge of exclusive authority to set a schedule of fines for use in the violations bureau. In some instances, however, police and city officials are exercising this control in

[50] Warren, op. cit. supra n. 10 at 56 et seq.

violations bureaus. In a few cities the governing bodies have established by ordinance a rigid set of fines without authorizing any minimum or maximum for each offense included therein.

VIOLATIONS BUREAU FINE SCHEDULES

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Schedule of fines set by:						
Judges	8	14	22	35	59	87
Judge and city attorney	1	..	..	..	1	..
Judge and city council	..	1	..	3	1	..
Judge and city commission	..	..	..	1	..	..
City council	1	12	2	3	10	30
City council and mayor	..	..	..	2	..	.
State legislation	3	..	5	3	10	15
Chief of police	..	.	.	..	.	4
Chief of police and city manager	.	.	1	..	..	1
City manager	..	..	..	..	1	..
City commission	..	..	..	3	.	5
Police	..	2	1	3	6	6
Director of traffic	..	.	1	..	2	1
Mayor	.	..	.	..	1	11
City attorney	..		.	.	.	1
Trial justice and review board	.	..		.	1	..
U.S. Commissioner	.	..	.	.	.	1

A violations bureau properly supervised, the personnel of which has been carefully selected, can be a useful tool in conjunction with a traffic court. Upon it, too, falls a portion of the responsibility for increasing respect for the judicial process. Improvement in the procedure and technique used by the violations bureaus in their handling of traffic cases is to be hoped for and to be expected as soon as judges are given complete responsibility and supervision over their operations.

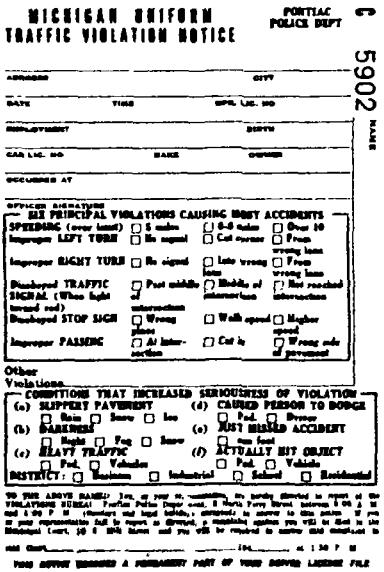
All moving violations should be heard, moreover, by the judge and should not be handled through a traffic court violations bureau or other organization provided for the voluntary payment of fines or posting of bail by violators desiring to plead guilty. Nonmoving violations may be handled through such a bureau if it is under the supervision of the judge and steps are taken to acquaint the violator with the fact that he is participating in a judicial process and not a mere revenue-

raising scheme. In relation to this it is to be noted it was reported in 1948 that parking violations constituted approximately 70% of the violations bureau cases in cities having a population over 500,000; 60% in cities having a population from 200,000 to 500,000; 90% in cities having a population of 100,000 to 200,00; 77% in cities having a population of 50,000 to 100,000; 92% in cities having a population of 25,000 to 50,000; and 93% in cities having a population of 10,000 to 25,000.

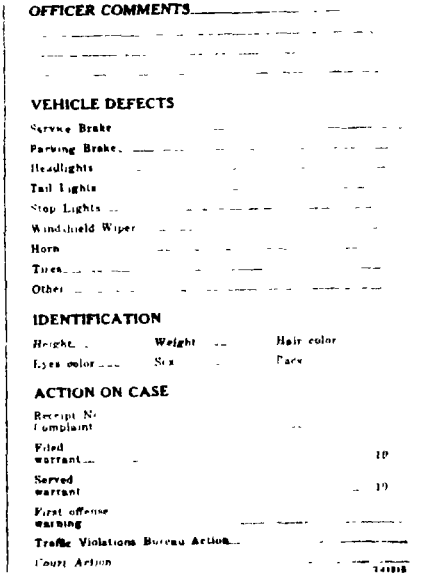
Fines and Penalties

The outstanding development in this field is the *Michigan* uniform enforcement policy with its new-style traffic ticket, which is used in thirty-three cities in that state. There are

Front Side of Ticket

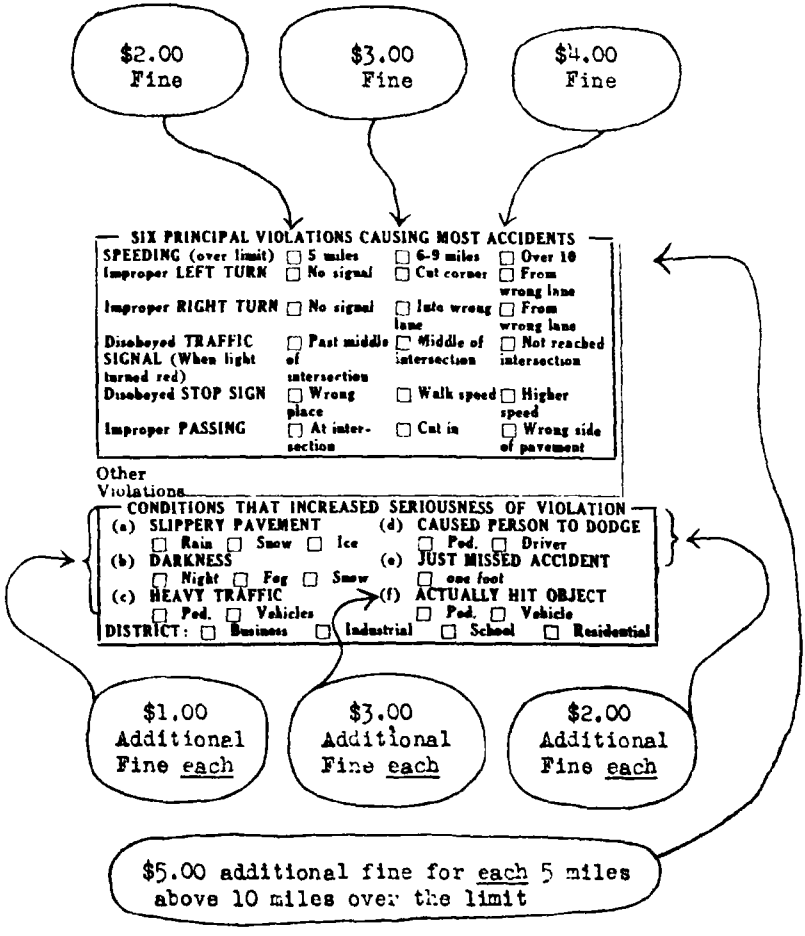

MICHIGAN UNIFORM
TRAFFIC VIOLATION NOTICE
PONTIAC POLICE DEPT
5902
SIX PRINCIPAL VIOLATIONS CAUSING MOST ACCIDENTS
CONDITIONS THAT INCREASED SERIOUSNESS OF VIOLATION
(a) SLIPPERY PAVEMENT
(b) DARKNESS
(c) HEAVY TRAFFIC
(d) CAUSED PERSON TO DODGE
(e) JUST MISSED ACCIDENT
(f) ACTUALLY HIT OBJECT
DISTRICT:

Reverse Side of Ticket


OFFICER COMMENTS
VEHICLE DEFECTS
Service Brake
Parking Brake
Headlights
Tail Lights
Stop Lights
Windshield Wiper
Horn
Tires
Other
IDENTIFICATION
Height
Weight
Hair color
Eyes color
Sex
Face
ACTION ON CASE
Receipt No.
Complaint
Filed warrant
Served warrant
First offense warning
Traffic Violations Bureau Action
Court Action

several cities in other states which have adopted it, but only in *New Jersey* has the principle of the Michigan ticket been adopted on a statewide basis. This state has utilized the essential features of the uniform ticket and made refinements

to suit its state practice and its recently promulgated rules, which became effective January 1, 1949.[51] The Michigan uniform ticket, technically a uniform traffic violation notice, embodies many features which are useful to judges hearing traffic cases. This type of ticket affords an opportunity to judge the seriousness of each violation and makes possible the evaluation of the dangers resulting from the conditions under which it was committed. It improves the handling of cases in the violations bureau through the use of a "unit system," because under it the more serious violation receives a higher fine in increasing



[51] N.J. Rules of Practice, Rules 8: 10-1 et seq.

proportion. Fourteen Michigan cities—Ann Arbor, Bay City, East Lansing, Grand Rapids, Jackson, Kalamazoo, Lansing, Midland, Monroe, Muskegon, Pontiac, Port Huron, Saginaw, and Ypsilanti—are operating under a violations bureau uniform traffic fine schedule as shown herein. In twenty-six other cities using the uniform ticket the uniform schedule is used as a guide by the justices.

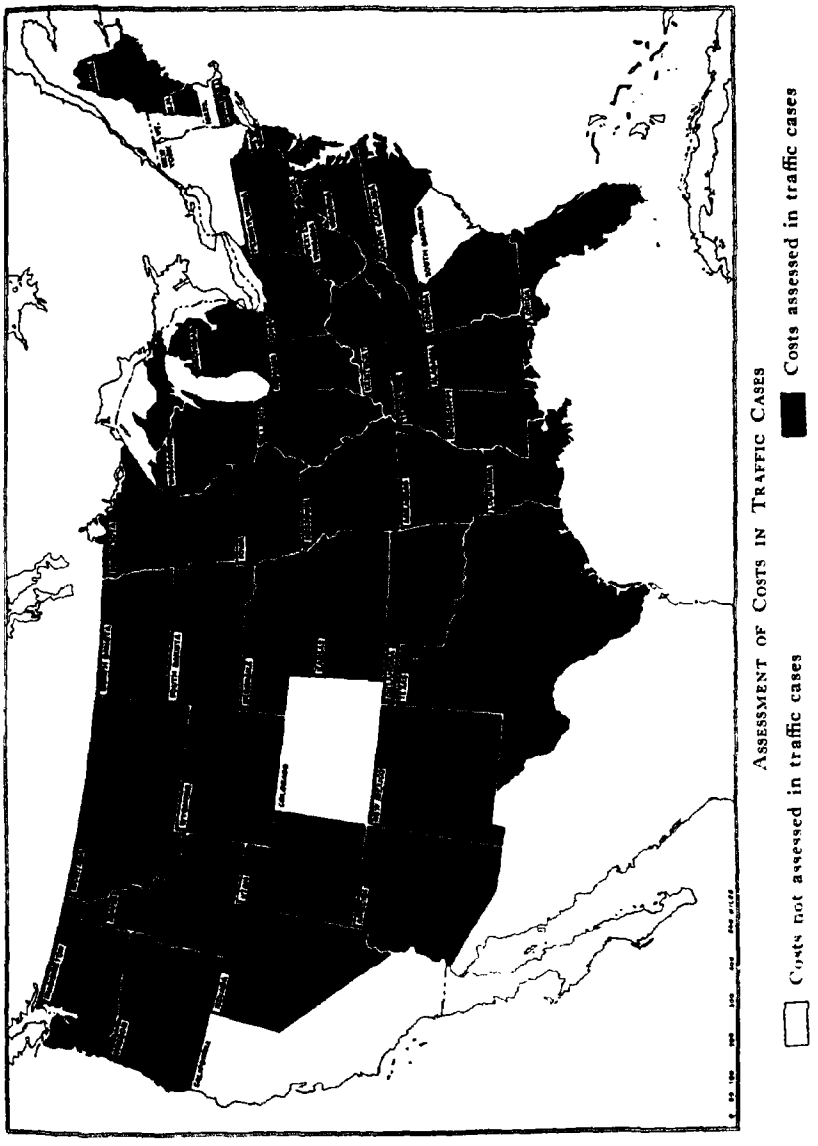
In *Arizona* by agreement among the members of the Justice of the Peace Association all the justices adhere to a minimum fine schedule approved in 1946.

One of the features in the imposition of fines which is most objectionable is the necessity for adding "costs." It has been recommended that this taxing of court costs as a separate penalty be eliminated and the fine assessed in one sum. If costs are included, they should be allowed only in a reasonable amount. At the present time only the states of *California, Colorado, Massachusetts, New York, South Carolina,* and *Vermont* do not assess costs in traffic cases.

With relatively few exceptions the courts trying traffic cases have authority to impose jail sentences upon conviction of a violator. The majority also possess the power to grant probation, which is useful in certain instances. Most judges may exercise the right to suspend sentences. It is difficult to deter-

JUDICIAL POWERS—TRAFFIC CASES

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Traffic judge is authorized to:						
Suspend driver's licenses	11	20	36	58	93	217
Recommend driver's license suspensions	11	20	35	57	96	223
Recommend driver's license revocations	8	16	19	31	61	118
Impose jail sentence	14	22	35	59	110	246
Place defendants on probation	12	21	39	52	98	231
Suspend sentence	14	25	39	43	111	257
Reduce charges	12	15	33	35	83	182
Penalties increased for repeaters:						
Yes	13	20	22	40	59	120
No	1	6	17	19	35	81


ASSESSMENT OF COSTS IN TRAFFIC CASES
Costs assessed in traffic cases
Costs not assessed in traffic cases

mine whether this power is being used or abused. A lesser number but still a great many courts have authority to reduce fines, a power and practice much frowned upon because of the pressure to which it inevitably subjects the judges. There are no statistics and no basis for comparing the effectiveness with which these powers are being used by the judges in their respective cities, but they deserve serious study.

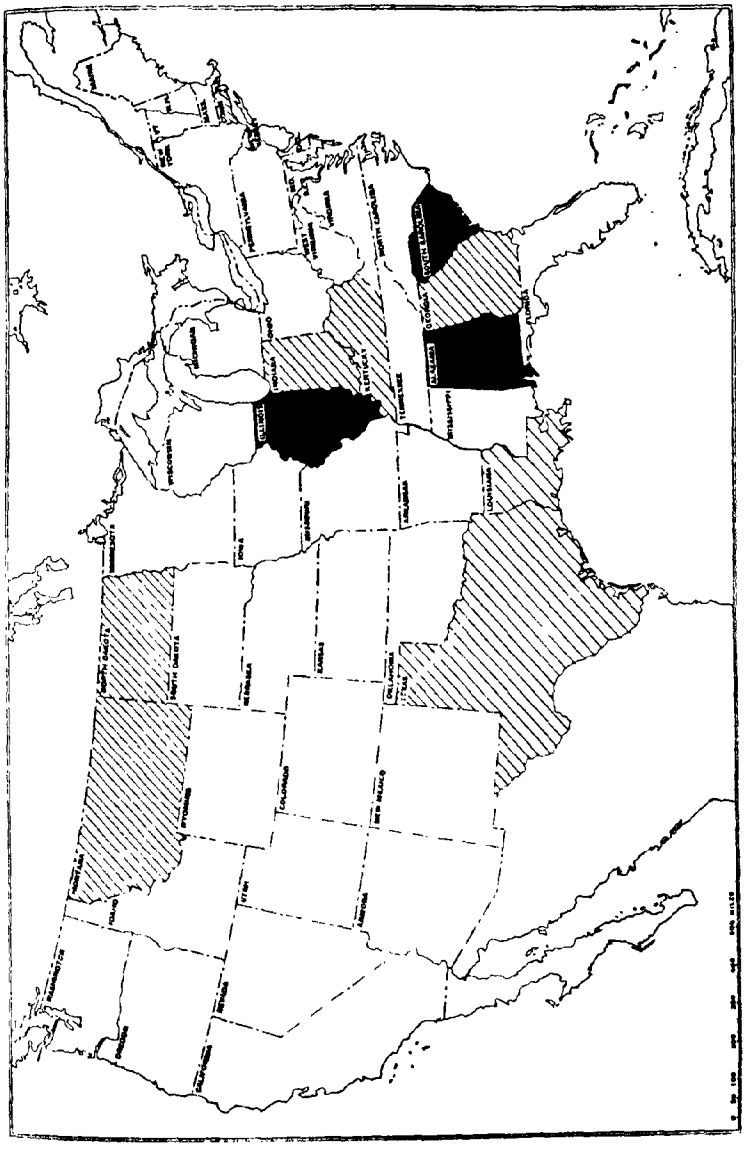
The violators who require most careful treatment are the repeaters. Without records of previous driver violations it would be difficult to single them out for the special attention they require. Fortunately, prior conviction records are available in most cities. As a result of their availability the judges in 528 of the 587 cities reporting in 1948 are able to utilize these records in determining the penalty to be assessed against repeaters. Thus, we find that 81% of the cities reporting having a population of over 500,000 were using the records of prior convictions in dealing with repeaters.[52] This situation is a distinct improvement over the conditions existing in 1942, when it was stated that "only one of every eight judges in these jurisdictions was given such data in any appreciable number of cases." [53] It is to be noted, of course, that while citywide records are most helpful, they are only useful in treating the local offender and, thus, if repeaters are to be properly handled, convictions should be reported to a central office for a wide geographical area, preferably statewide. The failure to report such convictions to the office of motor vehicle administration or other state official was the most persistant complaint voiced at the state traffic court conferences. Shortly after each conference increased reporting of convictions was experienced. At the present time it can be stated that the situation has improved considerably.

Thirty-seven states require the courts to report convictions, fines, and penalties assessed in traffic cases to a central state

[52] CONVICTION RECORDS READILY AVAILABLE

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Yes	13	17	38	67	114	279

[53] Warren, op. cit. supra n. 10 at 184.



REPORTS OF CONVICTIONS IN TRAFFIC CASES TO STATE AGENCY

Convictions, etc., in traffic cases reported to a central state agency

No information as to practice in such instances

Convictions, etc., in traffic cases not reported to central state agency

agency: *Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin,* and *Wyoming.*[54] Replies from thirty-three states indicate that 84.5% of all convictions are being reported—an increase of 4.5% over the prior year. The failure of the courts to report promptly convictions on traffic violations has been a major cause for dissatisfaction and distrust prior to and during the recent war years. The figures now given indicate some improvement in this respect. Thus, in 1948 the following was indicated as to the reporting of convictions:

CONVICTIONS REPORTED TO STATE AGENCIES IN FORTY-TWO STATES

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Yes	11	21	29	47	98	191
No	2	5	9	15	14	76

The mere compiling of convictions as to the prior record of repeating violators without making them readily available upon request would not contribute to the enforcement of traffic laws by the court. Efficient use of the records at the central agency has not generally been made. Delays have been encountered in requests by mail, and in some states other means of communication are not within the budget allotted. The usefulness of these records is nullified where the time lag involved is great. This is a problem in each state for the motor vehicle administrator.[55]

[54] In 1947 in Alabama, Illinois, and South Carolina this was not done. This question was not answered by Kentucky, North Dakota, and Texas. No reports were filed by Connecticut, Georgia, Indiana, Louisiana, and Montana.

[55] As to the problem of how best to ascertain the repeating violators, one device which is being utilized in Illinois and New York is that of listing violations on the driver's license and making a certain number of violations within a certain period cause for taking up the license.

USE OF CONVICTION RECORDS

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Prior conviction records available to court:						
Yes	13	28	36	65	107	266
No	0	0	3	9	1	11
Records used in assessing fines:						
Yes	14	24	35	60	111	239
No	0	4	0	5	4	17
Statewide record:						
Yes	5	9	20	28	47	115
No	6	13	10	25	49	104
Local record only.						
Yes	9	18	17	37	58	158
No	0	3	3	4	6	16

Special attention is always given to the treatment of juvenile violators by traffic judges. Only a few traffic courts have any jurisdiction over youngsters, although some of them exercise it with the consent of the juvenile court or other court having such jurisdiction. This problem existed at the time of the Warren report, and it still remains unsolved. A recent objective study of this subject by Douglas H. MacNeil points out the respective contentions of the traffic court and juvenile court judges.[56] The Warren volume recommends that juvenile traffic violators be heard by the traffic courts except where a behavior problem is involved.[57] Few traffic courts have received jurisdiction over these cases in the ensuing years, and only a small number of those courts reporting exercise jurisdiction over juveniles.[58]

[56] "Judicial Treatment of the Juvenile Traffic Violator," in 27 Focus (a publication of the National Probation and Parole Association) No. 6, § 166. (1948).

[57] Warren, op. cit. supra n. 10 at 156-158.

[58] TRAFFIC COURTS EXERCISING JURISDICTION OVER JUVENILES

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Yes	2	4	9	14	28	87
No	12	22	31	51	89	188

Ticket Fixing

Ticket fixing may be accomplished in one or more of the following ways: (1) cancellation of tickets and summons; (2) deletion or change of records; (3) excessive continuances; (4) reduction of charges; (5) weak prosecution; and (6) from the bench by the judge himself.

The elimination of ticket fixing is simple where the courts are given and vigorously exercise the rule-making power or in a community aroused in behalf of its eradication. Pending that millennium in every state, however, there are certain steps available for improvement, such as: (1) publication of monthly, semiannual, and annual reports of courts and police departments; (2) use of triplicate or quadruplicate tickets, and publication of regular audit reports; (3) trying traffic cases in open court under recognized procedural conditions; and (4) the stimulation of public support and indignation against unsavory practices.

The outstanding development during 1948 was the acceptance by the National Committee on Uniform Traffic Laws and Ordinances of several new sections and revisions to the Uniform Vehicle Code.[59] These set out the form of quadruplicate traffic citations, place the responsibility for their issuance on one official, control the manner of service and the disposition of copies, declare the cancellation of such citations to be a misdemeanor, provide for publication of reports and periodical audits, and require the magistrates or judges to keep records of every case and its disposition.

It is difficult to determine whether the "ticket fix" evil is greater or less than at the time of the publication of the Warren report. The constant pressure exerted during this interim may account for the attention that is being given to the problem by the nation's press. Special privilege and favoritism seem to flourish in all larger metropolitan areas. The Chicago Bar Association Committee on Municipal Courts has recently

[59] Act V, §§ 186, 190.1, 190.2, 190.3, and 191. These revisions all pertain to the subject of ticket fixing. It is too early to ascertain whether or not any of these revisions have been enacted in any jurisdiction.

stated: "Specific evidence has been produced of payment of graft to court attachés for the return of drivers' licenses to drivers guilty of traffic offenses without a record on each license of the conviction for the traffic violation as required by law." [60] The findings of this committee were amply supported by a committee of municipal court judges appointed by the chief justice of the Chicago Municipal Court to investigate irregularities of this type. They concluded their report with the statement:

> Men in judicial office should be honest, intelligent, alert and courageous. The task of administering justice fairly and impartially can only be successfully accomplished if, in addition, they have the help of a cooperative public, an alert and aggressive body of lawyers and a critical but honest press and radio. We address this report to them as well as ourselves.[61]

The 1948 indictment of five magistrates in Philadelphia arose out of violations of the Magistrates Court Act with reference to unlawfully delaying the trial of cases by granting continuances without endorsing the reason therefor on the magistrate's docket, and for rewriting, modifying or altering the official decision except in the presence of and with the written approval of the prosecutor.[62]

Another investigation into ticket fixing practices was made in 1945 by a "One-Man Grand Jury"—Hon. George B. Murphy of the Circuit Court of Wayne County, Michigan. He inquired into the ticket fixing practices in the Detroit Recorder's Court, Traffic and Ordinance Division, and this inquiry resulted in a scathing report of the practices uncovered. Judge Murphy, *inter alia*, stated:

> One of the main purposes of enforcing traffic violations is to teach the public to respect the law and respect the courts, with the ultimate idea in mind of making the streets of Detroit safe for

[60] 24 Chicago Bar Record 283 (Aug. 1948).

[61] "Irregularities in the Municipal Court," Criminal Justice Journal of the Chicago Civil Commission 24 (No 76. Sept. 1948).

[62] The prosecutor in these cases has stressed that these practices afforded an opportunity for fixing cases between hearings, and for the operation of other similar political influences. Phila. Inquirer, Nov. 30, 1948, and other Philadelphia newspapers of the same date.

public travel. But, when violators are pampered, as reflected by this practice, they look upon traffic tickets lightly, and are not deterred from violating the traffic laws, because, in the last analysis, to them it means just one more ticket that can be easily "fixed." This all tends to lend disrespect to the court and the enforcement of traffic laws, for which every worthwhile citizen struggled so hard to perfect and paid so many tax dollars in so doing.

The existence of the long continued practice of fixing tickets in the court was either known by the judges, or was not known. There is no middle ground. All officials and employees of the court, including the violations bureau, hold their respective positions at the pleasure of the judges. Therefore, the responsibility of the orderly administration of the court's affairs falls squarely upon the shoulders of the two judges. This responsibility they must bear. It cannot be avoided. So, if they knew of the practice of "fixing tickets," they should have taken steps long ago to abolish it.[63]

Although no indictments were returned, the attention the report received helped correct existing abuses.

Ticket fixing cannot be accomplished with "nonfix" quadruplicate traffic tickets such as are now being used in many Michigan cities and throughout New Jersey [64] unless other safeguards are also utilized. Publication of audits of tickets issued, written, and disposed of in court is a recommended practice. Although almost half of the cities reporting in 1947 and 1948 [65] replied that a summary of traffic cases was pub-

[63] Findings and Recommendations of One-Man Grand Jury in re Recorder's Court, Traffic and Ordinance Division. In the matter of the Petition of Gerald K. O'Brien, Prosecuting Attorney for a One-Man Grand Jury to investigate into the commission of certain crimes in the County of Wayne, Misc. No. 71692 in the Circuit Court of Wayne County, Michigan.

[64] See for other safeguards in New Jersey, N J. Rules of Practice, Rules 8: 10-1 et seq.

[65] WAS A SUMMARY OF TRAFFIC CASES PUBLISHED?

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
1948:						
Yes	9	10	16	36	55	131
No	4	15	22	30	57	148
1947:						
Yes	11	13	21	38	69	114
No	1	14	12	31	47	175

lished periodically during those years, there was not any agreement as to how the report should be made available to the public, or whether it was to be presented so as to reveal readily the information desired. These reports have been variously given out in the annual report of the court, the reports of the police department, an auditor's annual report, a monthly report by the court, a mimeographed press release, a detailed monthly report by the chief clerk to the chief magistrate, or daily, monthly, quarterly and annual reports to the press. Despite such reports it is unfortunate that the strict requirement of an audit of all tickets issued and the results forthcoming has not been adhered to in every instance. The clearest example of the effectiveness of requiring regular audits is furnished by *New Jersey,* where these have been required since January 1, 1949. These figures speak for themselves.

SUMMARY OF SPECIAL TRAFFIC REPORT FOR THE MONTHS OF JANUARY, FEBRUARY AND MARCH, 1948, AND JANUARY, FEBRUARY AND MARCH, 1949

	January, February, March, 1948	January, February, March, 1949	% of Increase or Decrease over 1948
The total amount of fines collected in traffic cases	$148,570	$247,195	+66.4%
The total amount of costs collected in traffic cases	$33,627	$64,508	+91.8%
The total number of tickets handed out to offenders	65,961	61,263	−7.1%
The total number of convictions in traffic cases	49,775	57,800	+16.1%
The total number of dismissals in traffic cases	3,839	1,418	−63.1%
The total number of offenders who failed to appear	18,184	1,891	−89.6%

In addition to the valuable effects resulting from requiring such audits, another means of eliminating the "ticket fix" [66] is to be found in the recently promulgated New Jersey rules governing the courts in which traffic cases are tried. Under these, proceedings for contempt of court may be invoked against any person who aids in the disposition of a traffic

[66] See for comparative comments on audits Newark Evening News, Oct. 27, 1948; June 21, 1949; Newark Star Ledger, April 10, 1949. As to punishment for contempt see N.J. Rules of Practice, Rule 8:10-2.

ticket in any manner other than that authorized by the court. The existence of such power in itself is probably sufficient to discourage such deleterious practices.

Judicial Statistics Pertaining to Traffic Cases

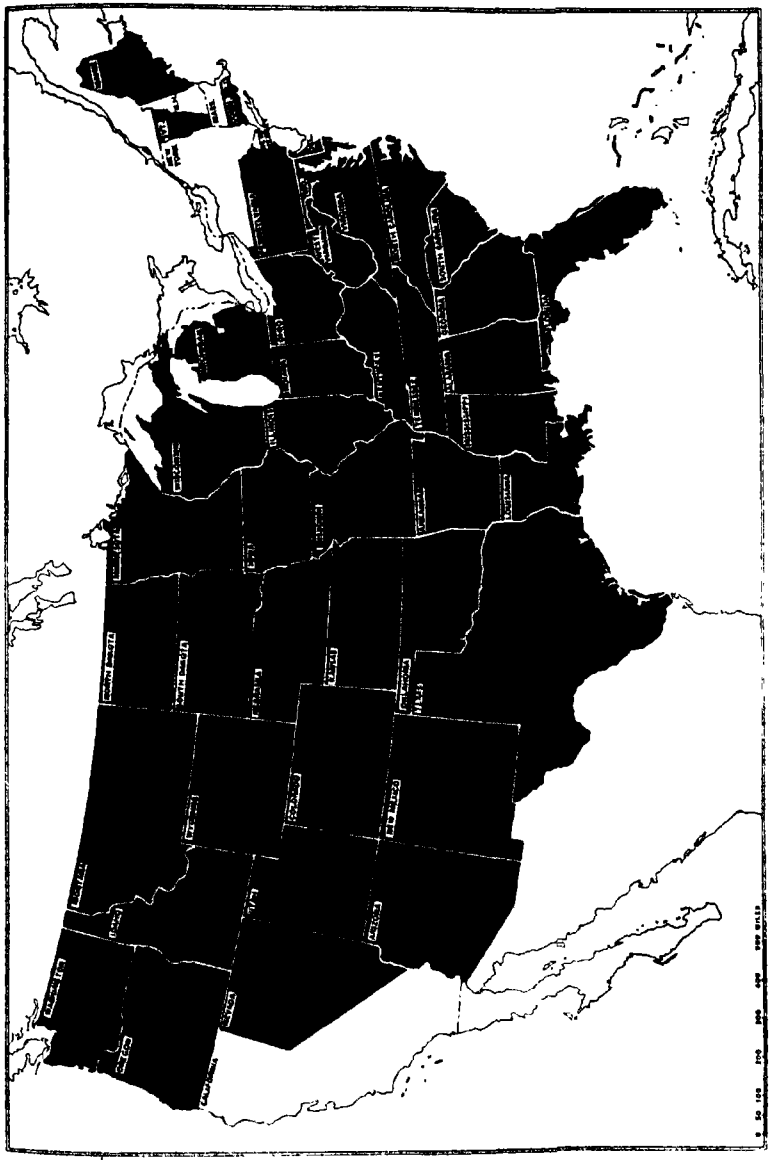
From time to time most of the judicial councils have prepared statistical data on the number of traffic cases processed by the trial courts of limited jurisdiction. In 1948, however, the judicial councils of only *California, Massachusetts, New Hampshire,* and *New York,* and the administrative director of *New Jersey* courts compiled traffic case statistics.[67] Although records have been compiled by motor vehicle administrators on the number of convictions reported, these are inadequate for the purposes of improving traffic law administration. Judicial statistics are so essential to court improvement that it is difficult to formulate any acceptable plan of structural reorganization without them. Their importance, moreover, to the related problem of the elimination of ticket fixing cannot be underestimated.

Despite this lack of interest in traffic court statistics on the part of the judicial councils and others, an idea of the enormous number of traffic violations may be obtained from the following reported statistics pertaining to urban courts. Thus, in 1948,[68] 580 cities having a population from 10,000 to over a million reported 10,703,933 total violations. Of this num-

[67] For publication see, 12 Calif. Jud. Coun. Rep. 135 (1948); 24 Mass. Jud. Coun. Rep. 75 et seq. (1948); 2 N.H. Jud. Coun. Rep. 95 (1948); N.J. Administrative Director's Report (1949); 15 N.Y. Jud. Coun. Rep. 171, 173 (1949).

[68] Number of Traffic Violations Handled by Urban Courts in 1948

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Cities eligible to report	16	34	52	117	217	692
Cities reporting	15	29	41	74	123	298
Processed through courts	2,100,947	609,724	225,684	203,064	154,687	198,241
Processed through violations bureaus	2,396,527	2,038,112	1,038,686	1,010,053	421,418	306,790
Total violations	4,497,474	2,647,836	1,264,370	1,213,117	576,105	505,031



JUDICIAL STATISTICS PERTAINING TO TRAFFIC CASES

Statistical data compiled on traffic cases processed by trial courts of limited jurisdiction

No compilation of statistical data on traffic cases processed in trial courts of limited jurisdiction

ber, 3,492,347 were processed through the courts, while 7,211,586 were processed through violations bureaus. Although the number of rural violations cannot be stated with accuracy, such figures are partially supplied by forty-five state police and state highway patrol organizations that reported 1,240,333 tickets issued for violations in 1948. It is conceivable from these figures that the combined rural and urban figures bring the national total to more than 13,000,000 traffic violations during 1948.

The Justice of the Peace

The recommendation that the present justice of the peace system should either be eliminated or greatly improved epitomizes all recommendations of every study made of that system.[69] The state that has come closest to establishing a system of courts consistent with these recommendations is *New Jersey*. Shortly after the adoption of its new constitution of 1947, greatly simplifying and strengthening the judicial system, the legislature passed a series of statutes that abolished all justices of the peace and small cause courts, by whatever name they were known, as well as all the mayors' courts, recorders' courts, family courts, magistrates courts, police courts, city courts, and the like. This sweeping revision then provided for the establishment of a county district court in every county and of a municipal court in every municipality or group of municipalities. The county district court's primary jurisdiction is in civil matters up to $1,000, but its judges may exercise the powers of a municipal magistrate in criminal matters when a municipality fails to appoint one. The judges of the district court have always been lawyers. The primary jurisdiction of the municipal court is criminal, to act as a committing magistrate and to hold defendants for action of the grand jury, to try nonindictable offenses or offenses where defendants waive indictment and a jury, violations of local ordinances and, of course, traffic cases. Judges who are laymen may continue in

[69] See generally Pound, "A Generation of Improvement of the Administration of Justice," 22 N.Y.U.L.Q. Rev 369, 385-386 (1947).

office, but all new magistrates must be members of the bar. These courts are an integral part of the state judicial system and under the supervision of the chief justice of the Supreme Court, as the administrative head of all of the courts in the state.[70] The practice, procedure, and administration of these courts is governed by rules promulgated by the Supreme Court,[71] and the administrative director of the state courts collects weekly statistics and supervises the work of all of these courts.[72] A judicial conference was called by the Supreme Court to prepare the judges of these new courts for their duties and to consider the many problems incident to their traffic court work. This was an intensive three-day conference held in Trenton on November 30, December 1 and 2, 1948,[73] and attended by more than five hundred judges and prosecutors, and another such conference is planned for September, 1949. Since these courts have been integrated into the state judicial system as a whole and are under the supervision of the chief justice, New Jersey will be in a position to give the country an opportunity to see whether or not such a system presents a model for eliminating the present-day criticism of the justice of the peace and the local police courts.

Missouri also has established a new system of statewide local courts. Its constitution of 1945 provided for the organization of magistrate courts in each county, the number of such magistrates being dependent on population. These replaced the justices of the peace on January 1, 1946,[74] although city and village courts also continue to function. While the magistrate courts seem to be administering justice more effectively, they have not been operating sufficiently long for a proper evaluation of their usefulness as a model for other states. Contrary to the situation in New Jersey, Missouri did not take steps to reorganize the various kinds of courts functioning within the municipalities. Present indications are not favorable for integrating the latter into the state system. Thus, in Missouri

[70] N.J. Const. Art. VI, § 7.

[71] N.J. Rules of Practice, Rules 7:1 et seq.

[72] Id. Rule 7:50-1, Rule A 14, discussed supra Chapter II at 61-62.

[73] 71 N.J.L.J. 433 (1948).

[74] Mo. Const. Art. V, §§ 1, 18-21 24, 25, and 27.

while there are statewide magistrate courts exercising, among other powers, jurisdiction in traffic cases, there exist side by side courts in various municipalities with similar jurisdiction.

At the request of the 1947 legislature the judicial council of *California* made a study of courts of limited jurisdiction and courts exercising jurisdiction of cases involving traffic violations.[75] During this study frequent meetings were held with representatives of the State Bar of California and of the Justices and Constables Association to keep them advised of its progress.[76] The council reported that it

> found from its studies that the principal defect in our present inferior court system is the multiplicity of tribunals and their duplication of functions, a defect inherent in the court structure. There are six separate and distinct types of inferior courts, totaling 767 in number, created and governed under varied constitutional, statutory and charter provisions. The jurisdiction of those courts overlaps, since in almost every instance each court serves a locality which is also served by at least one other court. Conflict and uncertainty in jurisdiction is one result of such multiplicity and duplication. Another result is that many courts are operated on a part-time basis and are presided over by laymen engaged in outside businesses or by lawyers engaged in private practice. . . .
>
> As a result of its survey, the Council has concluded that the improvement of administration of justice in traffic cases can best be accomplished by a complete reorganization of all courts exercising jurisdiction inferior to the superior court. It is evident that there is a very close connection between the enforcement of traffic laws and the organization of the courts wherein violations of those laws are prosecuted. In the opinion of the council substantial improvement in the judicial enforcement of traffic laws will automatically follow from a simplification of court structure, and the solution of many problems in the traffic field is dependent upon court reorganization. Neither uniformity in practice and procedure nor efficiency can be expected from a system embracing multiple types of courts which exist and are governed by diversified authority in a manner usually necessitating their operation on a part-time basis

[75] Calif. Stat. (1947) pp. 3448, 3379.

[76] "County Court Plan," 19 Calif. S.B.J. No. 6 (Nov.-Dec. 1944); Smith, "Proposed Inferior Court Revision," id. No. 5 (Sept.-Oct. 1944); "Survey of Inferior Court Structure," 20 id. No. 4 (July-Aug. 1945).

and under circumstances where it is often not feasible to provide them with adequate clerical assistance or physical facilities.[77]

The California legislature acted upon this report and the amendments to the constitution and codes suggested therein. A constitutional amendment[78] providing for municipal and justice courts and eliminating all other courts of limited jurisdiction was approved and is to be submitted to the people of California in November of 1950. Under this amendment judges of any existing local courts who have served on the bench for five years preceding the date of approval of the amendment are eligible to become judges of the new municipal courts, but all other judges of the municipal courts are required to be members of the bar. If this amendment is ratified, California will join the states having a statewide system of courts of limited jurisdiction. All existing courts inferior to the superior court will be eliminated, municipal and justice courts will be established according to a system embodied in legislation which has already been enacted[79] and the new court system will go into immediate action if the constitutional amendment is ratified.

Prior to these very recent improvements of trial courts of limited jurisdiction, other states also were instituting reforms aimed at modification of the jurisdiction of the justice of the peace. In *Florida* one county has taken advantage of a constitutional amendment[80] permitting a reduction in the number of justices of the peace by a referendum, and has established a municipal court. The *Georgia* constitution which was adopted in 1945 retains the justice of the peace but authorized the legislature to abolish this position and establish a new set of courts.[81] The state of *Indiana* in 1939[82] adopted a law per-

[77] 12 Calif. Jud. Coun. Rep. 15, 77 (1948).

[78] Calif. Assembly Const. Amend. No. 49, Jan. 26, 1949, amending Art. VI, §§ 1, 11, 23 and repealing §§ 11a and 13.

[79] See Calif. Assembly Bills (1949) Nos. 1814-1823 inclusive.

[80] Fla. Stat. Ann. (1944) Vol. 26, Const. Art. V, § 21 as amended 1944.

[81] The Court of Ordinary, however, still retains jurisdiction in traffic cases when the defendant waives a jury trial in any county not having a city or county court.

[82] Ind. Stat. (Burns, 1946) §§ 4-3801 to 4-3809 inclusive.

mitting the creation of a magistrate court for each county, with exclusive jurisdiction over traffic cases and additional criminal jurisdiction. A salary was set for the judge who would be appointed for either full-time or part-time service. This legislation was not self-executing, and required the presentation of a petition to the judge of the circuit court of a county for the establishment of such a court. After due notice and formal hearing the circuit court judge may enter an order providing for the establishment of a magistrate court. Up to the present time such a petition has been successful only in two communities in Marion County. In *Kansas* a magistrate court was established in Johnson County (Kansas City) in 1948, by an act patterned after the Missouri Magistrates Act.[83]

Earlier the states of *Maryland* and *Virginia* had adopted the trial magistrate and trial justice systems respectively. Instead of abolishing the office of justice of the peace, Virginia merely transferred the bulk of jurisdiction to a court which was designated a "Trial Justice."[84] It was believed that this system could serve as a model for other states. The Maryland adaptation[85] which followed shortly thereafter was also proposed as a definite step forward that other states could copy. Proponents of these systems have been somewhat disappointed because there are now rumblings of discontent with the present functioning of these courts. The 1947 *New Hampshire* legislature authorized the attorney general to print and distribute a uniform system of dockets and records for municipal courts.[86] *Oregon* established countywide district courts to replace the justices of the peace in certain counties in 1947,[87] and in that year the legislature abolished the fee system and placed all justices of the peace on a salary basis.[88] *South Dakota*, also in 1947, adopted an act abolishing justices of the peace and the fee system in all cities over 3,000, and substituted police

[83] Kan. Gen. Stat. (Supp.) §§ 20-2501 et seq. as enacted L. 1947 c. 233.

[84] Va. Code (1942) §§ 4987 et seq. as originally enacted in 1936, amended 1940, 1942.

[85] Md. Code Ann. (Supp.) Art 52, § 93 et seq. originally enacted in 1939.

[86] N.H. Laws (1947) c. 304.

[87] Ore. Code (1947 Supp.) §§ 93-4401 et seq. enacted as L. 1947 c. 589.

[88] Id. §§ 27-223i to 27-233j enacted as L. 1947 c. 564.

magistrates on a salary basis.[89] In 1937 *Tennessee* provided a method for replacement of justices of the peace within any county securing the passage of a private act to establish a court of general sessions. This device has been utilized in practically all of the most populous counties in the state.[90] In 1947 a trial justice court was established in Anderson County (Oak Ridge) with countywide jurisdiction over traffic violations, thus eliminating the justice of the peace insofar as these cases are concerned.[91] In 1949 the *Wisconsin* legislature approved a bill which established a traffic court division of the district court of Milwaukee. This court was formally opened on April 1, 1949.

Thus, in some states progress is being made, the trial courts of limited jurisdiction have been improved or the means to make such improvements have been made available. Notwithstanding the obvious evils of the justice of the peace system, some states are still in the process of making investigations, surveys, reports, and recommendations. Thus, many states have reported that a study or survey of trial courts of limited jurisdiction had been undertaken from the period commencing January 1, 1942, and ending December 31, 1948. These studies vary in thoroughness of research and results and conclusions reached. This contrasts most favorably, however, with the lack of interest that existed in the previous decade. In 1934 Professor T. L. Howard of the University of Chattanooga reported:

> It is surprising that, in spite of the importance of the justice of the peace system, and the popular discontent with its operation, so few factual studies have been made of the actual workings of these courts. For instance, it is a standing joke to speak of J.P. as stand-

[89] S.D. Laws (1947) c. 207, p. 245.

[90] Williams, "General Sessions Courts in Tennessee," 31 J. Am. Jud. Soc'y 101 (1947). Twenty-seven counties now have a Court of General Sessions.

[91] The A.B.A. Traffic Court Contest received the following comment in 1947: "This court relieved justices of the peace throughout the county. . . . Being presided over by a competent and experienced attorney, it has not only served justice by rendering well-founded decisions, but has also created greater respect among offenders by the dignity with which it has been conducted."

> ing for "judgment for plaintiff." Yet how many investigators have actually gone to the trouble of finding out what percentage of the decisions in a typical justice court is rendered for the plaintiff? How much statistical information on other points is available to students of the problem? [92]

Illustrative of the contemporary studies dealing with these courts are the thoroughgoing, scholarly reports prepared by Professor Emeritus Edson R. Sunderland for the Judicial Council of *Michigan*. These were the result of a nationwide survey with which was combined an examination of all the plans adopted or proposed for adoption in any state. Any groups starting out to study these courts will save much time and research by first considering this important contribution to the administration of justice. Professor Sunderland's first report was published in October, 1945, in the Report of the Michigan Judicial Council for that year and was entitled "A Study of Justices of the Peace and Other Minor Courts—Requisites for an Adequate Statewide Minor Court System." A year later he prepared a "Tentative Draft of an Act to Establish County Courts of Record to Supersede Justices of the Peace." [93] The Michigan legislature failed to consider this proposal in 1948 and again in 1949 when the bills were introduced [94] but died in committee.

The trial courts of limited jurisdiction in *Arkansas* were surveyed recently during the study of a general program by the state bar, under which a revision of judiciary organization of that state was considered,[95] but no action has been taken. *Colorado's* courts were also reviewed carefully by a judicial commission, financed to do an adequate survey for all courts.[96] However, proposals for the amendment of the judiciary article of the constitution, including abolition of justices' courts failed

[92] Howard, "The Justice of Peace System in Tennessee," 13 Tenn. L. Rev. 19 (1934).

[93] 15 Mich. Jud. Coun. Rep. (Oct. 1945); 16 id. (Oct. 1946).

[94] Report of Committee on Legislation and Law Reform of Michigan State Bar, 27 Mich. S.B.J. 40 (Sept. 1948).

[95] "'Master Court' Judicial System Proposed," 9 Am. L. & Lawyers 8 (May 13, 1947).

[96] Johnson, "Progress of the Judiciary Committee's Plan," 25 Dicta 75 (April, 1948).

of approval in the House although approved by the Senate.[97] The *Illinois* Association of Justices and Police Magistrates, with the cooperation of the American Bar Association, has undertaken a survey of existing conditions in the justice of the peace courts.[98] The *Iowa* State Bar Association and a legislative commission in 1947 introduced legislation to abolish the justice of the peace, but this bill was defeated. Although a new program is under way to submit a bill for a revised court organization,[99] no action was taken in 1949. During the interim Burlington established a municipal court, and several cities are seriously contemplating taking similar action. In *Massachusetts* [100] improvements in the district courts are being seriously examined, suggestions for this purpose having been recently reviewed. Studies are being conducted by an administrative committee for the district courts consisting of five justices sitting in these courts, appointed by the chief justice of the Supreme Judicial Court and also by a committee of the Boston Bar Association.[101] The judicial council in *New Hampshire* [102] is studying a program to make the municipal and justice courts more effective. The junior bar section of the *Texas* State Bar has completed a factual survey which is now being expanded into a full report for legislative action.[103] In *Washington* [104] the judicial council reports that efforts to study the justice of the peace over the past fifteen years have proved abortive because of the gigantic nature of the task. It is therefore requesting adequate finances from the legislature to accomplish this project. In the meantime a comprehensive report on justices of the peace was made by one of the committees of the Washington State Bar in 1948.

[97] Further action is now being considered by the Judiciary Committee of the Colorado Bar Association.

[98] 8 Illinois Justice Newsletter (No. 8, Oct., 1948).

[99] 8 News Bull. Iowa State Bar Assoc. 1 (Sept. 1948).

[100] Bolster, "District Courts," 16 Bar Bull. (Boston, March, 1945).

[101] The bar association's committee on improvement of the district court system presented a number of bills to the legislature in 1949. After a hearing these bills were withdrawn, however, and further study is planned. 20 Id 91, 155 (1949).

[102] 1 N.H. Jud. Counc. Rep. 20 (1946).

[103] Report of Junior Bar Section of State Bar of Texas, 11 Tex.B.J. 446 (June, 1948).

[104] 11th Wash. Jud. Coun. Rep. 19 27 (Jan., 1949).

Current and other earlier activities in this field include: *Delaware,* several attempts have been made to improve the justice court system without success, and plans for further activity are being made; *Louisiana* is redrafting the judiciary article as a part of a constitutional revision program; *Minnesota,* the judiciary committee of the constitutional commission has completed its work, which includes far-sweeping changes in these courts; *Montana,* a state bar committee has canvassed the improvements achieved in other states and is considering the recommendation of plans for their adaptation to a state with its vast area and small population; *New York,* a very aggressive magistrates association and justice of the peace section in the Association of Towns is constantly seeking improvements and making them; *North Carolina* has appointed a judicial revision commission; *Ohio,* the Ohio Magistrates Association is interested in securing the support of the Ohio State Bar for some progressive legislation; *Oklahoma,* constitutional revision is being sought by the state bar; *Pennsylvania,* after a study of the justice of the peace system was made, efforts were made to abolish it but these failed; *South Dakota,* in addition to recent legislation, the judicial council is working on this problem; *Utah,* legislation prepared by the Junior Bar Section of the State Bar, despite failure in 1947, will again be introduced to the legislature; *West Virginia* has had a recent legislative attempt to improve the justices of the peace defeated, but this problem is being reviewed; *Wisconsin,* justice courts have been studied by an interim legislative committee appointed in 1947.

Concurrently with the foregoing activities there has been a movement to improve the personnel of these trial courts of limited jurisdiction through the educational process. On a national scale the American Bar Association has encouraged the formation of a national conference of trial courts of limited jurisdiction.[105] The first meeting of this group was held in 1947, another was held in 1948, and a third will be held in 1949.

[105] 72 A.B.A. Rep. 112 (1947). See A.B.A. Handbook, The Improvement of the Administration of Justice 95 (1949).

The meeting in 1948 saw the formation of a permanent organization by the officers of statewide organizations of justices of the peace—the American Association of Trial Courts of Limited Jurisdiction. This organization should aid in spreading information about the problems of these courts and the various devices used in the several states to aid in overcoming their deficiencies. The following are illustrative of the activities being attempted in the states.

California.—A manual of forms and procedure for justices and constables was prepared by the Justices and Constables Association of California in 1943. It has been revised periodically. A copy is made available to all new justices upon assuming office. Annual meetings of this group devote considerable time to informative and instructive lectures and talks on practical subjects.

Nebraska.—A manual for the guidance of the justice of the peace is being prepared by Municipal Court Judge Edward C. Fisher, author of *People's Court.*

New Hampshire.—The judicial council held a judicial conference for the municipal and justice courts in October, 1948.[106]

New York.—New York's justices of the peace have been pioneers in holding schools, having held their first statewide sessions at Hobart College in 1938. A few local sessions had preceded this and served as a steppingstone to the statewide program. Two more state schools were held before the war, and then none were held until 1946, when Albany Law School and the University of Rochester were the hosts. The program is designed to be repeated in even-numbered years, when newly elected justices take office. The 1948 schools were held at the Law School of New York University and at Colgate University. Alfred Morrison, director of these schools, states that they were designed to meet the needs of new and inexperienced lay justices of the peace, to explain their duties and to furnish them with practical information on how to conduct their courts. Mr. Morrison edits "Justice Court Topics," an informative and training bulletin published monthly and distributed to the jus-

[106] 2 N.H. Jud. Coun. Rep. 35 (1948).

tices of the peace.[107] Also he has written a guide for the use of such courts, and is organizing countywide schools with instructors furnished by the county bar associations, which will embrace the entire field of justice court work.[108]

Oregon.—The municipal law committee of the Oregon State Bar has prepared a manual for the guidance of courts in smaller communities.

Pennsylvania.—After attempts to abolish the justice of the peace system proved unsuccessful,[109] a series of classes for the minor judiciary were conducted by the Public Service Institute of the Department of Public Instruction. The Minor Judiciary School is divided into courses in criminal law and civil law. Both courses are conducted in twenty-four three-hour sessions meeting at least once each week. A zone instructor is appointed to conduct the classes and receives payment on a per diem basis by the Department of Public Instruction. He may use any assistants he sees fit. Two guides for instruction and study have been prepared—a criminal law manual published in 1944, and a civil law manual published recently. This activity has improved the functioning of local courts and should continue to do so.

Conclusion

The first contest to determine the city or cities that had made the most progress in the improvement of practice and procedure in their traffic courts was held during the 1947-1948

[107] "Justice Court Topics" is an information and training extension bulletin published monthly by the Board of Trustees of the Town and Country Officers Training School of the State of New York, in cooperation with the Association of Towns and the Bureau of Public Service Training of the New York State Department of Education.

[108] Morrison's Guide for the Justices of Peace (1949). This book of 56 chapters contains 165 forms. The Erie County Magistrate Association for two years has been running a school for the exclusive benefit of nine justices of the peace who took office on January 1, 1948, and it is now planned to have county schools in more than one-half of the 56 rural counties in New York.

[109] See Survey of the Minor Judiciary in Pennsylvania, A study of Justices of the Peace and Alderman (1942) prepared under the guidance of the Committee on Minor Judiciary of the Pennsylvania Bar Association, and published by the Institute of Local Government, Pennsylvania State College.

year. The subject of traffic courts was included as a supplemental part of the 1947 National Traffic Safety Contest of the National Safety Council, which generously made its experienced services and facilities available to the legal profession. These contest reports, with additional information submitted by the various cities, formed the basis for the first awards ever made in this field by the American Bar Association. The reports of this and a similar contest held in 1948, and designated as the Annual Inventory of City Traffic Safety Activities, have been used in this chapter.

The judges of the 1947 contest had to pioneer in the manner of grading entries and determining the weight to be given to the various subjects. They also decided that it would be improper to compare cities of large population with those having a smaller population, and recommended that awards be made in the six groups used in the National Traffic Safety Contest.

Awards for the 1947 contest, announced in 1948, were as follows: Group I, cities having a population of over 500,000, tie for first place, *Washington, D. C.* and *Milwaukee, Wisconsin;* Group II, cities having a population of between 200,000, and 500,000, first place, *Denver, Colorado;*[110] Group III, cities having a population of 100,000 to 200,000, tie for first place, *Sacramento, California,* and *Tulsa, Oklahoma;* Group IV, cities having a population of 50,000 to 100,000, first place, *Winston-Salem, North Carolina;*[111] Group V, cities with a population of 25,000 to 50,000, first place, *Plainfield, New Jersey;*[112] Group VI, cities having a population of 10,000 to 25,000, first place, *Midland, Michigan.* The awards for the contest held in 1948 will be announced in September, 1949. These contests have made it possible to determine the progress achieved since the Warren report. From their results, if continued over a number of years, the answers may be found to

[110] Second place, Syracuse, N.Y.; honorable mention, Kansas City, Mo.; Portland, Ore.; Akron, Ohio; Dallas and Fort Worth, Tex.

[111] Tie for second place, Santa Monica, Calif. and Lansing, Mich.; honorable mention, Lincoln, Neb.

[112] Honorable mention, Greenwich, Conn.; Jackson, Mich.; and Beloit, Wis.

the many questions now puzzling judges, prosecutors, and other officials.[113] The contest reports should eliminate much of the guesswork that has been relied upon up to this time as a basis for making improvements.

The program to improve traffic courts and other trial courts of limited jurisdiction requires continuous effort. The effectiveness of all traffic courts will be measured by the manner in which they fulfill their primary obligation, which is to impress defendants with the need for traffic law observance rather than merely to penalize them. Intangible and difficult as this goal may be, it is nevertheless the great objective in this important field. At the time of the making of the Warren report the conclusion was reached that on the whole the treatment of offenders was very unsatisfactory from the point of view of educating them to a sense of their social responsibility for compliance with the law.[114] It is known that many judges possess the desire to do a better job and that many are receiving recognition for their efforts. Unfortunately, there are few reports available as to the progress in this field.

On the whole, the judges and prosecutors upon understanding the principles and purposes of the administration of traffic

[113] See President's Highway Safety Conference Inventory and Guide for Action (1948), and Kayser, "Let's Back Our Traffic Courts," 35 Public Safety 8 (Jan. 1949).

[114] SCHOOLS FOR TRAFFIC VIOLATORS (1948)

Population—Cities	Over 500,000	200,000-500,000	100,000-200,000	50,000-100,000	25,000-50,000	10,000-25,000
Drivers:						
Yes	4	5	3	9	6	9
No	9	21	38	58	108	269
Pedestrians:						
Yes	1	2	2	5	3	4
No	8	24	34	60	106	251
Hours required to attend:						
Drivers				Av. 5	Av. 10	Av. 3½
Pedestrians				Av. 6	Av. 10	Av. 3½
Number attended:						
Drivers				3603	2040	242
Pedestrians				1160	37	10
Driver clinic operated:						
Yes	1	6	4	6	7	12
No	9	21	30	58	98	236

court justice are willing to impress defendants with the need for traffic law observance. They realize the need for eliminating the revenue aspects of the problem. With the increasing demand for the holding of statewide conferences of traffic court judges and prosecutors of three, four, and five days' duration, there will be many opportunities to stress the aims as well as the techniques of traffic court work. The necessity for effective trial courts of limited jurisdiction is as important today as it was in 1916, when the late Chief Justice Charles Evans Hughes made a special plea to interest lawyers in this problem:

> I never speak "of this work" of our higher courts without the reflection that after all it is the courts of minor jurisdiction which count the most so far as respect for the institution of justice is concerned. . . . If our bar associations could create a sentiment which would demand that in all our cities the police and minor civil courts should fairly represent the Republic as the embodiment of the spirit of justice, our problem of Americanization would be more than half solved. A petty tyrant in a police court, refusals of a fair hearing in minor civil courts, the impatient disregard of an immigrant's ignorance of our ways and language, will daily breed Bolshevists who are beyond the reach of your appeals. Here is work for lawyers. The Supreme Court of the United States and the court of appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of the Republic will be found in the treatment of the poor and the ignorant; in indifference to their misery and helplessness lies disaster.[118]

Finally, the 1949 recommendations of the Subcommittee on Traffic Courts of the President's Highway Safety Conference must be continually stressed as an indication of the work remaining to be done and the minimum standards which must be achieved if trial courts of limited jurisdiction, traffic courts and justice of the peace courts, are to perform properly the tasks set for them.

> 1. The 57 recommendations contained in Warren on "Traffic Courts" be approved.

[118] N.Y.S.B.A. Rep. 287 (1916), address delivered on Jan 14, 1916.

2. Courts of record should be provided for the hearing of all traffic cases.

3. The word "Police" should be eliminated from the name of courts and substituted by a more appropriate title.

4. Statewide supervision and administration of all traffic courts should be placed in the chief justice of the highest appellate court in each state.

5. Uniform rules governing the procedure in traffic cases should be promulgated by the rule-making authority in each state.

6. The uniform traffic tickets, similar to the one developed under the Michigan uniform enforcement policy and the other used statewide in New Jersey by all enforcement officers, should be approved for use in every state.

7. That the salaries paid to traffic court judges and prosecutors should be increased to be equal to those paid judges of courts of general trial jurisdiction and prosecutors assigned thereto.

8. That all municipalities, counties and states be urged to take active steps to provide dignified and impressive courtrooms for the trial of traffic cases.[116]

[116] See President's Highway Safety Conference, Committee on Enforcement, Subcommittee on Traffic Courts (1949).

CHAPTER VIII

THE LAW OF EVIDENCE

Recommendations Adopted by the American Bar Association, July, 1938

(1) That error in the admission or rejection of evidence should not be ground of itself for directing a new trial unless the appellate court after an examination of the entire record is of opinion that the error has resulted in a miscarriage of justice or has affected the substantial rights of the parties.

(2) That where case is heard by a judge without a jury a new trial should not be granted for error in the admission of testimony if there is substantial evidence to support the findings, unless it appears that the findings are based on testimony which should have been excluded. A new trial should not be granted for error in the exclusion of testimony unless it appears that the findings were affected by its exclusion.

(3) That exceptions to the admission or rejection of testimony should not be required for the review of error on appeal: but for all purposes for which an exception has heretofore been necessary it should be sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor. New federal rule 46.

(4) That the rule excluding testimony of an interested party as to transactions with deceased persons, should be abrogated by the adoption of a statute like that of Connecticut, which removes the disqualification of the party as a witness and permits the introduction of declarations of the decedent, on a finding by the trial judge that they were made in good faith and on decedent's personal knowledge.

(5) That declarations of a deceased or insane person should be received in evidence if the trial judge shall find (1) that the person is dead or insane, (2) that the declaration was made and (3) that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

(6) That the rule of the North Carolina statute that the trial judge may require the disclosure by a physician of a privileged communication from a patient if in the opinion of the judge such disclosure is necessary for the proper administration of justice, is a salutary rule and should be adopted in the other states. Privilege should not be extended to accountants, social workers or journalists.

(7) That the rule of the uniform business records as evidence act, drafted by the Uniform Laws Conference in 1936 and printed in the appendix to the report of the committee should be adopted in the several states.

(8) That ordinary witnesses should be allowed to state their conclusions with respect to ordinary matters subject to explanation, thus permitting a witness to state his observation in a natural and non-technical manner.

(9) That the principles embodied in the uniform act of 1937 relating to expert testimony and set forth in the appendix to the report of the committee, should be adopted in the several states by appropriate legislation or rules of court.

(10) That the provisions of new federal rule 44, permitting the introduction in evidence of certified copies of official records should be adopted in all of the states.

(11) That the uniform act drafted in 1936, requiring that judicial notice be taken of the common law and statutes of other states of this union and that the law of a foreign country be determined by the court, should be adopted in all of the states.

(12) That witnesses should be sworn separately, the oath being administered to each witness as he takes the stand to testify; and that the judge should see that it is administered in a dignified and understandable way, either by himself or by the clerk.

(13) That the scintilla rule as to the sufficiency of evidence should be abolished.

(14) That the provisions of new federal rule 43 (b) should be adopted in the several states.

(15) That as recommended by the Committee of the Commonwealth Fund a decade ago, a general rule should be adopted in every jurisdiction substantially as follows: "Any rule of evidence need not be enforced if the trial judge, on inquiry made of counsel or otherwise, finds that there is no *bona fide* dispute between the parties as to the existence or non-existence of the facts which the offered evidence tends to prove, even though such fact may be in issue under the pleadings. No error can be assigned or predicated upon

the violation of any rule of evidence, either at law or in equity, when it appears from statements of counsel or from other evidence in the case or is shown in any other lawful way, that there is no *bona fide* dispute between the parties as to the fact sought to be proved or disproved by the offered evidence, even though such fact may be in issue under the pleadings."

Recommendations for Reference, Further Study, Etc.

(1) That the American Bar Association Committee on the Ross Bequest be asked to select, as the subject of a competitive award: The formulation of a simplified code of evidence rules for use in jury trials.

(2) That state and city bar associations proceed to study the most improved methods of calendar administration, with a view to reducing inconvenience to witnesses, and urge the adoption of such methods by their local courts.

(3) That state and city bar associations make a study of the abuse of continuances in their communities, and demand of the courts that the abuse shall cease.

(4) That state and city bar associations investigate the subject of intimidation of witnesses with a view of remedying the abuse wherever it exists.

(5) That legislatures should make no change in the rules of evidence or procedure without notice to state and local bar associations and giving them an opportunity to be heard with regard thereto.

(6) *Privilege for Attorney and Client Communication.* That the Section on Criminal Law be requested to study and report on limitations on this privilege which should be prescribed in the public interest.

(7) That the American Medical Association be requested to examine its canon of ethics regarding the giving of testimony by one physician against another, in malpractice suits, with a view of removing the obstacle which the canon is frequently interpreted as interposing in this type of litigation.

(8) *Comment on Failure of Accused to Testify.* That the Section on Criminal Law be requested to arrange for a thorough study of the experience of those states where such comment is permitted.

(9) That a committee be appointed to study the needs and possibilities of a simplified set of rules for defining burden of proof and presumptions.

(10) That a committee be appointed to examine all the exceptions to the hearsay rule with a view to codifying or formulating them in a model statute and to general improvement in the application of the rule.[1]

INTRODUCTION

The Committee on Improvements in the Law of Evidence, upon whose studies the recommendations adopted by the American Bar Association were based, found that revision of certain features of procedure in the administration of rules of evidence was essential to the improvement of the law of evidence. It considered that any proposed changes in the rules of evidence would be ineffective unless a suitable administration of such rules was insured. Hence there were recommendations as to the effects of error in the admission or rejection of evidence, and as to the removal of the requirement for formal exceptions to the admission or rejection of testimony over objection.[2] The other approved recommendations relate to specific changes in the law of evidence. These rules are those as to which improvement seemed most simple, feasible, and necessary. Improvement of details throughout the law of evidence was not considered. The recommendations made were limited to phases of the law of evidence which in most states were frequently involved in and represented the most obvious obstructions to the rational investigation of facts in jury trials. While modifications of a substantial number of outstanding rules of evidence which were believed to require correction were considered, the recommendations as approved are limited in scope, and no wholesale attempt was made to reorganize or rewrite the law of evidence.[3]

[1] Appendix A at 508. It is to be noted that Recommendation (13) here was approved by the American Bar Association under "Trial Practice." Id. at 507. Recommendation (13), Discovery, as made under Evidence, is considered in the chapter on Trial Practice herein at p. 234.

[2] See report of Committee on Improvements in the Law of Evidence, Appendix A at 558, for other proposals involving evidence administration in general, e.g., judge's comment on evidence, judge's charge preceding argument of counsel, calendar arrangement to promote convenience of witnesses, etc., id. at 559 et seq.

[3] Appendix A at 569.

In 1927 a committee of the Legal Research Committee of the Commonwealth Fund published the results of five years' study of various evidence rules and recommended the enactment of five specific statutes directed at various reforms.[4] Several of these were embodied in the recommendations of the American Bar Association. Since these recommendations were made, the American Law Institute has studied the law of evidence as a whole. Drafting of its Model Code of Evidence began in 1939, and in 1942 approval of the Model Code was given. This American Law Institute Model Code of Evidence (hereafter referred to as the Model Code) was not envisioned as a restatement of the law of evidence, but was intended to clarify the law as a whole in order to aid in making a trial a rational proceeding.[5] It is to be noted that the rules of the Model Code are based on the postulate that the effectiveness of "all rules of procedure, including evidence, depends upon the capacity and character of the tribunal enforcing and using them. The keystone of our system of administering justice is the trial judge." [6]

The Section of Judicial Administration of the American Bar Association now considers the "natural starting point for consideration of reform of the law of evidence in any given state" to be the Model Code, and that it is "preferable to work towards a complete revision, along the lines of the Model Code, rather than a piecemeal correction of the more outstanding faults." [7] The Model Code has not been adopted as yet in any state. In Missouri a proposed Evidence Code has been prepared by the Missouri Bar, which embodies some of the changes of the Model Code and some other changes but

[4] Morgan, Chaffee, Jr., Gifford, Hinton, Hough, Johnston, Sunderland, Wigmore, The Law of Evidence, Some Proposals for its Reform (1927). Cf. Tracy, "What Progress in Reform of Evidence Rules," 20 J. Am Jud. Soc'y 80 (1936).

[5] A.L.I., Model Code of Evidence, Introduction and Foreword (1942). See Ladd, "A Modern Code of Evidence," IV Annual Handbook, National Conference of Judicial Councils 114 (1942).

[6] A.L.I. Model Code of Evidence at 7 (1942).

[7] A.B.A. Handbook, The Improvement of the Administration of Justice 57 (1949). See as to the changes in the law of evidence, Morgan, "The Law of Evidence, 1941-1945," 59 Harv.L.Rev. 481 (1946).

which for the most part is a codification of present Missouri statutes and decisions.[8] In view of the work done by the American Law Institute and the position taken by the Section of Judicial Administration, reference will be made to the pertinent sections of the Model Code in discussing the status of the recommendations approved by the American Bar Association.

Effect of Error in Admission or Rejection of Evidence

(1) That error in the admission or rejection of evidence should not be ground of itself for directing a new trial unless the appellate court after an examination of the entire record is of opinion that the error has resulted in a miscarriage of justice or has affected the substantial rights of the parties.

(2) That where case is heard by a judge without a jury a new trial should not be granted for error in the admission of testimony if there is substantial evidence to support the findings, unless it appears that the findings are based on testimony which should have been excluded. A new trial should not be granted for error in the exclusion of testimony unless it appears that the findings were affected by its exclusion.

Recommendations (1) and (2) are considered together here, since the reports from the states indicated that the distinction made between jury and nonjury cases was not apparent in the decisions in most of the states. Thus, in reporting the findings as to the prevailing rules in the several jurisdictions their repeated inclusion under the various rules may be expected. The recommendations are designed to prevent reversals for errors which probably did not affect the finding or verdict. The recommended rules are similar to Rules 6 and 7 of the American Law Institute's Model Code of Evidence:

> Rule 6. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon by reversed, by reason of the erroneous admission of evidence unless
>
> . . . .
>
> (b) the court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded

[8] Mo. Evidence Code (Proposed, Mo. Bar 1948).

on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

Rule 7. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless

. . . .

(b) the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.[9]

(A) Improper rejection of evidence.

The rule that the improper rejection of evidence is always ground for a new trial, which has been denominated "the bane of the rules of evidence," [10] is not followed in any jurisdiction today. The recommendations prevail generally throughout the United States although the terminology used varies somewhat from jurisdiction to jurisdiction as well as within a jurisdiction in some instances. Thus, the improper rejection of evidence is not ground for a new trial unless upon an examination of the entire cause it appears that the error has resulted in a miscarriage of justice: *Alabama, Arizona, California, Colorado (jury cases only), Delaware, Florida, Iowa, Kansas (jury cases only), Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma (except equity cases), Pennsylvania (jury trials), Rhode Island (except equity), South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin,* and *Wyoming.* Typical of such rules is that of Alabama, which provides:

> Hereafter no judgment may be reversed or set aside, nor new trial granted . . . in any civil or criminal case on the ground of . . . the improper admission or rejection of evidence, . . . unless . . . after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.[11]

[9] A.L.I. Model Code of Evidence 78-80 (1942).

[10] Appendix A at 562.

[11] Ala. Sup. Ct. Rule 45, Ala. Code (1940) tit. 7 at 1022. Semble, Wis. Stat. (1947) § 274.37. Cf. Report of Com-

The improper rejection is not ground for a new trial if it appears that if the rejected evidence had been received it ought not to have varied the decision: *Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas* (*jury cases only*), *Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia* (*nonjury cases*), *Wisconsin,* and *Wyoming.*

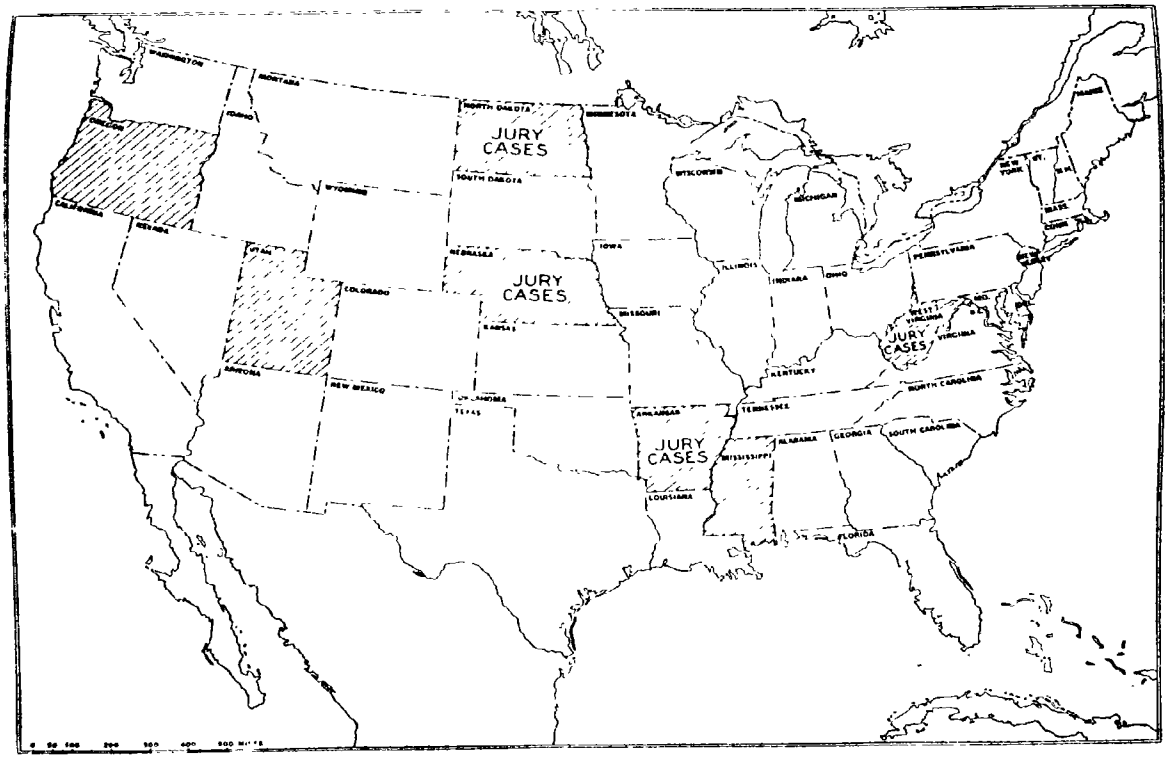
The improper rejection of evidence is not ground for a new trial if there is substantial evidence to support the findings, unless it appears that the findings were affected by its exclusion: *Alabama, Delaware, District of Columbia, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, South Dakota* (*nonjury trials*), *Texas, Utah, Vermont, Virginia, West Virginia* (*nonjury trials*), and *Wisconsin.*

The improper rejection of evidence is ground for a new trial only if it appears that the findings were affected by its exclusion in all cases, not only nonjury cases as recommended: *Alabama, California, Colorado, Georgia, Idaho, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin,* and *Wyoming.*

Thus, all jurisdictions have some form of the recommended rule, or one analogous to it, as to when the improper rejection of evidence is or is not ground for a new trial. A number of specific variations in the rules may be noted. In *Georgia* improper rejection of evidence is not ground for a new trial if other substantially similar evidence was admitted. The *Iowa* rule allows a new trial for errors of law, "but only if they materially affected" the aggrieved parties' "substantial rights." [12] In *Kentucky* and *Tennessee* the improper rejection

mittee on Improvements in the Law of Evidence, Appendix A at 561. See also Colo. R.Civ.P. 118(f).

[12] Iowa R.Civ.P. 244.



EFFECT OF ERROR IN ADMISSION OR REJECTION OF EVIDENCE

Admission or rejection of evidence over objection is not ground for a new trial unless upon examination of the record it appears that the error has resulted in a miscarriage of justice or has affected the substantial rights of parties, etc.

The improper admission of evidence objected to presumptively works a prejudice to the party against whom it is admitted

of evidence is ground for a new trial if prejudicial to the substantive rights of a party. In *Maine* the decisions are developing the rule that error in rejection of testimony shall not be noticed unless likely to change the judgment. In *Missouri* the appellate court may review nonjury cases on both the law and the evidence presented, and improperly rejected evidence may be taken by deposition and considered by the appellate court.[13] The proposed Missouri Evidence Code, moreover, embodies a rule consistent with the recommendations:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission or exclusion of evidence unless the error is against the complaining or losing party and materially affects the merits of the action.[14]

(B) Improper admission of evidence.

In conformity with the recommendation the improper admission of evidence objected to is not of itself ground for a new trial in any jurisdiction. The rule which prevails in *Mississippi, Oregon,* and *Utah* in all cases, and in jury cases only in *Arkansas, Nebraska, North Dakota,*[15] and *West Virginia* is embraced, however, within that criticized,[16] since in those states the improper admission of evidence objected to presumptively works a prejudice to the party against whom it is admitted.

In forty-six jurisdictions the prevailing rule is that approved by the American Bar Association, to the effect, that the admission of evidence over objection is not ground for a new trial unless upon an examination of the entire record it appears that the error has resulted in a miscarriage of justice or has affected the substantial rights of the parties: *Alabama, Arizona, California, Colorado* (jury cases only), *Connecticut, Delaware, District of Columbia,*[17] *Florida, Georgia, Idaho,*

[13] Mo. Rev. Stat. Ann. (1939) § 874.114.

[14] Mo. Evidence Code (Proposed, Mo. Bar, 1948) § 1.06.

[15] See n. 19 infra.

[16] Appendix A at 561-562.

[17] It is presumed that the court disregarded inadmissible evidence, but it may be shown to have considered it.

Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska (criminal cases), *Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas*[18] (nonjury cases), *Utah Vermont, Virginia, Washington, West Virginia, Wisconsin,* and *Wyoming.*

An analogous rule recommended by the Committee on Improvements on the Law of Evidence which studied these problems intensively has also been enunciated in many of the states. This rule takes the following form: the admission of evidence objected to is not ground for a new trial if, independently of such evidence, there was sufficient evidence to justify the decision. The rule prevails in all cases in *Alabama, Connecticut, Delaware, Indiana, Maryland, Minnesota, Mississippi, Montana, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington,* and *Wisconsin;* in nonjury cases only in *Nebraska* and *Texas* (*civil cases*); and in equity cases only in *Arkansas.*

In *Kansas* the law is not settled on this point, the decisions varying with the facts of the cases, while in *North Dakota* there are no recent cases in which this point is discussed.[19]

[18] In jury cases a reversal is ordered if the erroneous admission of evidence was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Tex. R.Civ.P. 434. The courts look to the nature of the testimony itself to determine whether it probably caused an improper judgment. The appellant need not show prejudice by other means if the evidence erroneously admitted is considered to be of such nature that it probably influenced the jury. Before the adoption of the Rules of Civil Procedure in 1941 the language embodied in Rule 434 was used in Rule 62a, for the district and county courts. Under this rule it was held that the admission of improper testimony required a reversal unless it affirmatively appeared from the record that the error was harmless, and a reversal followed if the court had a "reasonable doubt" as to whether the error was harmful. Under the new rules the courts have not expressly rejected the rule of "reasonable doubt" but are more reluctant to reverse on this ground even though the language of the new rule is the same as that of the former one.

[19] While the early North Dakota cases seem to indicate that the improper admission of evidence objected to presumptively works a prejudice to the party against whom it is admitted, even among these cases it has been stated that "when, from the character of the irrelevant testimony or from the record, it is clear that no prejudice could result in any conceivable view

Thus, as to Recommendations (1) and (2), while many of the reporters were not always definite as to the precise rule prevailing in their particular jurisdictions, probably because cases had not occurred in which it was necessary to make the exact distinctions involved, it may be said that the recommendations prevail in all but a few jurisdictions.

Exceptions Not Necessary

(3) That exceptions to the admission or rejection of testimony should not be required for the review of error on appeal. . . .

The objection which serves to request a ruling by the judge upon the admissibility of evidence serves as indispensable purpose if the rules of admissibility are to be observed. The exception, however, comes after the ruling on the objection and indicates nonassent; as such it is not essential during trial. Rule 5 of the Model Code, adopts Rule 46 of the Federal Rules of Civil Procedure, and is similar to the recommendation of the American Bar Association:

> Formal exception to a ruling or order of the judge as to any matter to which these Rules are applicable is unnecessary; for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time when the ruling or order is made or sought, make known to the judge the action which he desires the judge to take or his objection to the action of the judge, and the grounds therefor.[20]

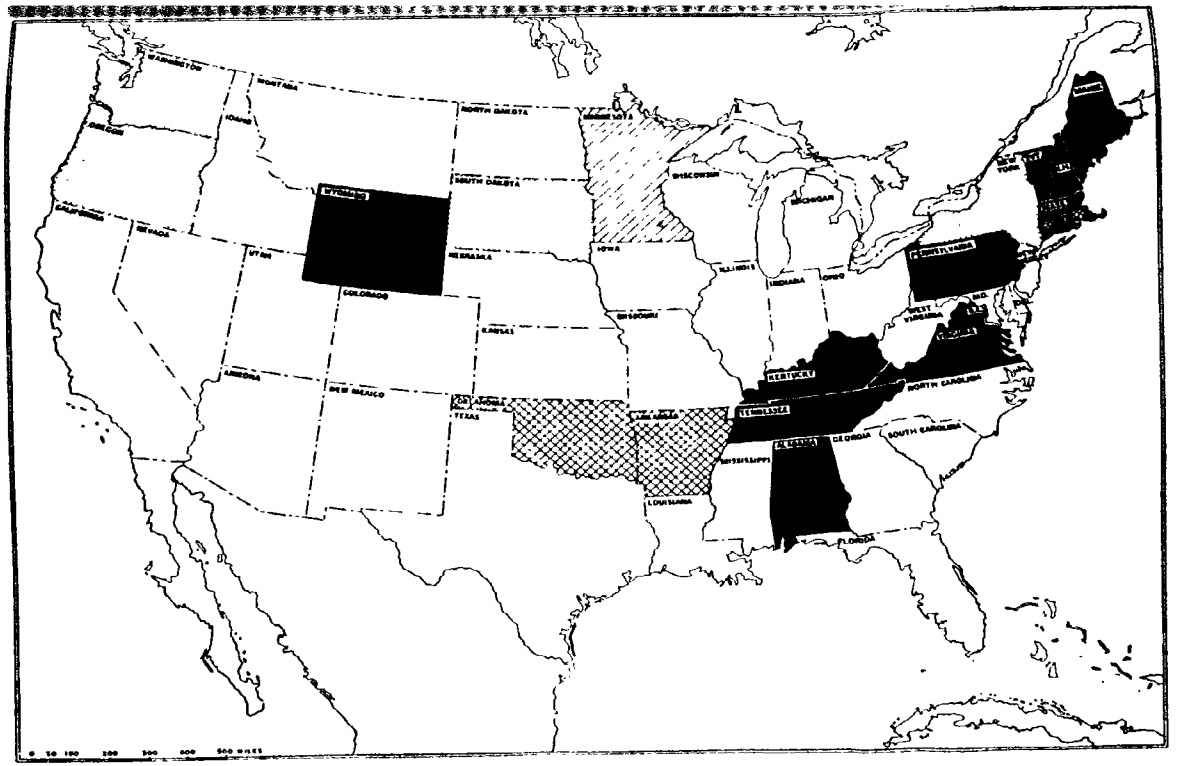
Contrary to the recommendation, exceptions to the admission or rejection of testimony are required to permit review of error on appeal in all cases in eleven jurisdictions:[21] *Ala-*

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of the case, then the admission of such improper testimony should never reverse the case." State v. Kent, 5 N.D. 516, 539, 67 N.W. 1052, 1057 (1896). There are very few North Dakota cases in which this point is discussed and no recent cases, and it was reported that North Dakota might not clearly fall within the criticized rule. See Yankton County v. Rosstenscher, 1 Dak. 120, 125, 46 N.W. 575, 576 (1875); The Territory v. Gay, 2 Dak. 125, 147, 2 N.W. 477, 487 (1879); Schnase v. Goetz, 18 N.D. 594, 120 N.W. 553 (1909).

[20] Moore's Federal Practice 3089 (1938), A.L.I. Model Code 78 (1942).

[21] In January, 1949, a bill was introduced in the Oklahoma legislature to eliminate the necessity for excep-



EXCEPTIONS TO ADMISSION OR REJECTION OF TESTIMONY

- Exceptions to admission or rejection of testimony not necessary to permit review of error on appeal
- Exception need be taken only as to charge of court or refusal of a request to charge, [illegible] instructions to jury. Ex-
- Exceptions customarily taken although not absolutely necessary
- Exceptions to admission or rejection of testimony are required to permit review of error on appeal in all except equity cases
- Exceptions to admission or rejection of testi-

bama, Connecticut, Kentucky, Maine, Massachusetts, New Hampshire, Pennsylvania, Tennessee, Vermont, Virginia, and *Wyoming;* and in all except equity cases in *Arkansas, Oklahoma,* and *Rhode Island.*

In *Minnesota* a party may except orally at the trial or in lieu of an exception the aggrieved party must specify the alleged error in his notice of motion for a new trial or other relief [22]; thus, while exceptions are not required, they are customarily taken. An exception need only be taken to the charge of the court or refusal of a request to charge in *New York* and *Washington.* In *Oregon* and *South Dakota* an exception need be taken only as to rulings on instructions to the jury.

Although objections at the time evidence is offered may be required, as recommended, exceptions are not necessary to permit review of error on appeal except as noted above in all cases in thirty-five jurisdictions: [23] *Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia,* and *Wisconsin;* and in equity actions only in *Arkansas, Oklahoma,* and *Rhode Island.*

Thus Recommendation (3) is embodied in the practice of a majority of the jurisdictions.

Survivor's Testimony

(4) That the rule excluding testimony of an interested party as to transactions with deceased persons, should be abrogated by the adoption of a statute like that of Connecticut, which removes the disqualification of the party as a witness and permits the introduction of declarations of the decedent, on a finding by the trial judge that they were made in good faith and on decedent's personal knowledge.

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tions. In 1949 the taking of exceptions to adverse rulings on the admission of evidence became unnecessary in North Carolina. N.C. Laws (1949) c. 150.

[22] Minn. Stat. Ann. (1945) § 547.03.

[23] E.g., La. Gen. Stat. (1939) § 1974.

The prohibition excluding testimony by the survivor with respect to transactions had with a person now deceased, in actions against the decedent's representative is the only relic of the long abolished disqualification of interested persons as witnesses.[24] This rule has been criticized as an anchronism and an obstruction to the truth, since its details are highly technical and have no relation to the psychology of veracity. In 1927 it was made the subject of thorough inquiry by a committee appointed by the Commonwealth Fund, and this committee recommended the substitution of a permissive statute similar to that in force in Connecticut:

> No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.
>
> In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.[25]

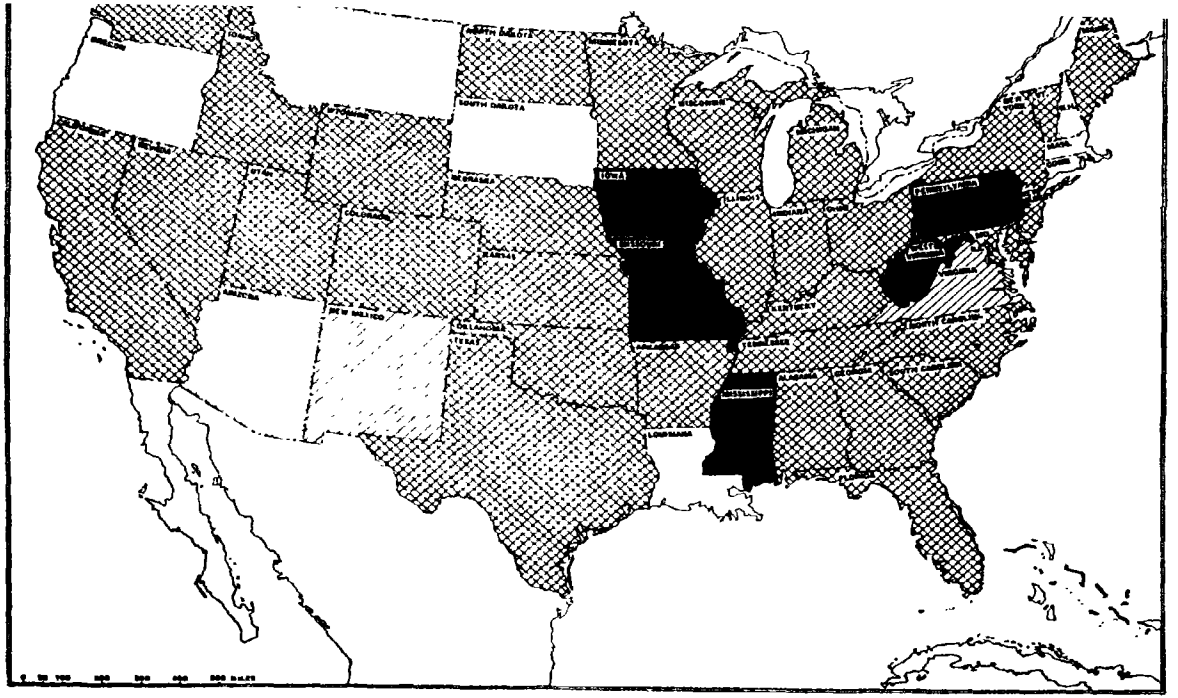
Under the terms of Rule 101 of the Model Code of Evidence, which relates to the qualifications of witnesses, this prohibition of a survivor's testimony against a representative of a deceased party would be eliminated in accord with the American Bar Association recommendation:

> Every person is qualified to be a witness as to any material matter unless the judge finds that
>
> (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or
>
> (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth.[26]

[24] II Wigmore on Evidence § 578 (3d ed. 1940), cf. VII id. § 2065.

[25] Morgan et als., op. cit. supra n. 4 at 35. Cf. Conn. Gen. Stat. (1949) § 7895, 7896.

[26] A.L.I., Model Code of Evidence 91 (1942).



SURVIVOR'S TESTIMONY

- Survivor's testimony freely admitted under provisions similar to Connecticut statute
- Survivor's testimony admitted if required by court, or if court finds that without such testimony injustice will be done
- Survivor's testimony admitted but no verdict may be found on such testimony if uncorroborated
- Interested party may not give evidence against decedent's representative by testifying to transactions with deceased except on consent or implied waiver by the representative
- Survivor's testimony absolutely prohibited

A variation of the criticized rule to the effect that an interested party may not give evidence against a decedent's representative by testifying to transactions with the deceased except on consent or implied waiver by the representative prevails in thirty-two jurisdictions: *Alabama, Arkansas, California, Colorado (with certain listed exceptions)*[27], *Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin,* and *Wyoming.*[28] It is to be noted that in some of the states, such as Georgia [29] and Minnesota,[30] if the testimony of the decedent has been preserved and can be produced in evidence by the opposite parties, an interested party may testify in respect to such testimony. The condemned rule as an absolute prohibition of the survivor's testimony prevails in *Iowa, Mississippi, Missouri,*[31] *Pennsylvania,* and *West Virginia.*

Twelve jurisdictions, the majority of which had acted before 1938 and even prior to the Commonwealth Committee report,[32] have adopted remedial statutes consistent with the

[27] E.g., an interested party may give such evidence if conversation takes place in presence of any member of family of deceased over 16 yrs. of age, whose testimony is procurable. Colo Stat. Ann. (1935) c. 177, § 2.

[28] E.g. Ga. Code Ann (1933) § 38-1603. N.J. Rev. Stat. (1937) § 2:97-2 It is to be noted that the Georgia statute provides that "When suit shall be instituted against joint defendants, one of whom shall be the representative of an insane or deceased person, the sane or living party defendant shall not be admitted to testify as to any transaction or communication with the insane or deceased party, when his evidence would tend to relieve or modify the liability of the party offered as a witness and to tend to make the estate of said insane or deceased party primarily liable for the debt or default." Ga. Code Ann. (1933) § 38-1603(7).

[29] Ga. Code Ann. (1933) § 38-1603(8).

[30] Minn. Stat. Ann. (1945) § 595.04. "It shall not be competent for any party to an action or interested party to give evidence concerning conversation or admission of a *deceased or insane* party or person unless testimony of such deceased or insane person concerning such conversation or admission has been preserved and can be produced in evidence and then only in respect to such conversation or admission."

[31] The proposed Missouri Code would abolish this rule. Mo. Evidence Code (Proposed, Mo. Bar, 1948) § 5.01 at 65-66.

[32] Morgan et als., op. cit. supra n. 4.

recommendation, that the survivor of a transaction with a deceased person be permitted to give evidence against a decedent's representative by testifying to transactions with the deceased person. In only five states, however, is the survivor's testimony admitted freely under provisions similar to that of the approved *Connecticut* statutes:[33] *Louisiana, Massachusetts, Oregon, Rhode Island,* and *South Dakota.*[34] In the remaining seven jurisdictions the survivor's testimony is admitted only under special conditions. Under the *Arizona* statute the survivor is incompetent unless required to testify by the court.[35] The *Montana* and *New Hampshire* statutes provide for the admission of the survivor's testimony in the discretion of the trial court when it appears that without such testimony "injustice will be done."[36] In the *District of Columbia,*[37] *New Mexico,*[38] and *Virginia*[39] a survivor may testify, but no verdict may be found on such testimony if uncorroborated. In all of these jurisdictions except *New Mexico* self-serving statements of the decedent are admissible.

Thus, the fourth recommendation has not been followed generally. Of the few jurisdictions having a more liberal rule, only six have the recommended rule.

Deceased Person's Statements

(5) That declarations of a deceased or insane person should be received in evidence if the trial judge shall find (1) that the person is dead or insane, (2) that the declaration was made and (3) that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

[33] Conn. Gen. Stat. (1949) §§ 7895, 7896.

[34] La. Gen. Stat. (1939) §§ 2024, 2026, see Hood v. Glass, 198 So. 543 (La. App. 1940); Mass. Gen. Laws (1932) c. 538, §§ 4, 5; Ore. Comp. Laws Ann. (1940) § 3-103, but cf. § 19-704; R.I. Gen. Laws (1938) c. 538, §§ 4, 5; S.D. Code (1939) § 36.0104.

[35] Ariz. Code (1939) § 23-105.

[36] Mont. Rev. Code (1935) § 10355 (3); N.H. Rev. Laws (1942) c. 392, §§ 25, 26.

[37] D.C. Code (1940) § 14-302 as amended P.L. No. 745, 80th Cong., 2d Sess. (1948), "In a civil action against a person who is legally incapable of testifying. . . ." See comment, 14 D.C.B.A.J. 140 (1948).

[38] N.M. Stat. (1941) § 20-205.

[39] Va. Code (1942) § 6209. This statute applies in any action against a person who for any cause is incapable of testifying.

This recommendation is similar to one approved by all the members of the committee of the Commonwealth Fund and is based primarily on the Massachusetts statute enacted in 1898:

> A declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.[40]

The operation of this statute was given a thoroughly comprehensive study by the committee of the Commonwealth Fund. This inquiry indicated that although enacted over a quarter of a century previously, virtually no criticism had been made of the statute and no technical difficulties in interpretation had developed. The framers of the Model Code admitted their wide departure from the common law at this point.[41] Thus, Rule 503 is even more liberal than the Massachusetts statute or the recommendation here made, and reads as follows:

> Evidence of a hearsay declaration is admissible if the judge finds that the declarant
>
> (a) is unavailable as a witness, or
>
> (b) is present and subject to cross-examination.[42]

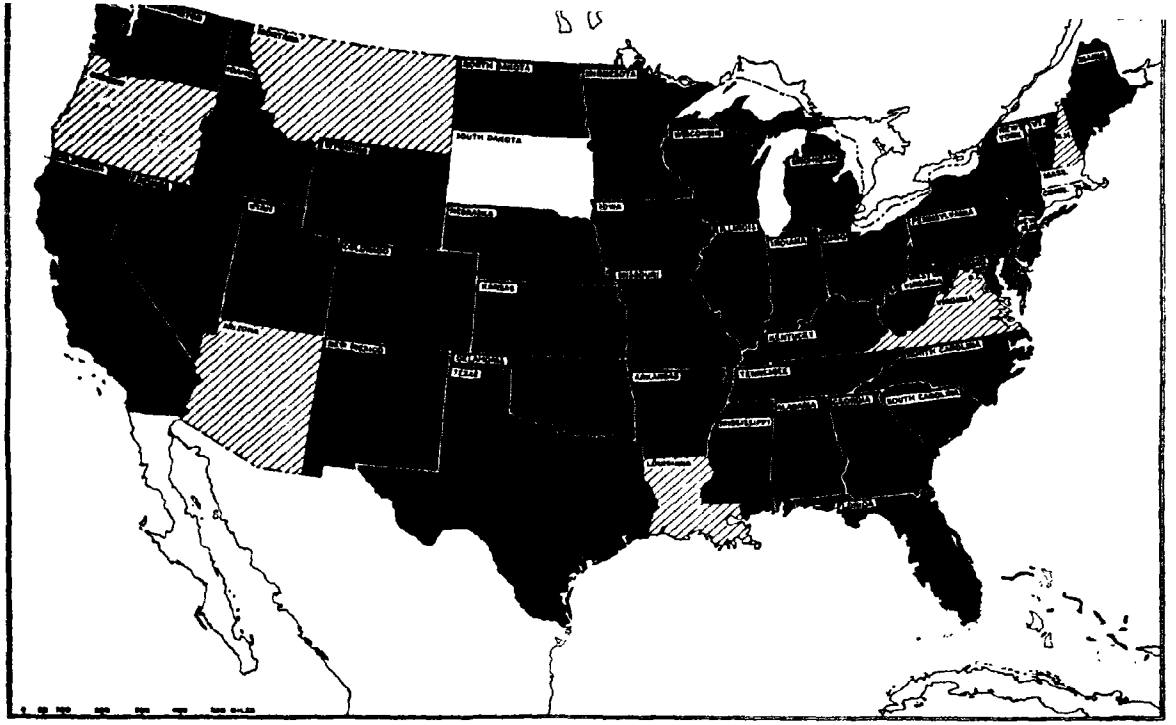
It is to be noted that the position taken by the American Bar Association in 1938 is not as inclusive as that later adopted in the Model Code; however, it goes further than the Massachusetts statute, the application of which is limited to a "deceased person." The American Bar Association, however, did not think it wise to admit declarations of persons otherwise unavailable, other than those deceased or insane, as was allowed under the statute drafted by a majority of the committee of the Commonwealth Fund.[43] Within its scope, how-

[40] Mass. Gen. Laws (1932) c. 233, § 65 as amended L. 1941, c. 363. For discussion see Morgan et als., op. cit supra n. 4 at xx, 37 et seq. Cf V Wigmore on Evidence, op. cit. n. 24, at § 1576.

[41] A.L.I. Model Code of Evidence 47 (1942).

[42] Id. at 231-232.

[43] Cf. two statutes proposed, one approved by all members of the committee, applied to declarations of insane



DECEASED PERSON'S STATEMENTS

Declarations of a dead or insane person received under certain liberalized provisions, analogous to recommended rule

Written statements of dead or insane person received if survivor is permitted to testify and does so

Declarations of dead or insane person admissible only under recognized exceptions to the hearsay rule

ever, the recommendation made by the American Bar Association, although more limited, is consistent with the Model Code.

In all jurisdictions except those discussed below the declarations of a decedent or insane person are admissible only if they can qualify under other recognized exceptions to the hearsay rule, such as dying declarations, admissions against interest, family history, etc. Thus, the customary criticized rule prevails in all but the few jurisdictions named.

In addition to *Massachusetts*, where, as already indicated, this has been the practice since 1898, the declarations of a deceased or in some instances an insane person may be admitted under certain conditions in only a few jurisdictions. Statutes similar to that of *Massachusetts* [44] are those of *Rhode Island* [45] and *South Dakota*,[46] under which the declarations of a decedent are admissible upon a finding by the trial court that they were made before commencement of the action in good faith and on declarant's personal knowledge. In *Connecticut* memoranda and declarations of a decedent are admissible if relating to matters in issue in an action in which decedent's estate is a party or in an action to which those claiming title under or from decedent are parties. Moreover, in civil actions if any party is mentally ill or unable to testify because of incurable illness, relevant memoranda made while sane are admissible.[47] The deceased's written statements are admissible in other states, such as *Oregon* and *Virginia*, in which the survivor of a transaction is permitted to testify and does so.[48]

as well as deceased persons; the other approved by a majority of the committee applied to declarations "of a person deceased, insane or unavailable." Morgan et als. op. cit. supra n. 4 at 48-49.

[44] Mass. Gen. Laws (1932) c. 233, § 65 as amended L. 1941, c. 363.

[45] R.I. Gen. Laws (1938) c. 538, §§ 4-6.

[46] S.D. Code (1939) § 36.0104. In Tennessee an unsuccessful attempt was made to have such a statute adopted. See 16 Tenn.L.Rev. 137, 143-144 (1939).

[47] Conn. Gen. Stat. (1949) §§ 7895, 7896, 7897.

[48] Ore. Comp. Laws Ann. (1940) § 3-103, "(2) . . . when a party to an action, suit or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject matter in his own behalf may also be proven." Va. Code (1942) § 6209. Cf. Minn. Stat. Ann. (1945) § 595.04, quoted supra n. 30.

(6) That the rule of the North Carolina statute that the trial judge may require the disclosure by a physician of a privileged communication from a patient if in the opinion of the judge such disclosure is necessary for the proper administration of justice, is a salutary rule and should be adopted in the other states. . . . Privilege should not be extended to accountants, social workers or journalists.

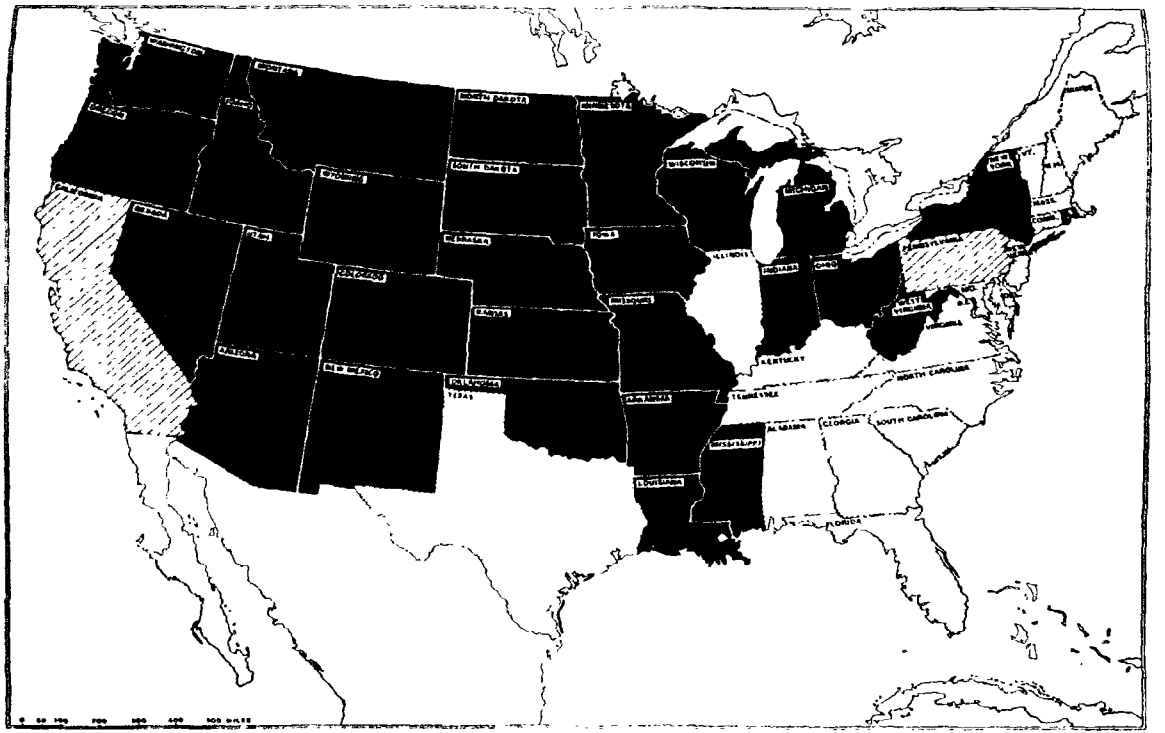
(A) Physician-patient privilege

The privilege respecting communications between doctor and patient was not one recognized at common law, but is one that has been engrafted on the law by statute in more than half of the states. The committee studying this suggested that the privilege was invoked primarily for the suppression of evidence necessary in certain cases, such as personal injury actions.[49] The North Carolina statute, adoption of which was recommended, does not eliminate the privilege but allows the trial court judge in his discretion to compel disclosure of the privileged information where necessary. Rules 220-223 of the Model Code [50] provide for limitations and termination of the privilege under various defined circumstances, such as in an action in which evidence was introduced to show the physician was consulted in order to commit a crime or tort, or an action in which the patient's physical condition is an element of the claim or defense of the patient. Thus, although the Model Code rules provide for invasion of this privilege in several specific situations, its rules would not seem to be as comprehensive as that embodied in the *North Carolina* statute, where the matter is left completely to the discretion of the trial judge as follows:

> Provided that the presiding judge of a superior court may compel such a disclosure if in his opinion the same is necessary to the proper administration of justice.[51]

The first part of the recommendation applies only to those jurisdictions in which communications between physician and

[49] Appendix A at 578.
[50] A.L.I. Model Code of Evidence 159-164 (1942).
[51] N.C. Gen. Stat. (1943) § 8-53.



PHYSICIAN-PATIENT PRIVILEGE

- Physician-patient privilege recognized but limited, judge may compel disclosure when necessary to proper administration of justice.
- Physician-patient privilege not recognized
- Physician-patient privilege recognized, disclosure *may* be required in certain particular types of action
- Physician-patient privilege recognized, *disclosure* of privileged communication not permitted unless privilege waived

patient are privileged: *Arizona, Arkansas, California, Colorado, District of Columbia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio,*[52] *Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, West Virginia, Wisconsin,* and *Wyoming.* It is to be noted that in some of the states the physician-patient privilege is rather limited, thus, in some states applying only to civil cases.[53] As a general rule, of course, the privilege is subject to waiver by the patient.[54]

In all jurisdictions in which such communications are privileged, except in North Carolina as indicated in the recommendation and except for the limited instances noted below, disclosure of a privileged communication to a physician may not be required even if in the opinion of the trial judge such disclosure is necessary for the proper administration of justice. As recommended, such disclosures may be required in the *District of Columbia* [55] in certain criminal cases; while in *California* and *Pennsylvania* in actions to recover damages for personal injuries any physician who has prescribed for or treated the injured person may testify.[56]

(B) Extension of privilege to accountants, social workers or journalists.

In recent years statutes embodying certain novel privileges of secrecy have been enacted.[57] While their history has not been traced, such enactments undoubtedly have resulted from pressure by certain occupational groups. None of these novel privileges are recognized by the Model Code.[58]

Contrary to the recommendation, communications between

[52] The Ohio State Bar Association is recommending substantial abolition of this privilege

[53] See California and Pennsylvania statutes, cited infra n. 56.

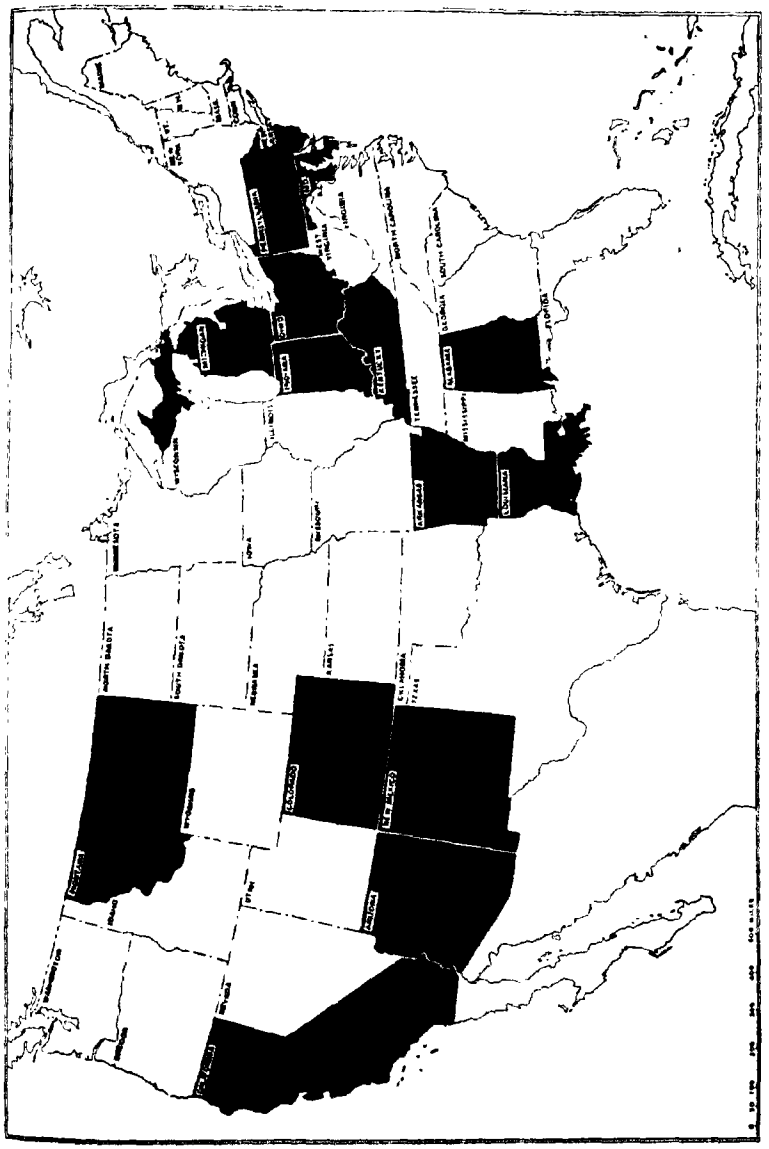
[54] E.g., Iowa Code (1946) § 622.10. Cf. *Howard v. Porter*, 35 N.W. 2d. 837 (Iowa, 1949).

[55] D.C. Code (1940) §§ 14-308, 33-420.

[56] Calif. Code Civ. Proc. (1946) § 1881(4); Pa. Stat. (Purdon, 1930) tit. 28, § 328.

[57] Appendix A at 583.

[58] A.L.I. Model Code of Evidence 22-31, 130-172 (1942).


EXTENSION OF PRIVILEGES
Criticized novel privileges not recognized
Privilege extended to accountants or journalists

accountant and client are privileged in only five jurisdictions: *Colorado, Kentucky, Louisiana, Michigan,* and *New Mexico.*[59] Communciation between journalist and person interviewed are privileged[60] also in eleven jurisdictions: *Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Montana, New Jersey, Ohio,* and *Pennsylvania.*[61] In conformity, however, with the recommendation, it was reported that in no jurisdiction was communication between social worker and client privileged. Thus, while the first part of the recommendation is not being followed by those jurisdictions making communications between physician and patient privileged, it would seem that the personal privileges are not being extended widely in those specific instances subjected to condemnation.

As to this, however, it should be noted that other communications are privileged in many of the jurisdictions. For example, communications between clergyman and penitent are privileged in thirty-one jurisdictions: Arizona, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Communications between husband and wife are privileged:[62] Alabama, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts,

[59] Accountants' privilege: Colo. Stat. Ann. (1947) c. 177, § 9; Ky. Rev. Stat. (1948) § 325.440; La. Gen. Stat. (1939) § 9341; Mich. Comp Laws (1948) § 338.423; N.M. Stat. (1941) § 20-112.

[60] For collection of material discussing pertinent statutes and case law, see N.Y. Law Revision Commission, Report and Study relating to problems involved in conferring upon newspapermen a privilege which would legally protect them from divulging sources of information given them. Leg. Doc. (1949) No. 65A.

[61] E.g., Ala. Code (1940) tit. 7, § 370; Ark. Stat. Ann. (1947) § 43-917; Calif Code Civ. Proc. (1946) § 1881(6), limited privilege, "the sources of any information procured for publication and published in a newspaper"; Ind. Stat (Burns, 1933) § 2-1733 as added 1941; Mont. Laws (1943) c. 196; N.J. Rev. Stat. (1937) § 2:97-11. It is to be noted that the bill introduced in 1949 in the New York legislature for recognition of the privilege for journalists was not enacted. N.Y. Times, March 9, 1949, p. 18, col. 2.

[62] See Vernier, American Family Laws, § 226 at 583, 586-587 (1935) for analysis of such statutes.

Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. These two privileges are ones traditionally respected although not recognized at common law.[63] Though perhaps subject to some criticism, as are all privileges, these were not expressly condemned by the American Bar Association and are to be found in the Model Code, Rules 214-220.[64]

Other privileged communications, some rather novel, prevail in certain of the states. Communications of and to a public official on official business are privileged in nine jurisdictions: California, Colorado, Idaho, Iowa, Minnesota, Montana, Nevada, Oregon, and Utah.[65] It is to be noted that such privilege is not perhaps subject to condemnation, because it may be considered analogous to the common-law privilege for secrets of state and official information,[66] which is incorporated in the Model Code.[67] Communications between attorney and secretary are privileged in Arizona, Iowa, Nevada, and Utah.[68] This may be viewed primarily as an extension of the well recognized privilege of attorney-client communications. Communications between registered nurse and patient, analogous to that of physician and patient, are privileged in Arkansas and New Mexico.[69] In Montana any person engaged in teaching psychology in any school and who observes and studies child mentality is not permitted to testify in any civil action without the consent of the parent or guardian of any child so taught or observed.[70] Thus, it would seem that while the recommendation as to certain limitations of special instances

[63] Wigmore, op. cit. supra n 24, §§ 2332, 2394.

[64] A.L.I. Model Code of Evidence 151-159 (1942).

[65] E.g., Calif. Code Civ. Proc. (1946) § 1881(5); Colo. Stat. Ann. (1935) c. 177, § 9(5); Iowa Code (1946) § 622.11; Mont. Rev. Code (1935) § 10536.

[66] Wigmore, op. cit. supra n 24 at §§ 2368-2371.

[67] A.L.I. Model Code of Evidence, Rules 227-228 (1942).

[68] E.g., Ariz. Code (1939) § 23-103(4); Utah Code Ann. (1943) § 104-49-3(2).

[69] Ark. Stat. Ann. (1947) § 28-607; N.M. Stat. (1941) § 20-112(d).

[70] Mont. Rev. Code (1935) § 10536 (6).

of privilege is being followed, at the same time new privileges, perhaps subject to the same condemnation [71] as those mentioned by name in the recommendation, are being developed contrary to its principle.

Evidence of Business Records

(7) That the rule of the uniform business records as evidence act, drafted by the Uniform Laws Conference in 1936 . . . should be adopted in the several states.

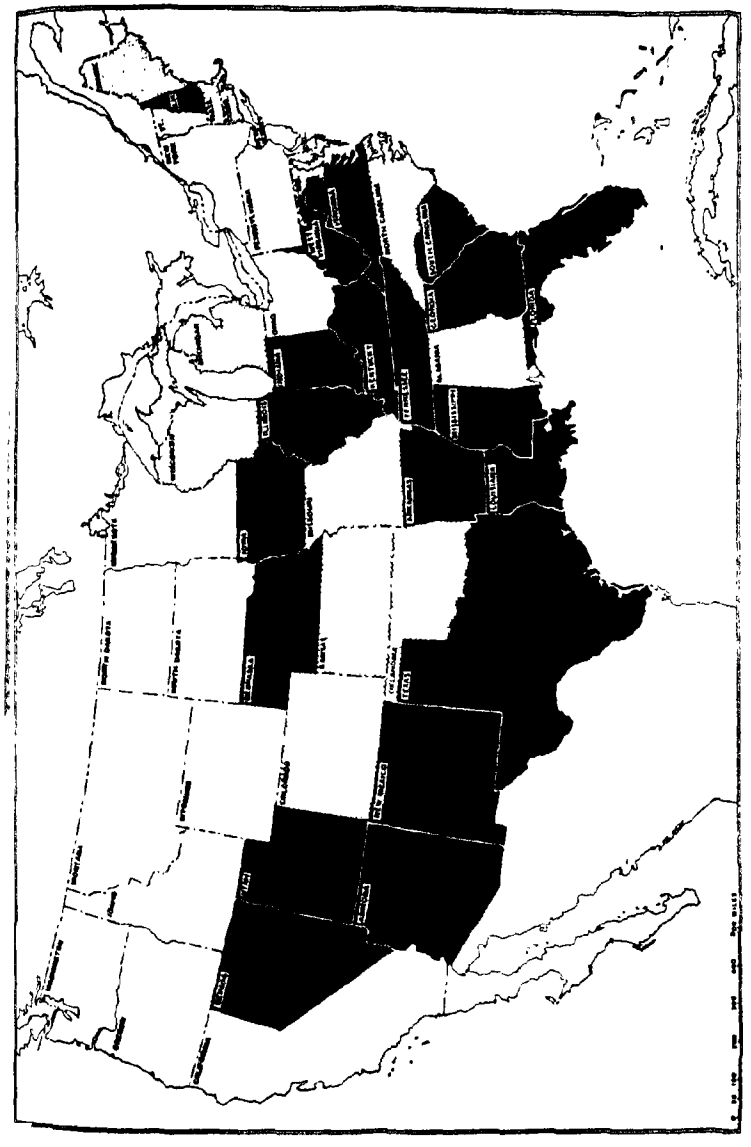
Common-law rules under which business entries could be received as evidence were very strict. The person making the entries had to be identified and the entries authenticated as his own; he had to be dead at the time of trial; he must have had personal knowledge of the transaction recorded, and the entries must have been made in the regular course of business and fairly contemporaneously with the transaction to which they related.[72] The application of this exception to the hearsay rule resulted in many limitations, and the rule as so limited was long recognized as out of date. It was subjected to examination by a committee of the Commonwealth Fund, which in addition formulated an improved rule similar but more limited than that recommended.[73] In 1936 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Business Records as Evidence Act.[74] For the purpose of promoting uniformity among the states the American Bar Association recommended that this act be adopted. It makes admissible as competent evidence the record of a tran-

[71] See Wigmore, op. cit. supra n. 24 at § 2285, analysis of the general principle of privileged communications. Cf. Report of Committee on Improvements in the Law of Evidence, Appendix A at 583. "The correct tendency would rather be to cut down scope of the existing privileges, instead of to create any new ones. We recommend that the legislatures refuse to create any new privileges for secrecy of communications in any occupation."

[72] Wigmore, op. cit. supra n. 24 at § 1518 et seq.

[73] Morgan et als. supra n. 4 at 63. The statute is quoted, Appendix A at 587. See Tracy, "What Progress in Reform of Evidence Rules?" 20 J. Am. Jud. Soc'y 80, 81 (1936) for list of states which had adopted such reform by 1936.

[74] IX Uniform Laws Annotated 263-265 (1942); id. Cum. Ann. Pocket Part 103 (1949).



EVIDENCE OF BUSINESS RECORDS

Admission of business records governed by Uniform Business Records as Evidence Act

Admission of business records governed by statute or case law liberalizing the common law rules

Admission of business records governed by criticized common-law principles

action insofar as relevant upon the testimony of a qualified witness as to the mode of its preparation, that it was made in the regular course of business, and if in the court's opinion the sources of information, method, and time of preparation justify its admission.

The admission of business records as an exception to the hearsay rule is governed by the recommended act in sixteen jurisdictions[75]: *California, Delaware, District of Columbia, Idaho, Minnesota, Montana, New Jersey,*[76] *New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Washington,* and *Wyoming.* The more limited act, prepared by a committee of the Commonwealth Fund, was adopted by several of the states, while other states also have special statutes liberalizing the rules as to this problem: *Alabama, Colorado, Connecticut, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Oklahoma, Rhode Island,* and *Wisconsin.*[77] Without the aid of a special statute the North Carolina courts have established a greatly modified and liberal rule as to business records as evidence in a line of cases beginning in 1905.[78]

[75] Calif. Civ. Code (1946) §§ 1953e-1953h; Del. Rev. Code (1935) § 4704a as added L. 1945, c. 252; Idaho Code (1947) §§ 9-413 to 9-416; Minn. Stat. Ann. (1945) §§ 600.01-600.04; Mont. Rev. Code (1935) §§ 10598.1-10598.4 added L. 1937, c. 59; N.Y.C.P.A. (1948) § 374a; N.D. Rev. Code (1943) § 31-0801; Ohio Gen. Code (Supp.) §§ 12102-22 to 12102-25; Ore. Comp. Laws Ann. (1940) §§ 2-819 to 2-819c as added L. 1941, c. 414; Pa Stat. (Purdon, Supp.) tit. 28, §§ 91a-91d as added L. 1939, No. 35; S.D. Code (1939) § 36.1001; Vt. Rev. Stat. (1948) § 1753-56; Wash. Sess. Laws (1947) c. 53; Wyo. Comp. Stat. Ann. (1945) §§ 3-3122 to 3-3125.

[76] N.J. Stat. Ann. (Supp.) §§ 2:98-35 to 2:98-39 as added L. 1949, c. 124.

[77] The statute prepared by the committee of the Commonwealth Fund was followed with some variations by Alabama, Connecticut, Maryland, Michigan, and Rhode Island. Ala. Code (1940) tit. 7, § 415; Conn. Gen. Stat. (1949) § 7903; Md. Code Ann (Supp.) art. 35, § 68; Mich Comp Laws (1948) § 617.53; R I. Gen. Laws (1938) c. 538, § 1. Typical of other statutes are: Colo. Stat. Ann. (1935) c. 177, § 3; Kan. Gen. Stat. (1935) § 60-2869

[78] See Insurance Co. v. R R., 138 N.C. 43, 50 S.E. 452 (1905); Breneman Co. v. Cunningham, 207 N. C. 77, 81, 175 S.E. 829 (1934). Under this line of cases it is no longer necessary that the person making the entries be dead, or even that he be identifiable. If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they are made, they are admissible. See also State v. Lippard, 223 N.C. 167, 25 S.E. 2d 594 (1943); Atlas Supply Co. v. McCurry, 199

The admission of business records is governed by the criticized common-law rule in twenty jurisdictions, in some of which the rule has been embodied into statute: *Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, South Carolina, Tennessee, Texas, Utah, Virginia,* and *West Virginia.*[79]

Thus, surprising progress toward liberalizing the common-law rule has been reported since 1936, as the adoption of the recommended uniform law in sixteen jurisdictions demonstrates. Moreover, the existence of special statutes in other jurisdictions, particularly those patterned on the Commonwealth Fund proposal, is indicative of the tendency to depart from the common law.

Opinion Rule

(8) That ordinary witnesses should be allowed to state their conclusions with respect to ordinary matters subject to explanation, thus permitting a witness to state his observation in a natural and non-technical manner.

The rule sanctioned here was based on the 1934 study and recommendation of the New York Commission on the Administration of Justice, which had endorsed the abandonment of the common-law opinion rule prohibiting a qualified lay witness from stating the inferences drawn by him from something he has seen.[80] As stated in the Model Code's introduction to its rules on expert and opinion evidence:

> The entire body of the law dealing with opinion evidence of both lay and expert witnesses needs revision. The rules evolved in this country prohibiting a witness from stating in terms of inference relevant matters which he has perceived have been the sources of numerous trivial appeals and many undeserved reversals. They are

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N.C. 799, 151 S.E. 641 (1930); Flowers v. Spears, 190 N.C. 747, 130 S.E. 710 (1925).

[79] E.g., Ark. Stat Ann. (1947) §§ 28-924, 29-925; Iowa Code (1946) §§ 622.28, 622.29; Neb. Rev. Stat. (1943) §§ 25-1212, 25-1221.

[80] N.Y. Com'n on Administration of Justice, Report 298 (1934).

Opinion Rule
Opinion of ordinary witnesses stating their conclusions with respect to ordinary matters may be received
Opinion of ordinary witnesses received in
Practice as to statements of opinion by ordinary witnesses not yet settled
Opinion of ordinary witnesses may not be received

uncertain in phrasing and capable of capricious application. There has appeared in the more recent decisions a tendency to disregard them or at least to refuse to interfere with their application by the trials courts.[81]

In accord with this, Rule 401 of the Model Code is similar in principle to that advocated by the American Bar Association:

> (1) In testifying to what he has perceived a witness, whether or not an expert, may give his testimony in terms which include inferences and may state all relevant inferences, whether or not embracing ultimate issues to be decided by the trier of fact, unless the judge finds
>
> (a) that to draw such inferences requires a special knowledge, skill, experience, or training which the witness does not possess, or
>
> (b) that the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inference or stating inferences, and his use of inferences in testifying will be likely to mislead the trier of fact to the prejudice of the objecting party.
>
> (2) The judge may require that a witness, before testifying in terms of inference, be first examined concerning the data upon which the inference is founded.[82]

The opinion of ordinary witnesses stating their conclusions with respect to ordinary matters subject to explanation, as recommended, may be received in thirteen jurisdictions: *Arkansas, Colorado, Connecticut, Delaware, Kansas (limited as to certain matters only), Louisiana, Maine, Missouri, Nevada, New Hampshire, South Dakota, Utah,* and *Wyoming. Alabama* and *Iowa* courts frequently apply a concept known as the "shorthand rendition of the facts," under which many opinions of nonexpert witnesses are admissible. In *Michigan* control of testimony of witnesses stating conclusions is considered largely within the discretion of the court and while witnesses generally are not allowed to state conclusions, where

[81] A.L.I. Model Code of Evidence 198 (1942).

[82] Id. at 199-200.

a witness gives fully and definitely the facts on which a conclusion is based "there is no presumption of prejudice." [83] In *Arizona, California, Indiana,* and *South Carolina* the opinions of ordinary witnesses may be received only when the facts cannot be accurately stated without expressing an opinion.

The opinion of ordinary witnesses stating their conclusions with respect to ordinary matters subject to explanation, contrary to the recommendation, may not be received in twenty-six jurisdictions: *District of Columbia, Florida, Georgia, Idaho, Illinois, Kentucky, Maryland,*[84] *Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia,* and *Wisconsin.* In *Massachusetts, Minnesota,* and *Ohio* [85] the practice as to this matter is not yet settled.

The recommended rule prevails only in a minority of jurisdictions. The number, however, is sizeable, and since this is a clear departure from common-law rules, the trend would seem to be significant.

Expert Testimony

(9) That the principles embodied in the uniform act of 1937 relating to expert testimony . . . should be adopted in the several states by appropriate legislation or rules of court.

"The complications, futilities, and dissatisfaction associated with expert testimony have long been the subject of discussion, both within and without the profession." [86] Recognition of the need for revision is to be found in the study devoted to this matter by the National Conference of Commissioners on Uniform State Laws, which recommended a uniform act in 1937. This was designated a model act in 1943.[87] Rules 403-410 of

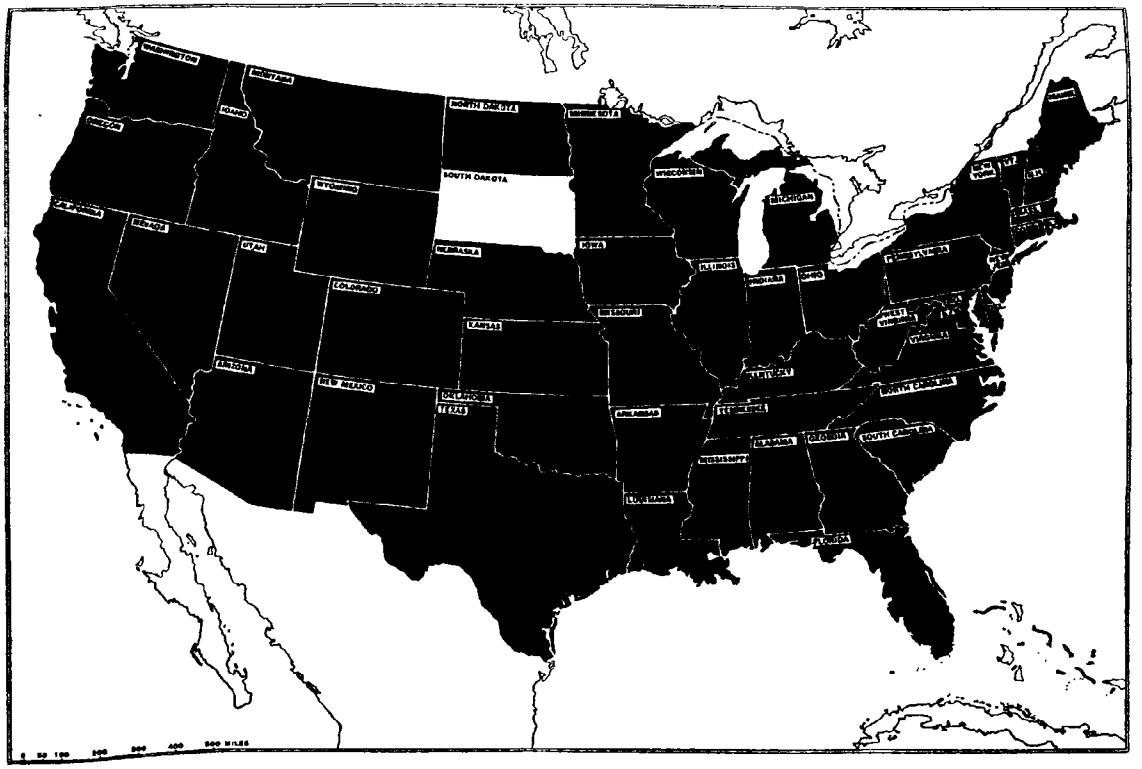
[83] See McDuffie v. Root, 300 Mich. 286, 1 N.W. 2d 544 (1942).

[84] But a layman who observed an allegedly insane person may testify as to his opinion concerning sanity or insanity.

[85] In Ohio it is the rule that non-expert witnesses must testify as to facts and not opinions or conclusions, but opinions of lay witnesses on ordinary matters have been received in many cases and reviewing courts have held such testimony proper.

[86] Appendix A at 572.

[87] IX Uniform Laws Ann., op. cit. supra n. 74 at 114 (1949).



EXPERT TESTIMONY

Admission of expert opinion evidence governed by recommended Model Expert Testimony Act

Admission of expert opinion evidence governed primarily by common-law principles

the Model Code [88] are substantially similar to the corresponding sections of the uniform act, adoption of which was recommended by the American Bar Association. In substance the uniform act and the model code provide: for the appointment of expert witnesses by the court on its own motion, or on request of either party, such appointment to be made only after notice and possible agreement by the parties as to the experts to be selected; no expert witness to be called by either party unless due notice is given; after the appointment of an expert witness the parties submit their persons, things or places under their control to the expert witness for examination for the purpose of enabling the witness to testify, the scope of such examination to be determined by the judge; reports to be filed by the experts to be open to inspection by the parties; expert witnesses appointed by the judge to be examined as if called by an adverse party; any report made by the expert permitted to be read at the trial; an expert witness permitted to state inferences, whether based on personal observation or evidence introduced at the trial, without specifying hypothetically the data on which the inferences are based even though required during examination or cross-examination to specify those data.

The admission of expert opinion evidence is governed by the recommended Model Expert Testimony Act only in *South Dakota,* in which state it was adopted by rule of the Supreme Court in 1942. In *Vermont* [89] a special statute governs the question of the admission of expert opinion evidence and appears to be based on Section 9 of the Model Act. The admission of expert opinion evidence is still governed by the outmoded common-law principles in all other jurisdictions, in some of which, however, the courts exhibit a liberal attitude.[90]

[88] A.L.I. Model Code 202-216 (1942).

[89] Vt. Stat. (1947) § 1748.

[90] E.g., see Grismore v. Consol. Prod. Co. 232 Iowa 328, 5 N.W. 2d 646, 655 (1942).

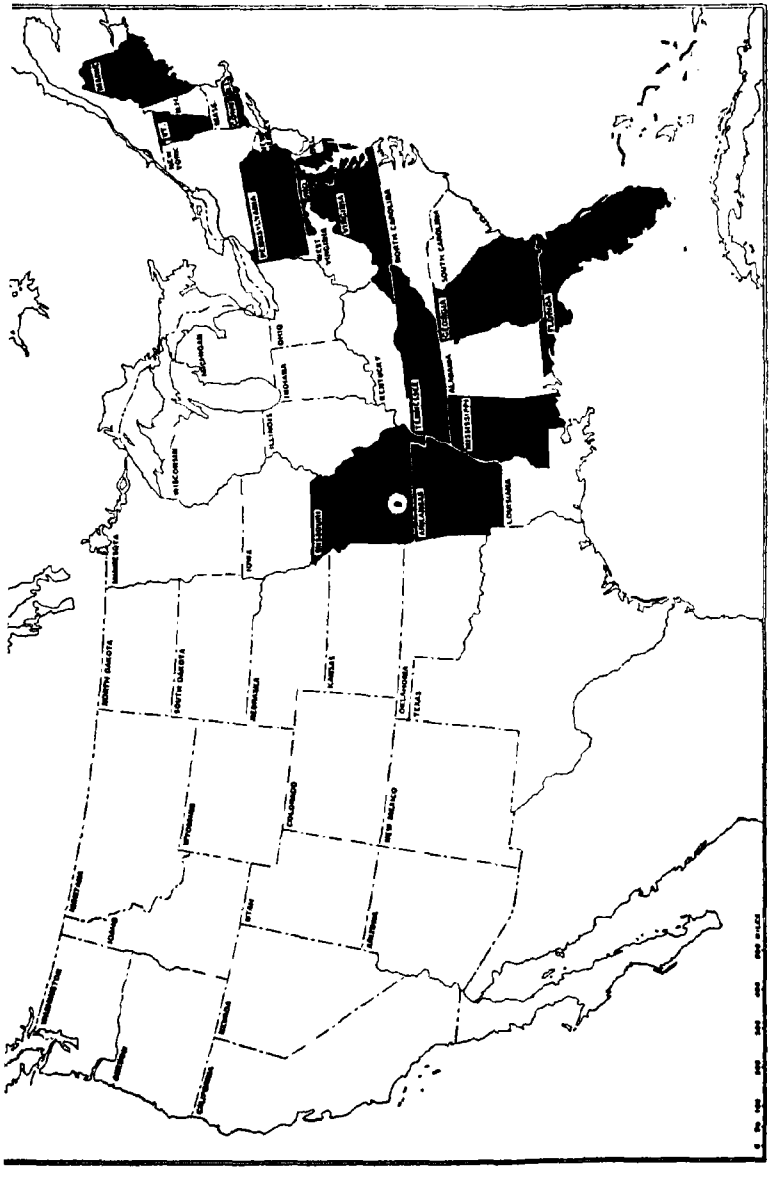
Certified Copies of Court Records

(10) That the provisions of new Federal Rule 44, permitting the introduction in evidence of certified copies of official records should be adopted in all of the states.

Historically, in England all court records were in London and the mode of proving them was quite simple. A clerk's copy as such was only admissible in certain courts, but an exemplified copy, one to which was affixed the court seal, thus indicating it was obtained by special court order, was admissible without limitation.[91] In the courts of the forty-nine jurisdictions comprising the United States a centralized system was and is lacking and the English rules proved inadequate for the situation thus created. As a result statutory action became necessary. While in some states, such as *California*,[92] the provisions were generalized and adequate, in others the legislation took the form of multitudinous detailed statutes covering various kinds of official records, and confusion resulted. This problem existed in the federal jurisdiction and was met by Federal Rule of Civil Procedure No. 44, the universal adoption of which was recommended. Provisions similar to it are embodied also in Rule 517 of the model code.[93] Federal Rule No. 44 reads as follows:

> (a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept,

[91] V Wigmore, op. cit. n. 24, § 1681.
[92] Calif. Code Civ. Proc. (1946) §§ 1905, 1918.
[93] A.L.I. Model Code of Evidence 276-278 (1942).



CERTIFIED COPIES OF COURT RECORDS

Provisions substantially similar to Federal Rule of Civil Procedure No. 44 govern admission of certified copies of official records

A series of special statutes governs introduction in evidence of certified copies of specific kinds of records

authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) Proof of Lack of Record. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.[94]

Provisions substantially similar to Federal Rule of Civil Procedure No. 44, permitting the introduction in evidence of certified copies of official records, as recommended, are in force in thirty-five jurisdictions, in some of which, as noted above, the statutes antedate the federal rule: *Alabama, Arizona, California, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin,* and *Wyoming.*[95]

[94] Moore, op. cit. supra n. 20, 3078 (1939).

[95] E.g., Ala. Code (1940) tit. 7, § 393; Ariz. Code (1939) § 21-926; Colo. R.Civ.P., Rule 44(a); Idaho Code (1947) §§ 9-312 to 9-315; Ind. Stat. (Burns, 1946) §§ 2-1605 to 2-1607; Kan. Gen. Stat. (1935) § 60-2854; Ky. Rev. Stat. (1946) §§ 422.020, 422.050; Mich. Comp. Laws (1948) §§ 617.15, 617.44; Minn. Stat. Ann. (1945) §§ 600.13, 600.17, 600.22; Mont. Rev. Code (1935) §§ 10551, 10555, 10568; Neb. Rev. Stat. (1943) §§ 25-1279 to 25-1282; Nev. Comp. Laws (1929) §§ 8955-8960; N.M. Stat. (1941) § 19-101(44); N.Y. C.P.A §§ 367, 382; N.C. Gen. Stat. (1943) §§ 8-34, 8-35; N.D. Rev. Code (1943) §§ 31-0902 to 31-0912; Okla. Stat. (1937) tit. 12, §§ 486-489; Ore. Comp. Laws Ann. (1940) §§ 2-728, 2-730; S.C. Code (1942) § 713; S.D. Code (1939) §§ 36.0801, 36.0901, 36.0902; Utah Code

In Connecticut and Pennsylvania everything provable under Rule 44 may be proved by virtue of various sections of the statutes. These states have, however, no general statute comparable to Rule 44, and thus would be subject to criticism on this ground. A series of special statutes governs the introduction in evidence of certified copies of specific kinds of records in *Arkansas, Florida, Georgia, Maine, Maryland, Mississippi, Missouri, Rhode Island, Tennessee, Vermont,* and *Virginia.*[96] Such collections of miscellaneous statutes were condemned by the committee studying these matters, since the law was difficult to find thereunder and in some instances no provision was made for the proof of certain records.

Judicial Notice of Foreign Law

(11) That the uniform act drafted in 1936, requiring that judicial notice be taken of the common law and statutes of other states of this union and that the law of a foreign country be determined by the court, should be adopted in all of the states.

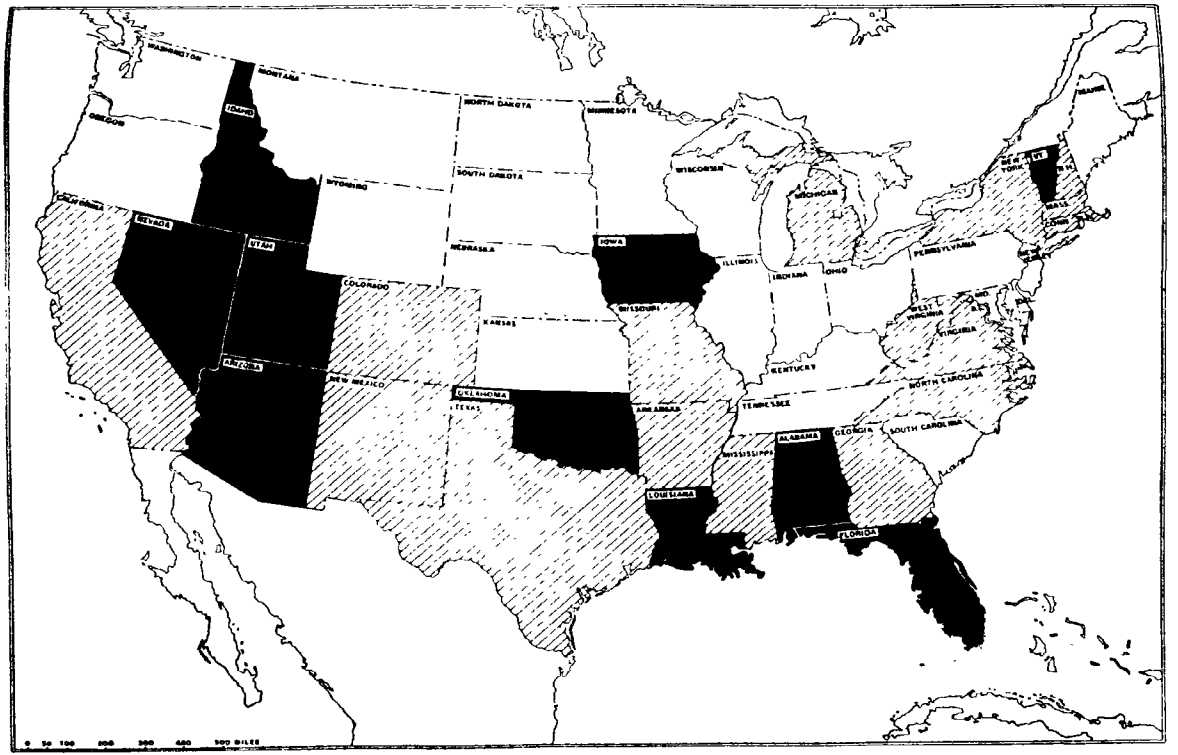
"Foreign" law is not judicially noticed at common law, and in this country the law of any state other than that of the forum is foreign law. This traditional rule has posed many difficulties in a country comprised of forty-nine jurisdictions, in each of which the law of another jurisdiction is likely to come into issue as a result of the many interstate activities. Proof of such law to the jury as at common law has proved unsatisfactory, since a jury is not law trained. To meet this problem the National Conference of Commissioners on Uniform State Laws formulated an act which was approved in 1936[97], adoption of which was recommended. Rules 802 and 803 of the Model Code are in substantial accord with the uniform statute.[98] In substance the uniform act and the model code provide that: courts shall take judicial notice of the common

Ann. (1943) §§ 104-47-10 to 104-47-21; W.Va. Code (1943) §§ 5719-5721; Wis. Stat. (1947) §§ 327.15 to 327.18.

[96] E.g. Ark. Stat. Ann. (1947) §§ 28-901 to 28-927.

[97] IX. Uniform Laws Ann., op. cit. supra n. 74 at 269, 271 (1942). See Appendix A at 582, Wigmore, op. cit. supra n. 24 at §§ 2572-2573.

[98] A.L.I. Model Code of Evidence 320-322 (1942). See Morgan, "Judicial Notice," 57 Harv.L.Rev. 270 (1944).



JUDICIAL NOTICE OF FOREIGN LAW

Judicial notice of foreign law is governed by the Uniform Judicial Notice of Foreign Law Act

Judicial notice of foreign law governed by special statutes

Judicial notice of foreign law governed by criticized common-law principle

law and statutes of all jurisdictions of the United States, any party may present admissible evidence of such laws upon the giving of reasonable notice to the adverse parties, and the determination of such law shall be made by the court and not by the jury.

Judicial notice of the common law and statutes of other states of the nation is governed by the Uniform Judicial Notice of Foreign Law Act, as recommended, in twenty-two jurisdictions: *Delaware, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Minnesota, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, Wisconsin,* and *Wyoming.*[99] Thus again, surprising progress has been made in securing adoption of the recommended act. It is to be noted that other states have provided special statutes or rules to meet this problem, most of which achieve the same result as the uniform law and some of which antedate it: *Arkansas, California, Colorado, Connecticut, Georgia, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Carolina, Texas, Virginia,* and *West Virginia.*[100]

Judicial notice of the common law and statutes of other states may not be taken and is still governed by criticized

[99] Del. Rev. Code (1935) §§ 4696, 4697 enacted L. 1945, c. 251; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 51, § 489-2; Ind. Stat. (Burns, 1946) §§ 2-4801 to 2-4807; Kan. Gen. Stat (Supp.) §§ 60-2878 to 60-2880; Ky. Rev. Stat. (1946) §§ 422.081-422.087; Me. Rev. Stat. (1944) c. 100, §§ 135-140; Md. Code Ann. (1939) art. 35, §§ 56-62; Minn. Stat. Ann. (1945) §§ 599.04-599.10; Mont. Rev. Code (1935) §§ 10532.1-10532.7 enacted L. 1937, c. 60; Neb. Laws (1947) c. 93; N.J. Rev. Stat. (Supp.) §§ 2:98-28 to 2:98-34; N.D. Rev. Code (1943) §§ 31-1003 to 31-1005; Ohio Gen. Code (Supp.) §§ 12102-3 to 12102-37; Ore. Comp. Laws Ann. (1940) §§ 2-503 to 2-509; Pa. Stat. (Purdon, Supp.) tit. 28, §§291-297; R.I. Sess. Laws (1940) c. 939; S.C. Laws (1948) p. 1813; S.D. Code (1939) § 36.0702; Tenn. Code Ann. (Supp.) §§ 9773.1-9773.7; Wash. Rev. Stat. (1941 Supp.) §§ 1278-1284; Wis. Stat. (1947) § 328.01; Wyo. Comp. Stat. Ann. (1945) §§ 3-3109 to 3-3115.

[100] E.g., cf. Ark. Stat. Ann. (1947) § 28-109; Calif. Code Civ. Proc. (1946) § 1875; Conn. Gen. Stat. (1949) §§ 7886, 7887; Ga. Code Ann. (1933) § 38-112; Mass. Gen. Laws (1932) c. 233, § 70; Miss. Code (1942) § 1761; Mo. Rev. Stat. Ann. (Supp.) § 847.54(b), Sup. Ct. Rule 3.14; N.M. Stat. (1941) § 19-101(44d); N.Y.C.P.A. § 344a as added 1943 (under this statute judicial notice of foreign law is a matter to be decided by the court, see 9 N.Y. Jud. Coun. Rep. 271 et seq.); N.C. Gen. Stat. (1943) §§ 8-3, 8-4; Tex. R.Civ.P. (1948 Supp.) Rule 184a (this rule is based on the Model Code); Va. Code (1942) § 6192a; W.Va. Code (1943) § 5711.

common-law principles in ten jurisdictions: *Alabama, Arizona, Florida, Idaho,*[101] *Iowa,*[102] *Louisiana, Nevada, Oklahoma, Utah,* and *Vermont.*

Thus, in a majority of states the recommended uniform statute or an analogous rule has been enacted, while in only eleven jurisdictions the inadequate common-law rule is still followed.

Administration of Oath

(12) That witnesses should be sworn separately, the oath being administered to each witness as he takes the stand to testify; and that the judge should see that it is administered in a dignified and understandable way, either by himself or by the clerk.

This recommendation is aimed at regularizing the mode of administration of the oath to witnesses in order to impress upon them more vividly the sense of responsibility which its taking should impart. The formal requirements of the recommendation of the American Bar Association and the rule of the Model Code are aimed at eliciting the truth by requiring a witness to express his purpose to tell the truth in a manner so as to bind his conscience. Thus, the Model Code requires that

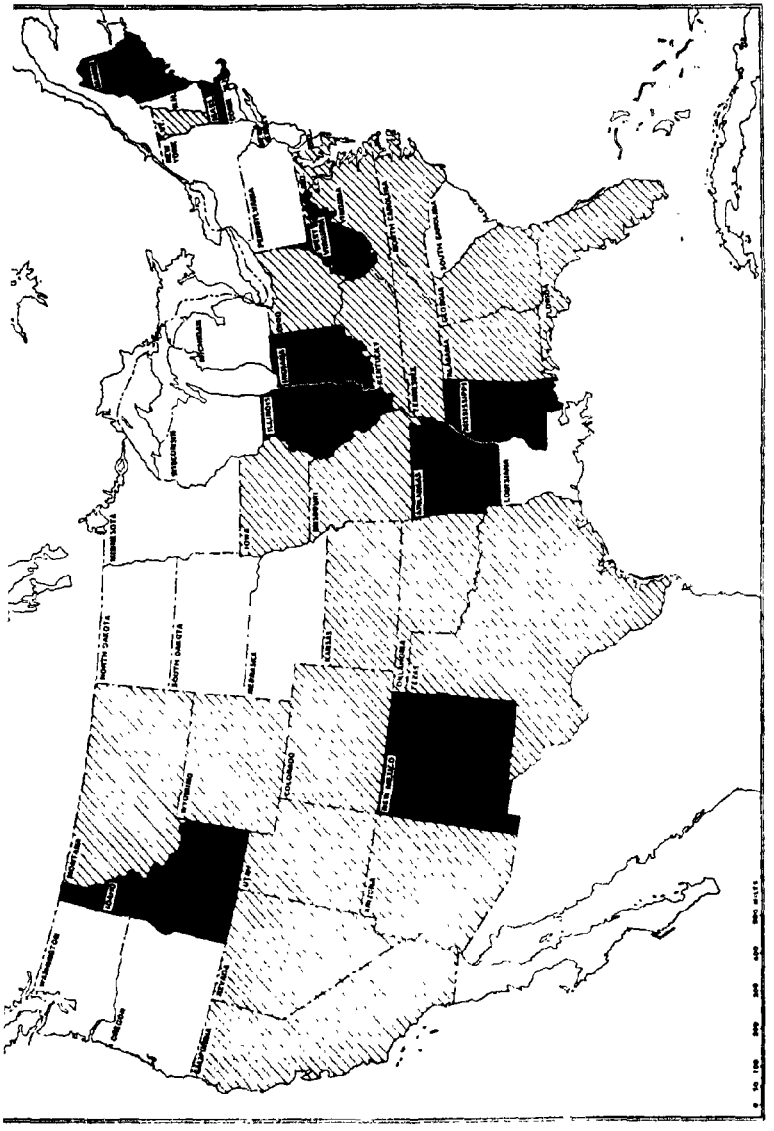
> Every witness before testifying shall be required to express his purpose to testify only to the truth, by oath or, at the option of the witness or the judge, by any other method, including affirmation, which the judge finds to be binding upon the conscience of the witness.[103]

Witnesses are sworn separately, the oath being administered to each witness as he takes the stand to testify (the approved rule) in only eighteen jurisdictions: *Connecticut, Delaware, District of Columbia, Louisiana, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Da-*

[101] Idaho Code (1947) § 9-101.

[102] Common law of another state may be proved as facts. Iowa Code (1946) § 622.61. Statutes are judicially noticed. Iowa R.Civ.P., Rule 94.

[103] A.L.I. Model Code of Evidence, Rule 103 at 100 (1942).


ADMINISTRATION OF OATH TO WITNESSES
Witnesses sworn separately
Witnesses sometimes sworn separately, sometimes in a group
Witnesses sworn as a group

kota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, and *Wisconsin.*

In the following twenty-two states witnesses are sometimes sworn separately in the approved manner and sometimes sworn in groups: *Alabama, Arizona, California, Colorado, Florida, Georgia, Iowa, Kansas, Kentucky, Maryland, Missouri, Montana, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia,* and *Wyoming.*

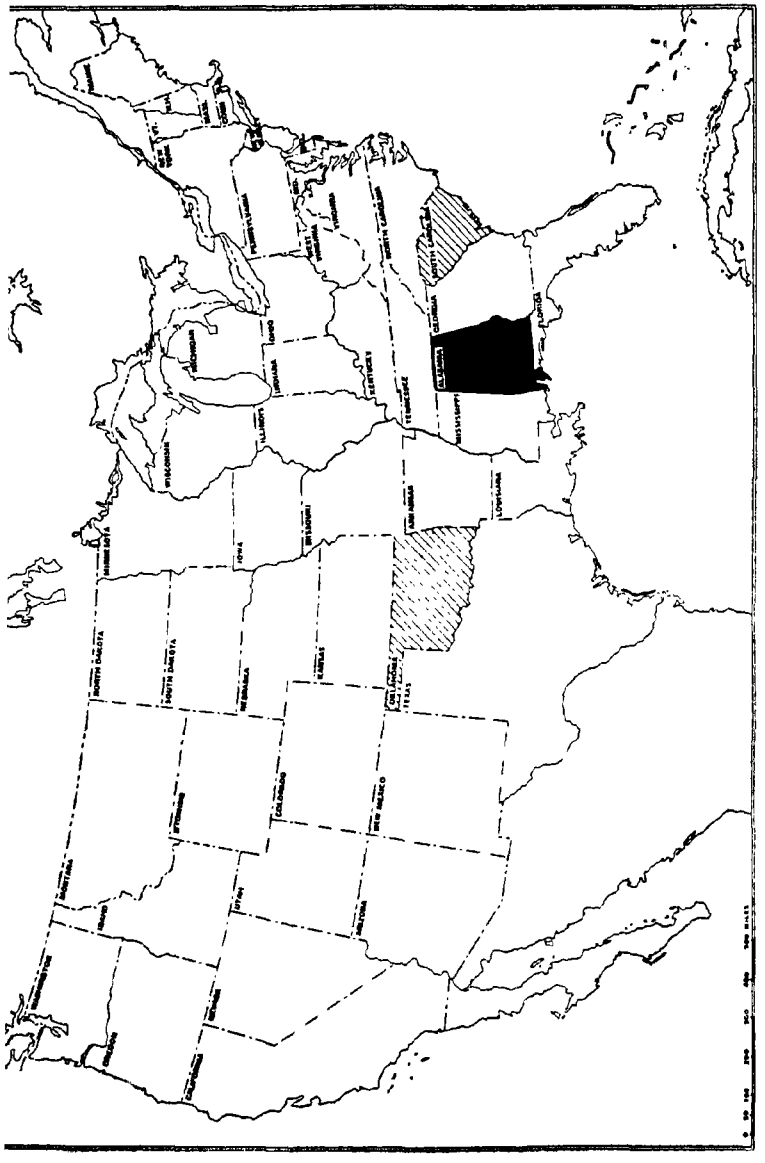
Witnesses commonly are sworn as a group in nine jurisdictions: *Arkansas, Idaho, Illinois, Indiana, Maine, Massachusetts, Mississippi, New Mexico,* and *West Virginia.*

The oath is always administered by the judge, as approved, only in *Michigan* (frequently), certain counties of *Nebraska,* some sections of *Texas,* and throughout *Washington.*[104] As recommended, the oath is administered by the clerk in twenty-two jurisdictions: *Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Virginia, West Virginia,* and *Wisconsin.* The oath is administered by either the judge or clerk, as permitted by the recommendation in *Alabama, Arizona, Arkansas, California, Colorado, Indiana, Iowa, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont,* and *Wyoming.*

The oath is administered as follows in the remaining jurisdictions: *Georgia,* by the attorney or the clerk; *Kentucky,* anyone authorized by and in the presence of the court; *Pennsylvania,* a matter of local practice, being variously administered by the judge, crier, tipstaff, etc.

It must be noted that because of variations, which are primarily matters of local practice, it is difficult to determine whether procedure in the forty-nine jurisdictions conforms to the recommendation that the oath be administered with dignity. For example, the practice recommended by the Com-

[104] Court Rule, 1942, Wash. Rev. Stat. (Remington, 1943 Supp.) § 308-27.



SCINTILLA RULE

Scintilla rule abandoned

If there is a scintilla of evidence tending to prove the facts in issue and no contradicting evidence, the court will direct a verdict in favor of the party bearing the burden of proof

Where a scintilla of evidence is offered, submission to the jury is required

mittee on Improvements in the Law of Evidence,[105] of having the oath repeated by the witness, is not followed in any jurisdiction. Nor does any jurisdiction require all persons in the courtroom to stand as the oath is administered, as also recommended by that committee.[106] It would seem that the administration of the oath to the witness by the court amidst absolute attention and silence on the part of everyone else in the courtroom might be even more impressive than the repetition of the oath with the audience standing, no information has been secured as to whether this practice prevails in any jurisdiction.

Scintilla Rule

(13) That the scintilla rule as to the sufficiency of evidence should be abolished.

The "scintilla rule" is one requiring submission of a particular issue to the jury, even if only a scintilla of evidence, that is, the smallest amount of evidence that can be imagined, has been introduced on the issue. The question is thus one of the sufficiency of evidence to go to the jury. This rule, which was repudiated in England in the nineteenth century, has been abandoned in the federal courts and in most states.[107] In *Alabama,* however, when a scintilla of evidence is offered, submission of the case to the jury is required,[108] and in *Oklahoma* and *South Carolina* if there is a scintilla of evidence tending to prove the fact or facts in issue and there is no contradicting or impeaching evidence whatever, the court will direct a verdict in favor of the party bearing the burden of proof.

Examination of Witnesses

(14) That the provisions of the new Federal Rule 43(b) should be adopted in the several states.

Federal Rule of Civil Procedure, Rule 43(b) reads as follows:

> A party may interrogate any unwilling or hostile party by leading questions. A party may call an adverse party or an officer, direc-

[105] Appendix A at 574.
[106] Ibid.
[107] See Wigmore, op. cit. supra n. 24, § 2494; Moore, op. cit. n. 20 at 3106.
[108] See Morgan, "Law of Evidence, 1941-1945," 59 Harv.L.Rev. 481, 509 (1946).

> tor, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.[109]

The Supreme Court in approving this rule did not adopt the provision included in earlier drafts permitting cross-examination to extend to all the material issues of the action.[110] The omitted provision was an expression of the so-called orthodox, English rule, which had been discarded in many of the states as well as the federal system following a statement of the Pennsylvania court limiting cross-examination to matters dealt with on direct examination.[111] This limitation has been criticized because of the technicalities to which it has given rise, and the Committee on Improvements in the Law of Evidence endorsed its elimination.[112]

The American Bar Association recommendation considered here embraces, however, only Federal Rule 43(b) as adopted, that is, without the provision authorizing cross-examination to all issues of the case. Thus, it relates solely to permitting hostile witnesses to be interrogated by leading questions, as well as allowing adverse parties to be called and interrogated by leading questions and impeached.[113] The provision as to a hostile witness represents an almost universal practice. Under the common-law rules, however, since the party who called a witness was considered to vouch for his credibility, he could

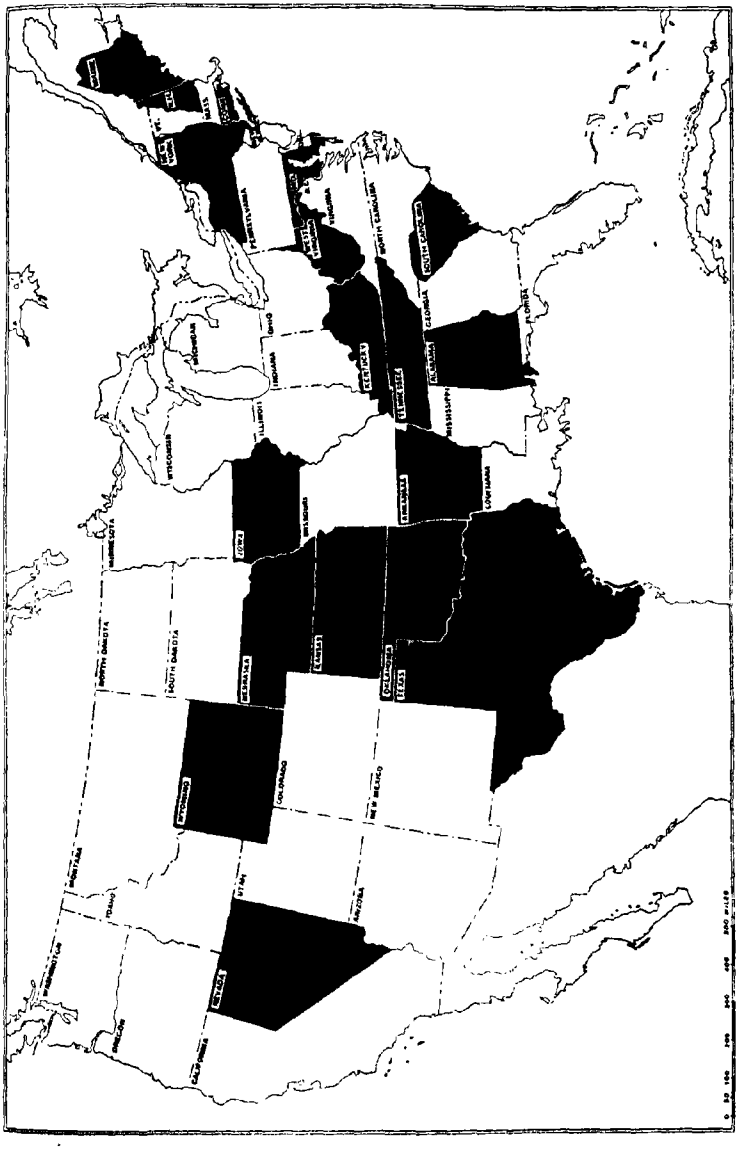
[109] See Moore, op. cit. supra n. 20; 3071-3073 for changes made in the rule.

[110] Appendix A at 590. The omitted sentence read as follows: "Except as stated in the last preceding sentence, any witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action. See Wigmore, op. cit. supra n. 24 § 1888 at 544. Cf. A.L.I. Model Code of Evidence 111-112 (1942).

[111] Ellmaker v. Buckley, 16 S. & R. 72, 77 (Pa. 1827). For discussion see Wigmore, op. cit. supra n. 24, § 1885, in which this is termed the federal rule.

[112] Appendix A at 575. See Wigmore, op. cit. supra n. 24, §§ 1885-1888.

[113] Moore, op. cit. supra n. 20, 3074; Wigmore, op. cit. supra n. 24 §§ 774, 916.



EXAMINATION OF WITNESSES

Provisions substantially similar to Federal Rules of Civil Procedure No. 43(b)

Rules as to calling an adverse party as a witness not liberalized

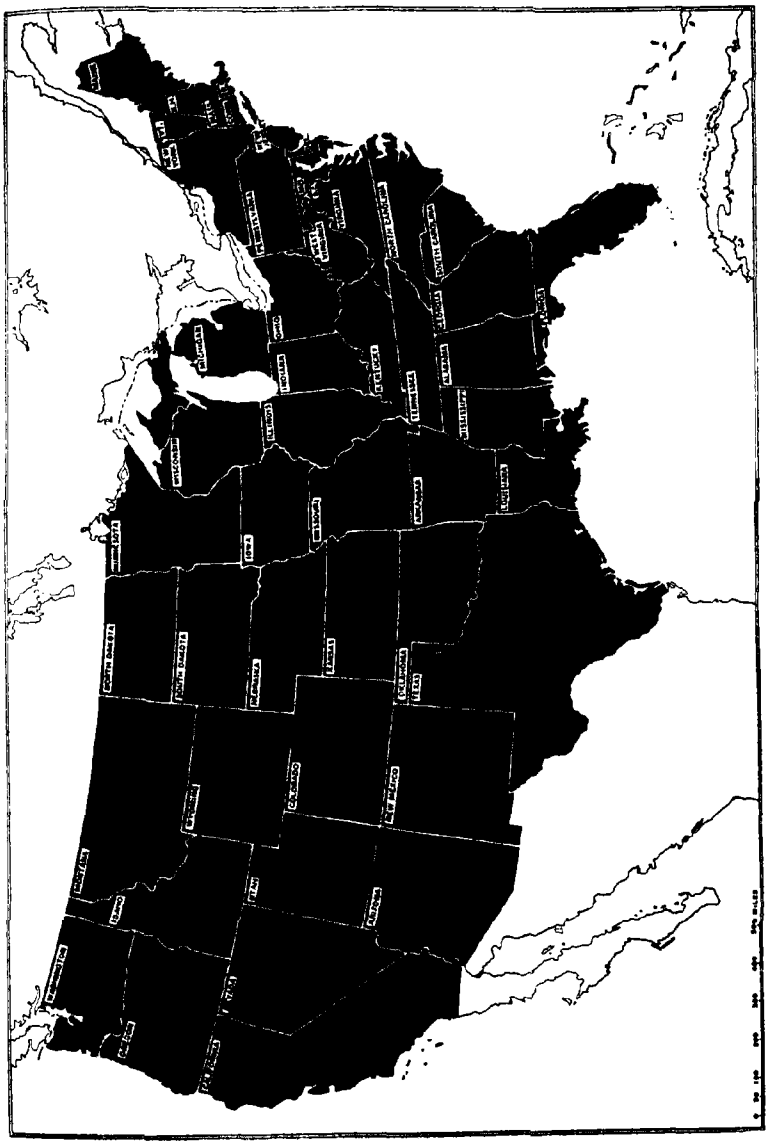
not impeach the witness nor ask him leading questions. This, of course, worked a hardship where it was necessary to rely on the adverse party for proof of an essential fact, and so the federal rule is a very vital one in the interest of truth and justice.

Provisions substantially similar to the present Rule 43(b) of the federal rules as to examination of hostile witnesses and adverse parties, as recommended, are established in state practice in thirty jurisdictions: *Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington,* and *Wisconsin.*[114] While the majority of jurisdictions have embraced the recommended rule, the remaining eighteen do not have provisions similar to Federal Rule 43(b).

In eight of the states having provisions similar to Rule 43(b) the examiner may in the cross-examination of a witness ask him any question relevant to any part of the issues, including the cross-examiner's own case: Arizona,[115] Georgia, Louisiana, Massachusetts, Michigan, Mississippi, Missouri (except criminal cases where defendant or spouse is testifying and also in civil causes not in support of counterclaims), and North Carolina. Such cross-examination is permissible in eight other states: Alabama, Kentucky, Maine, New Hampshire, Ohio, South Carolina, Tennessee, and Texas. In thirteen jurisdictions the criticized Pennsylvania rule is in effect, that is, the examiner on cross-examination is limited to matters dealt with on direct examination: Arkansas, Florida, Indiana, Iowa, Minnesota, Nebraska, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, and Wyoming. In Kansas the matter is largely in the discretion of the court.

[114] E.g. Calif. Code Civ. Proc. (1946) § 2055; Colo. R.Civ.P. 43b; Del. Rev. Code (1935) § 4688; Ga. Code Ann. (1933) § 38-1801; Idaho Code (1947) § 9-1206; Ind. Stat. (Burns, 1946) § 2-1728; Mass. Gen. Laws (1932) c. 233, §§ 22, 23; Mich. Comp. Laws (1948) § 617.66; N.M. Stat. (1941) 19-101 (43b); N.C. Gen. Stat. (1943) § 1-569; N.D. Rev. Code (1943) § 31-0202; R.I. Gen. Laws (1938) c. 537, § 58 as amended L. 1939, c. 705; Wis. Stat. (1947) § 325.14.

[115] Ariz. Code (1939) § 21-922.



No Bona Fide Dispute of Fact

Jurisdictions not following the recommended rule

No Bona Fide Dispute of Fact

(15) . . . a general rule should be adopted in every jurisdiction substantially as follows: "Any rule of evidence need not be enforced if the trial judge, on inquiry made of counsel or otherwise, finds that there is no *bona fide* dispute between the parties as to the existence or non-existence of the facts which the offered evidence tends to prove, even though such fact may be in issue under the pleadings. No error can be assigned or predicated upon the violation of any rule of evidence, either at law or in equity, when it appears from statements of counsel or from other evidence in the case or is shown in any other lawful way, that there is no *bona fide* dispute between the parties as to the fact sought to be proved or disproved by the offered evidence, even though such fact may be in issue under the pleadings.

This suggested rule was a development of the studies made by the Legal Research Committee of the Commonwealth Fund in 1927.[116] As stated by that committee, this rule which they recommended would do much "to mitigate the evil effects of this 'sporting theory of a lawsuit'. . . ." [117] In a simplified form this rule was incorporated in the Model Code:

> If the judge makes a formal finding that there is no *bona fide* dispute between the parties as to a material matter, all evidence relevant thereto shall be admissible, subject to Rule 303 and to any valid claim of privilege.[118]

The rule has not been adopted in any of the forty-nine jurisdictions. It is to be noted, moreover, that the purpose to be served by this rule is being satisfied in an increasing number of jurisdictions by another recommended procedure, the pretrial conference.[119]

Recommendations for Reference and Further Study [120]

(1) That the American Bar Association Committee on the Ross Bequest be asked to select, as the subject of a competitive award: The formulation of a simplified code of evidence rules for use in jury trials.

[116] Morgan et als. supra n. 4 at 1-7.
[117] Id. at 6.
[118] Rule 3, A.L.I. Model Code of Evidence 76-77 (1942).
[119] See chapter on Pretrial Conferences infra p. 206.
[120] Appendix A at 509. These recom-

It is to be noted that since this recommendation was made the American Law Institute has prepared and approved the Model Code of Evidence, which has received the endorsement of the Section of Judicial Administration of the American Bar Association.[121] Neither this code nor any other simplified code has been adopted in any state, although one has been prepared in Missouri by the evidence committee of the Missouri Bar. The Missouri code is primarily a codification of Missouri statutes and decisions, but some necessary reforms (seventeen) have been embodied therein, many of which are those recommended by the American Bar Association.[122]

(2) That state and city bar associations proceed to study the most improved methods of calendar administration, with a view to reducing inconvenience to witnesses, and urge the adoption of such methods by their local courts.

This recommendation for further study is based on the recognition of the necessity of having witnesses at a trial, while emphasizing the importance of inconveniencing them as little as possible,[123] since their interests are not at stake. Increasing

mendations for further study were based on the report of the Committee on Improvements in the Law of Evidence, id. at 558 et seq.

[121] A.B.A. Handbook, The Improvement of the Administration of Justice, 57 (1949).

[122] See Mo Evidence Code (Proposed, Mo. Bar, 1948) at xii et seq. This code was proposed for enactment in the 1949 legislature.

[123] In this connection it is to be noted that the Committee on Improvements in the Law of Evidence had recommended "that the state laws increase the present figures of witness fees to an amount more commensurate with modern wage standards." Appendix A at 568. The following list illustrates that witness fees now allowed are far from being commensurate with modern wage scales. Thus, in the following jurisdictions witness fees are $1.00 per day or less: Alabama, 75¢ and 5¢ mileage in criminal cases; Arkansas; $1.00 in probate and county courts, 50¢ in justice of the peace courts, 5¢ mileage for noncounty residents; California, $1.00 and mileage in justice of the peace courts; Connecticut, 50¢ per day; plus 10¢ mileage; Florida, $1.00 in justice of the peace courts; Georgia, 75¢; Illinois, $1.00, plus 5¢ mileage; Kentucky, $1.00 in circuit courts, 50¢ in inferior courts; Maryland, 50¢ to $1.00, plus mileage; Minnesota, $1.00, plus 6¢ per mile; Mississippi, $1.00 in justice of the peace courts; Nebraska, $1.00 in inferior courts, plus 5¢ mileage; New Jersey, 50¢ in county, $1.00 outside county, plus mileage; New Mexico, $1.00 in home county; New York, 50¢ to $1.00, plus 8¢ mileage; Oklahoma, $1.00, plus 5¢ mileage; Ohio, $1.00, plus 5¢ mileage outside county; South Carolina, $1.00, plus 5¢ mileage; Tennessee, $1.00, plus mileage over ten miles; Texas, $1.00 and 6¢ mileage in civil cases; Virginia, 50¢, plus 4¢ mile-

utilization of modern mechanical devices such as are used in business and industry, for improvement in this direction was suggested by the Committee on Improvements in the Law of Evidence.[124] It would seem at first thought that this is primarily a matter within the control of the courts, either on a statewide scale where there is an administrative head of the courts[125] or locally by the judges in their particular courts, for where there is criticism or fault, the burden is borne by the judiciary. The committee wisely recognized, however, that in ordinary circumstances changes in court methods and procedure, particularly on a statewide scale, do not originate with the judiciary for a variety of reasons and hence the need to have the bar direct its studies to this problem and make constructive criticisms and suggestions.

In the greater majority of the jurisdictions it was reported

age over ten miles; West Virginia, $1.00, plus 5¢ per mile, justice of the peace courts 50¢ and mileage.

In the following jurisdictions witness fees are between $1.00 and $2.00 per day: Alabama, $1 50 plus 5¢ mileage in civil cases; Arizona, $1.50 plus 15¢ per mile one way, civil cases only; Arkansas, $1.50 in circuit court; California, $2.00 plus mileage in superior court, $1.50 plus mileage in criminal court; Colorado, $1.50 to $2.50 plus 15¢ mileage, dependent upon the county, justice of the peace courts 50¢ to $2.00 and 15¢ mileage; Delaware, $2.00 per day and 5¢ mileage; District of Columbia, $1.50; Florida, $2.00 plus 5¢ per mile; Georgia, $2 00 in criminal cases for out-of-county witness; Idaho, $2.00 plus 25¢ mileage for probate and justice courts; Indiana, $1.25 plus 5¢ mileage; Iowa, $2.00 plus mileage; Kansas, $1.50 plus mileage; Maine, $2.00 plus 6¢ per mile, $1.50 before referees; Massachusetts, $1.50 plus 5¢ mileage; Michigan, $2.00 except in Wayne County plus 10¢ mileage; Mississippi, $1.50 plus 5¢ mileage; Missouri, $1.50 in home county, $2.00 outside county plus 5¢ mileage; Nebraska, $2.00 plus 5¢ mileage; Nevada, $2.00 in justice courts in civil cases only; New Mexico, $2 00 outside county plus 5¢ mileage; North Dakota, $2.00 per day plus 10¢ mileage one way; North Carolina, $1.00 to $3.00 plus 5¢ mileage; Oregon, $2.00 plus 5¢ mileage; Rhode Island, $1.50 plus 10¢ mileage; South Dakota, $2.00 plus 10¢ mileage; Texas, $2.00 plus 3¢ mileage in criminal cases, out-of-county witness (in county witness gets nothing); Washington, $2.00 plus 10¢ mileage.

In the following jurisdictions witness fees are over $2.00 per day: Idaho, $3.00 plus 25¢ mileage for district courts; Michigan, $5.00 in Wayne County plus 10¢ per mile; Mississippi, $5.00 plus 10¢ mileage for out-of-state witnesses; Montana, $3.00 courts of record; Nevada, $3.00 plus 5¢ mileage one way to courts of record; New Hampshire, $3.00 plus mileage; North Carolina, in some courts $3.00; Pennsylvania, $3.00 plus 5¢ mileage; Utah, $3.00 plus 20¢ mileage one way; Vermont, $2.50 plus 6¢ mileage; Wisconsin, $2.50 plus 5¢ mileage; Wyoming, $2.00-$5.00 plus 10¢ mileage.

[124] Appendix A at 565.

[125] See chapter on Managing the Business of the Courts at p. 29 et seq.

that evidently little in the way of improvement was being attempted but that in a few jurisdictions some steps were being taken in the administration of the trial calendar to reduce to a minimum inconvenience to witnesses. These were as follows: *District of Columbia,* by the use of a short daily trial calendar, notice given one to two weeks prior to trial; *Indiana,* by the pretrial conference, to reduce need of calling certain witnesses; *Maine,* by the court clerks cooperating with counsel; *Montana,* by notifying witnesses in some courts by telephone after service of subpœna; *New Jersey,* by joint superior and county court calendar in some counties; *North Carolina,* by frequent calendar meetings and revision of calendar; *North Dakota,* by the use of pretrial conference and care in setting cases to ensure prompt trial; Philadelphia, *Pennsylvania,* by a consolidated trial list so that cases can be tried continuously without regard to which courts cases were begun in and by providing information as to probable date of trial; *South Carolina,* by calling the calendar on Monday and setting cases and notifying witnesses of exact date of trial; *South Dakota,* by setting cases for a certain date and judges attempting to keep to a definite schedule; and *Virginia,* by setting cases for a certain date.

(3) That state and city bar associations make a study of the abuse of continuances in their communities, and demand of the courts that the abuses shall cease.

This recommendation for study is similar to the preceding one, in that it relates to a matter which is one of conducting the business of the courts. As was early recognized, these are matters in which the discretion of the trial court should not be fettered unduly by stringent rules; they are within the province of an administrative judge, since they relate to the efficiency of the management of the judicial system. The committee of the Section of Judicial Administration which studied these problems intensively emphasized "that any improvement in the system of evidence must rest on the assumption that promptness of trial is essential to the preservation of testimony and to securing the goodwill and dependable mentality of wit-

nesses" and that the "abuse of continuances, where it exists, is a curse which falls heavily on the witness." [126]

In the majority of jurisdictions it was reported that the matter of the abuse of continuances rested solely with the trial court and was a matter which varied from court to court. In several of the jurisdictions, however, it was reported that some steps were being taken to prevent the abuse of continuances. These were as follows: *Arkansas,* if opposing party will admit those matters as to which the absent witness is to testify, continuance will be denied, and affidavits may be required; *California,* good cause must be shown; *Connecticut,* after two continuances the case must go to trial or to the bottom of the trial list; *District of Columbia,* after trial is set, the application for continuance must be made to pretrial judge; *Florida,* a strict rule is applied; *Georgia,* to obtain a continuance diligence must be shown, no continuance is granted if opposing party admits the facts, the trial judge has unlimited discretion; *Kentucky,* permits affidavit for continuance to be read as deposition of witness where due diligence is shown; *Louisiana,* continuance is refused if opposing party will admit that if absent witness were present, he would testify as claimed; *Maine,* a strict rule is applied; *Maryland,* there is little abuse of continuance, testimony of an absent witness must be shown to be material and competent; *New York,* rules of various courts require affidavits showing cause of continuance, and limit number of adjournments; *North Carolina,* there are special statutes relating to the problem; *Oregon,* necessity must be shown to obtain a continuance; *Pennsylvania,* procedural rules restrict right to a continuance to specified grounds which may be raised only at specified times and allowing the court to impose costs in connection with continuances; *South Carolina,* the attorney must show need of witness but continuances are allowed freely for the convenience of attorneys; *South Dakota,* court rules place burden on judges to prevent counsel from causing needless delays; *Texas,* good ground must be shown by affidavit for continuance; *Tennessee,*

[126] Appendix A at 566.

a doctor's certificate is required if reason for requested continuance is illness; *Vermont,* cases on docket more than four years are automatically discontinued; *Wisconsin,* no cause noticed for trial is continued without consent of parties or cause shown.

(4) That state and city bar associations investigate the subject of intimidation of witnesses with a view of remedying the abuse wherever it exists.

This problem is primarily a subject for the criminal code, but it is also fundamental to the proper administration of the law of evidence, since improvements in the law of evidence itself would be of little value if witnesses would not testify. The recommendation here was directed at intimidation which takes place either in the court premises or outside of them, and is a matter in which the problems of proof are most difficult. Again, amelioration of this abuse where it takes place in the courtroom or the courthouse rests with the trial judge, who through his control of the court premises may make arrangements for the protection of witnesses and the exclusion of any "known bullies and touts." [127] Upon the bar rests the burden of recognizing this problem, where it exists, insisting upon measures for its elimination by the judge, and supporting adequate criminal laws for this crime as well as enforcement of such laws through prosecution of those involved when such intimidation takes place.

It was reported that the state criminal laws adequately provided for control of the crime of intimidating a witness in the following jurisdictions: *Alabama, Arizona, Arkansas, California, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Pennsylvania, South Dakota, Utah, Washington, West Virginia,* and *Wyoming.* The reporters in the following twenty jurisdictions considered that the provisions of the state laws, such as they were, did not provide adequately for the crime of intimidating a witness: *Colorado, Delaware, Florida, Georgia, Kentucky,*

[127] Id. at 567.

Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and *Wisconsin.*

(5) That legislatures should make no change in the rules of evidence or procedure without notice to state and local bar associations and giving them an opportunity to be heard with regard thereto.

The wisdom of this recommendation is readily apparent. Since rules of evidence are based on professional experience, to change them without consultation of representatives of the bar is most undesirable. Despite this it is reported that the legislatures of the following thirteen jurisdictions do make changes in the rules of evidence without due notice and opportunity to be heard by state and local bar associations: *Alabama, Arkansas, Kentucky, Louisiana, Minnesota, Missouri, Montana, New Hampshire, North Dakota, Rhode Island, Washington, West Virginia,* and *Wisconsin.* In *North Carolina* no notice is given, but such bills are referred to committees where anybody can be heard.

In the remaining jurisdictions the reporters felt that no complaint could be made that the legislature made changes in the rules of evidence without due notice and opportunity to be heard by state and local bar associations, although the reporters in three jurisdictions noted that there was no legal obligation to give such notice, *Arizona, Maine,* and *Nevada.* In *California* the State Bar acts to ensure its knowledge of all such bills presented to the legislature. In *Georgia, Pennsylvania,* and *Wyoming,* although the legislatures are not obliged to do so, there is little cause for complaint since there has been little regulation of the rules of evidence by the legislatures except where changes have been initiated by the organized bar.

(6) *Privilege for Attorney and Client Communication.* That the Section on Criminal Law be requested to study and report on limitations on this privilege which should be prescribed in the public interest.

While the validity of the privilege for attorney and client communications is well recognized, it is also well known that the privilege has been subject to abuse. The general privilege

has always been recognized to have an exception for communications made before the commission of a crime, but the committee of the Section studying this problem also thought it desirable to include an express denial of the privilege "where the attorney had knowledge (or ground to believe) that the client was contemplating the commission of a crime . . . or was attempting to suppress the discovery of a crime already committed."[128] Rule 212 of the Model Code adopts this principle:

> No person has any privilege under Rule 210 if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or to plan to commit a crime or a tort.[129]

In almost half of the jurisdictions there is an exception to the privilege of the attorney-client communication similar to that contained in Rule 212 of the Model Code. Thus, where the attorney has acted as a go-between or agent in the preparation of a crime or fraud, or in suppressing the means of its discovery, the court may require disclosure where on the facts such knowledge of the crime by the attorney may be presumed to exist in *California* (*probably*[130]), *Connecticut, District of Columbia* (*probably*), *Illinois* (*probably*), *Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Missouri,*[131] *New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island* (*probably*), *Texas, Virginia,* and *Wisconsin.* This substantial number of states imposing a limitation on the attorney-client privilege indicates awareness by the courts of the seriousness of the problem. It may be surmised that in those states in which such limitation has not developed, the problem has not as yet been presented to the courts.

(7) That the American Medical Association be requested to examine its canon of ethics regarding the giving of testimony by one physician

[128] Id. at 578.

[129] A.L.I. Model Code of Evidence 149-150 (1942).

[130] Abbot v. Superior Court, 78 Calif. App. ad 19, 177 P. 2d 317 (1947). See also Wigmore, op. cit. supra n. 24, § 2298.

[131] Cf. Mo. Evidence Code (Proposed, Mo. Bar, 1948) § 6.04.

against another, in malpractice suits, with a view of removing the obstacle which the canon is frequently interpreted as interposing in this type of litigation.

In malpractice suits against a medical practitioner the plaintiff is almost entirely dependent on the testimony of other practitioners, since in most states the plaintiff must adduce the testimony of a qualified medical expert with respect to the technical aspects of the alleged malpractice. The difficulties met in obtaining expert or medical testimony in prosecuting a malpractice action were vividly illustrated in the case of *Reeves v. Klein et al.* in the Superior Court of Massachusetts, decided in the plaintiff's favor on February 19, 1948.[132]

In the great majority of jurisdictions the plaintiff must adduce qualified medical testimony on the technical nature of the injury: *Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin,* and *Wyoming* (except mental cases). In *Montana* and *Nebraska* medical testimony as to the degree of care and actual injury is necessary, although lay evidence as to observations of the appearance of the condition may be offered. In the remaining eight jurisdictions lay evidence may be offered in certain situations: *Alabama, Arkansas, Georgia, Idaho* (*as to pain*), *Illinois, Louisiana* (*both are used*), *Mississippi* (*both may be used*), and *North Dakota.*

To the knowledge of those persons reporting, the canons of ethics of the local medical society in none of the jurisdictions have been revised for the purpose of authorizing testimony in malpractice suits. In several of the states, however, it was reported that the canons of the local medical society did not contain any canon prohibiting such testimony: *California, Delaware, Indiana, Iowa, Michigan, New Jersey, Ohio, Okla-*

[132] See 6 Harv. L. School Record, No. 2, p. 1 (Feb. 25, 1948).

homa, Oregon, Pennsylvania, South Carolina, Utah, and *Wyoming.* In *Idaho* it was reported that doctors do testify freely in malpractice cases, and in *Utah* the state medical association has set up a committee to investigate the facts and circumstances surrounding alleged malpractice. If the committee determines that the doctor is guilty, the medical association advises him to settle and will not provide medical testimony in support of the defense. If the committee determines the doctor is not guilty, it will discourage its members from testifying for the plaintiff. Generally the association frowns on any doctor's testifying in favor of a plaintiff against another doctor. In only one state, *Louisiana,* was it reported that the courts have in some way aided the plaintiff suing an allegedly incompetent medical practitioner to secure the requisite medical testimony. Only in *Indiana* has there been any attempt to aid the plaintiff in securing competent testimony from other medical practitioners. In that state a statute provides that a witness who is an expert in any profession may be compelled to appear and testify to an opinion as such expert whenever his opinion is material evidence relevant to an issue on trial.[133] The assistance rendered by such a statute is, of course, invaluable.

(8) *Comment on Failure of Accused to Testify.* That the Section on Criminal Law be requested to arrange for a thorough study of the experience of those states where such comment is permitted.

The privilege against self-incrimination is one protected by the Federal Constitution and many state constitutions and statutes. Because of criticism of this privilege it has often been suggested that after the claim of privilege, the prosecutor and the court or counsel be allowed to comment on the failure to take the stand and to indicate to the jury that they may draw inferences from it.[134] Rule 201 of the Model Code, while recognizing the privilege against self-incrimination, authorizes such comment by the judge and counsel.[135] Such a measure was introduced by constitutional amendment in *Ohio* in 1912 [136] and

[133] Ind. Stat. (Burns, 1946) § 2-1722. See 2 Ind. L.J. 422.

[134] Appendix A at 579.

[135] A.L.I. Model Code of Evidence 130 (1942).

[136] Ohio Const. Art. I, § 10.

in *California* in 1934.[137] Comment on the accused's failure to testify is also permitted in *Iowa, New Jersey,* and *Vermont.*[138] No states have acted to permit such testimony since the recommendations of the American Bar Association were made in 1938. The *Missouri* proposed code of evidence does not include this limitation on the privilege.[139] In other states a statute or interpretation of a constitutional or statuory provision prohibits all comment. A survey of judges in the five states in which such comment is permitted revealed that an overwhelming majority considered such comment an aid to the administration of justice.[140]

(9) That a committee be appointed to study the needs and possibilities of a simplified set of rules for defining burden of proof and presumptions.

As is well recognized, much has been written about the theory of burden of proof and all its refined technicalities, on which the jury must be instructed.[141] It is obvious that the rules relating to burden of proof ought to be formulated in a simplified manner for proper guidance of the jury. While in Nebraska uniform jury instructions on this subject have been adopted,[142] and in Missouri [143] and South Dakota there has been or is now some study of this problem, no other jurisdictions are attempting to study or enact rules or statutes embodying a simplified set of rules for defining the burden of proof and presumption by which the parties are controlled and the jury instructed. The Model Code, however, embodies a series of simple rules relating to presumptions but these have not been adopted as yet in any jurisdiction.[144]

(10) That a committee be appointed to examine all the exceptions to the hearsay rule with a view to codifying or formulating them in

[137] Calif. Const. Art. I, § 13.

[138] E.g., Vt. Stat. (1947) § 2412. Cf. N.J. Rev. Stat. (1937) § 2:97-10, see O'Regan and Schlosser, N.J. Criminal Law and Practice §§ 266, 267 (1938).

[139] Mo. Evidence Code, op. cit. supra n. 135, § 6.01, comments at 82.

[140] Appendix A at 581. Wigmore, op. cit. supra n. 24, § 2272.

[141] Appendix A at 581. See McBaine, "Burden of Proof: Degrees of Belief," 32 Calif.L.Rev. 242 (1944).

[142] See 25 Neb.L.Rev. 196.

[143] See Mo. Evidence Code, op. cit. supra n. 135, § 1.01.

[144] A.L.I. Model Code of Evidence, c. 8 (1942).

a model statute and to general improvement in the application of the rule.

This recommendation was based on the admitted dissatisfaction of the profession with the hearsay rule in its present form and recognition that adoption of the "Massachusetts hearsay statute" relating to statements of deceased persons in its original form or in an improved form would proceed slowly.[145] Therefore, further study of these matters was considered advisable. It is to be noted that in its chapter on hearsay the Model Code has departed most widely from the common law.[146] Thus, under Rule 503 in any instance when the declarant is unavailable as a witness, evidence of a hearsay declaration is admissible.

Although other states have followed the example of Massachusetts, no jurisdiction has attempted to codify the exceptions to the hearsay rule, with the purpose of simplifying them and generally improving the use of the rule. The hearsay rule and its exceptions have been incorporated into the proposed Missouri Code of Evidence.[147]

Conclusion

Although many of the recommendations of this chapter are extant in the practice of a majority of jurisdictions, wide acceptance of the minimum standards established in 1938 has not as yet been achieved generally. This is particularly evidenced by the degree to which there has been failure to follow the recommendations relating to a survivor's testimony, a deceased person's statements, the limitations on the privilege for communication between physician and patient, the opinion rule, expert testimony, and cases in which there is no *bona fide* dispute of fact. Nor has any jurisdiction other than Missouri attempted to study or to formulate a simplified code of evidence or a set of rules refining burden of proof and presump-

[145] Appendix A at 585; Mass. Gen. Laws (1932) c. 233, § 65. See text supra at 339.

[146] A.L.I. Model Code of Evidence, Rule 503 at 231-233 (1942).

[147] Mo. Evidence Code, op. cit. supra n. 135, Art. XI.

tions. Little, moreover, seems to have been done in the matter of studying improved methods of calendar administration, or the abuse of continuances.

The survey here presented is not reassuring as to the present state of the law of evidence. This is particularly true since recommendations for changes were limited to those rules where improvement seemed most necessary and feasible. It is significant that many of the recommendations were embodied in the practice of some jurisdictions for several decades or their adoption was recommended long since by such a group as the committee of the Commonwealth Fund. The incorporation of most of these recommended reforms in the American Law Institute's Model Code of Evidence seems to have done little to accelerate or widen their adoption. Without deprecating those achievements which have been made, such as in the adoption in many jurisdictions of the recommended rule relating to evidence of business records, certified copies of court records, and judicial notice of foreign law, the situation as to improvements in the law of evidence can only be characterized as deplorable. As was said by Professor Edmund M. Morgan:

> The way of the would-be reformer in evidence is hard indeed; but not so hard as will be that of the lawyer who believes in the Anglo-American system of trial by judge or by judge and jury if drastic reform of the law of evidence is much longer delayed.[148]

[148] Morgan, "Codification of Evidence," David Dudley Field Essays 164, at 176 (Reppy ed. 1949).

CHAPTER IX

APPELLATE PRACTICE

Recommendations Adopted by the American Bar Association, July, 1938

(1) That appeals from inferior courts by way of full retrial in a higher court should be avoided as far as possible, by improving the quality of the inferior courts, that, as a means of obtaining better inferior courts, the abolition of justice of the peace courts should be seriously considered, substituting therefor municipal courts or courts with wider territorial jurisdiction, properly organized and housed, having trained and salaried judges, competent clerks, office equipment sufficient for keeping proper records, and sitting, so far as practicable, at such times and places as the needs of the community indicate.

(2) That a pecuniary limit should be fixed for all courts, above which an appeal may be taken as of right and below which an appeal may be had only by leave of the reviewing court, on a showing that an important question of law is involved.

(3) That the filing of a simple notice of appeal, or of an application for leave to appeal, or some simple equivalent therefor, should be the sole step required to vest jurisdiction in the reviewing court, and that defects in the notice or application should not affect the jurisdiction. This notice should preferably be filed in the lower court, in order to serve the convenience of the appellant and to constitute a more easily effective notice to the appellee, and the clerk should be required to send a notice by mail to the appellee.

(4) That supersedeas bonds should be fixed by the court at such an amount only as will adequately secure to the appellee the full benefit of his judgment, that the filing of such bond should be permitted at any time before satisfaction of the judgment; and that enforcement of the judgment appealed from should not be stayed until the bond is filed.

(5) That assignments of error should be required prior to making up the record on appeal only when the appellant proposes to omit

some portions of the proceedings and record of the trial court, and that in other cases errors as well as cross-errors should be assigned only in the briefs and in the form of points relied upon for reversal. This is the method adopted by the new federal rules. Assignments of error made otherwise than in the briefs should not constitute limitations upon the scope of review except in so far as necessary to protect parties from actual prejudice.

(6) That the use of typewritten records, prepared in accordance with proper specifications, should be permissible in all cases, and that, if either party elects to print the record, the cost thereof should not be taxable as costs.

(7) That, so far as possible, all papers on file in the trial court which are to constitute a part of the appellate record should be sent to the appellate court in their original form and copies thereof should not be required for the use of the court.

(8) That abstracts of the record should not be required, but that such matters in the record as the parties desire to bring to the attention of the court should be set forth in appendices to the briefs, either by summarized statement or by quotation.

(9) That in preparing the record on appeal the appellant should be permitted to set forth all or any part of the testimony in question and answer form, and the appellee should be permitted to require testimony in question and answer form to be substituted for any condensed statement in narrative form prepared by the appellant.

(10) That either the trial or the appellate court should have power at any time to make an order authorizing any amendment of the record on appeal which is necessary to present the case fully and correctly, upon such showing, in such manner and on such terms as may be just. This is substantially the new federal rule (R. 75-h).

(11) That the number of pages in any brief taxable as costs should be limited by rule of court.

(12) That a systematic effort should be made by the Bar and the appellate bench in each state and in each federal circuit, through joint committees of lawyers and appellate judges, to examine the causes which are operating to limit the effectiveness of the oral argument, and to adopt such measures as may seem proper to restore it to the position of importance which it ought to occupy in our system of jurisprudence.

(13) That the problem presented by "one-man" decisions on appeal be made the subject of cooperative studies by the appellate bench and Bar in the various jurisdictions.

(14) That where no new principle or novel application of law is involved, and the decision is fully and clearly controlled by certain statutes or cases, an effort should be made to limit the opinions to a brief summary of the facts followed by a reference to such statutes or cases.

(15) That findings of fact should have the same effect on appeal in all cases tried by the court without a jury, whether they are cases at law or cases in equity.

(16) That appellate courts should have power to enter or order the proper judgment without a new trial when the record of the proceedings shows as a matter of law what such judgment should be: and when error affects only a part of a case, the court should have power to remand for a new trial of that part only, if such remand will not prejudice the substantial rights of any litigant.[1]

Introduction

The recommendations which head this chapter are directed primarily at the simplification and general improvement of appellate practice. The most important points of dissatisfaction with the present methods of appellate review are indicated in order to determine the reforms to be prescribed. These general proposals were intended by their draftsmen to be subject to modification appropriate to local needs, since uniformity in these matters was thought to be neither necessary nor practical nor possible.

The variations between the states because of differences in physical size, number of inhabitants, amount of judicial business, and more particularly the diversity of their hierarchies of courts account for the need to make only the most general recommendations as to the subjects of improvement in appellate practice.[2] Thus in Texas, although there is no distinction

[1] Appendix A at 510. See A.B.A. Handbook, The Improvement of the Administration of Justice 66-70 (1949).

[2] See, generally, Pound, Appellate Procedure in Civil Cases, passim (1941); Curran and Sunderland, "Organization and Operation of Courts of Review," 3 Mich. Jud. Coun. Rep. 48 (1933).

between law and equity as exists in several of the states, the appellate system of the state is divided into two. There is complete separation of civil and criminal cases for purposes of appellate review. All appeals in criminal cases go directly from the trial court to the Court of Criminal Appeals, the decisions of which are final. All appealable civil cases go first to a court of civil appeals (there are eleven) and from thence to the Supreme Court on writ of error. In 1940 the constitution was amended to authorize direct appeal from the trial courts to the Supreme Court in certain classes of cases.[3] The Texas example presents one picture of the variations possible, and it is only one of forty-nine jurisdictions, no two of which are precisely alike, the present status of each being explicable only by a study of a set of varying causes in its particular historical development that have resulted in the existent system.

The committee of the Section of Judicial Administration of the American Bar Association which examined these problems in detail stressed the importance of the efficient operation of the courts, with particular emphasis on the duty to render prompt, effective, and inexpensive service to the public.[4] It is to be noted that not all of the recommendations originally submitted to the Section of Judicial Administration were approved by it or in turn by the American Bar Association. On the contrary, the recommendations of the committee relating to appeals on short records, statement of issues in the brief, and enlarging the capacity of courts of review—divisional organization vs. intermediate appellate courts [5]—were not approved. It would seem that in most of these points the committee was ahead of its time.

[3] Tex. Const. Art. V, § 3b as adopted 1940. Cf. id. Art. V. § 6.

[4] Appendix A at 591. Cf. also Minority Report, Committee on Simplification and Improvement of Appellate Practice, submitted by Norman S. Sterry, id. at 606.

[5] Id. at 591. As to another, the final committee recommendation relating to regulation of appellate procedure by rules of court, this also was not formally approved by the American Bar Association but is embraced in the approved recommendation for the regulation of procedure by court-made rules. See chapter on Rule-making—The Judicial Regulation of Procedure infra at 91.

Appeals from Inferior Trial Courts

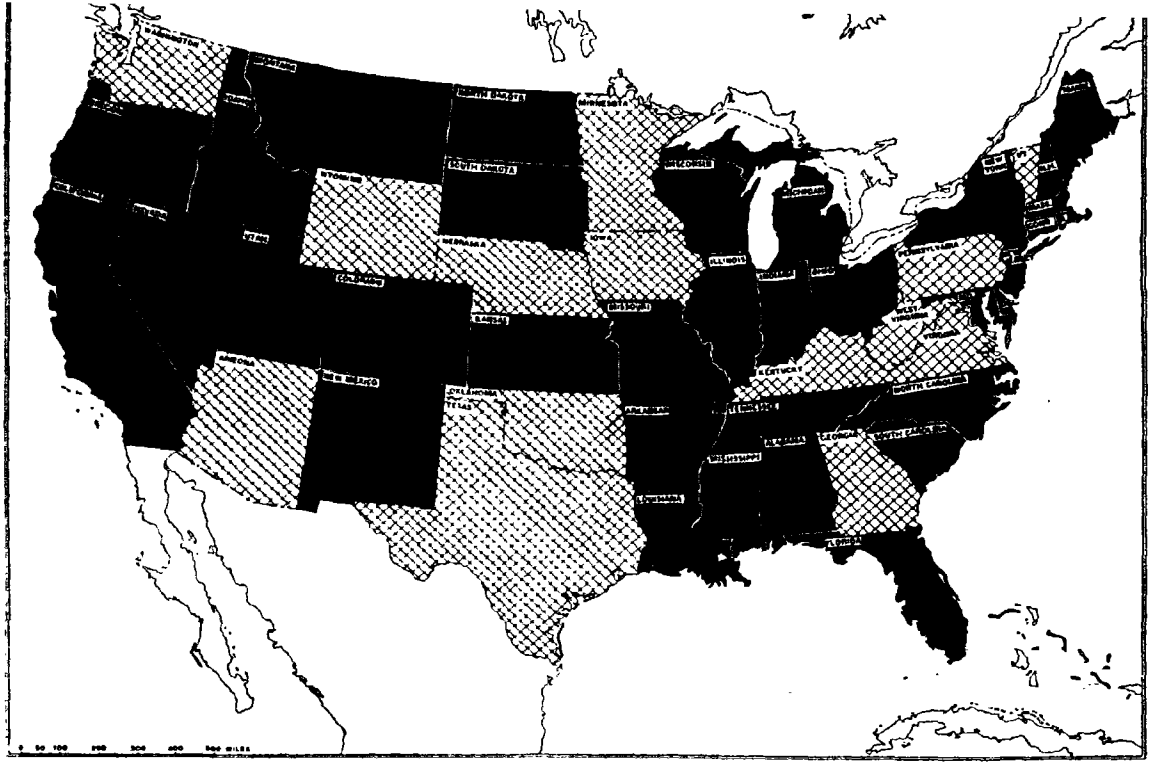
(1) That appeals from inferior courts by way of full retrial in a higher court should be avoided as far as possible, by improving the quality of the inferior courts, . . .[6]

The first part of this recommendation is directed at what is a common practice, that is, permitting appeals in the form of a trial *de novo* in a higher court from justice of the peace and other courts of first instance having limited jurisdiction. This makes it possible in such cases for a party to be required to bear the expenses of a superior court trial when the amount involved usually is insufficient to warrant such an expenditure. A second day in court, moreover, seems not only unnecessary, but really in some ways unjust. It is to be recognized that such full retrials have been allowed because of the inadequacies of many inferior courts of limited jurisdiction. The cure for this is not a trial *de novo* on appeal as customarily utilized, but rather improvement of such inferior courts. Since the subject of the improvement of such inferior courts does not relate directly to matters of appellate practice, the conditions of such courts have not been considered here, but are dealt with elsewhere in this volume.[7]

Substantiation of the view that such courts are generally considered inadequate is to be found in the fact that in all but a few exceptional instances it was reported, first, that appeals as of right are permitted in most instances; secondly, that appeals from inferior courts go to superior trial courts; and, thirdly, on appeal from an inferior court the superior trial court tries the case *de novo* without regard to the proceedings below.

[6] Consideration of the remainder of this first recommendation is reserved for the chapter on Trial Courts of Limited Jurisdiction: Traffic Courts and Justice of the Peace Courts infra at 263.

[7] In Missouri a system of magistrates court has been established and justice of the peace courts abolished. Mo. Const. (1945) Art. V, §§ 18-25. See State v. Walden, 357 Mo. 167, 206 S.W. 2d 979 (1947). In New Jersey a statewide county district court system has been established and all justices of the peace and small cause courts, by whatever name known, have been abolished. See further chapter on Trial Courts of Limited Jurisdiction: Traffic Courts and Justice of the Peace Courts infra at 306 for discussion of inferior courts.



APPEALS FROM INFERIOR TRIAL COURTS—AS OF RIGHT

Appeals as of right from trial courts of limited jurisdiction permitted, subject to certain limits, e.g. minimum amount must be involved

Appeals as of right from trial courts of limited jurisdiction permitted generally in all cases

Appeals from the local courts are permitted as of right in all states.[8] In fourteen states, however, a minimum amount, averaging $20, must be involved before appeals as of right are permitted:[9] *Arizona*, $20; *Georgia*, $50; *Iowa*, $25; *Kentucky*, $25; *Minnesota*, $15; *Nebraska*, $20; *Oklahoma*, $20; *Pennsylvania*, $5.33; *Texas*, $20; *Vermont*, $20; *Virginia*, $20; *Washington*, $20; *West Virginia*, $15; and *Wyoming*, $25.

The following exceptions to the prevailing practice that appeals from inferior courts go to superior trial courts[10] should be noted. In *California*, *Georgia*, and *New York* appeals from inferior courts go to superior trial courts or alternatively to the appellate division or term of such courts. In *Connecticut* appeals from inferior trial courts go directly to the highest appellate court if $15,000 or more is involved. In *Idaho* and *New Jersey*[11] appeals from inferior trial courts generally go

[8] E.g., Utah Code Ann. (1943) §§ 104-77-3 to 104-77-4.

[9] In Kentucky all cases of a civil nature in the justice of the peace and similar courts, except forcible entry and detainer actions, are appealable as a matter of right to the Quarterly Court regardless of the amount involved. All decisions of the Quarterly Court where the amount in controversy, exclusive of interest and costs, are over $25 are appealable as a matter of right. All monetary judgments of the county courts of over $50 are likewise reviewable. In Nebraska civil cases tried in inferior courts may be reviewed in the district court on writ of error even if judgment is for less than $20. The jurisdictional amount of $20 is required when civil cases are appealed from inferior courts to the district court for a complete retrial in the district court. In Texas justice courts have jurisdiction up to $200 and county courts have jurisdiction of from $200 to $1000. If a case involves more than $20 it may be appealed and tried de novo in the county court, and if it involves more than $100 another appeal may be taken to the Court of Civil Appeals where review is had on the record.

[10] E.g., Ala. Code (1940) tit. 13, §§ 477, 484, providing an appeal as a matter of right from the judgment of a justice of the peace to the circuit court, which is the trial court of general jurisdiction, or a court of like jurisdiction, and a trial de novo on such appeal. There are two slight restraints on this right of appeal with trial de novo. Id. tit 13, § 486 provides that in cases involving $20 or less the cause must be tried by the court without a jury. Id. tit. 13 § 488 provides that if the plaintiff appeals and does not recover more than the amount for which the justice rendered judgment, he is to be taxed with costs.

[11] Only appeals from inferior courts of limited criminal jurisdiction to county courts result in trials de novo without a jury. N.J. Rule 2:11. Appeals from inferior courts are generally determined on the record below and are taken to the appellate division of the superior court. N.J. Rule 4:2.

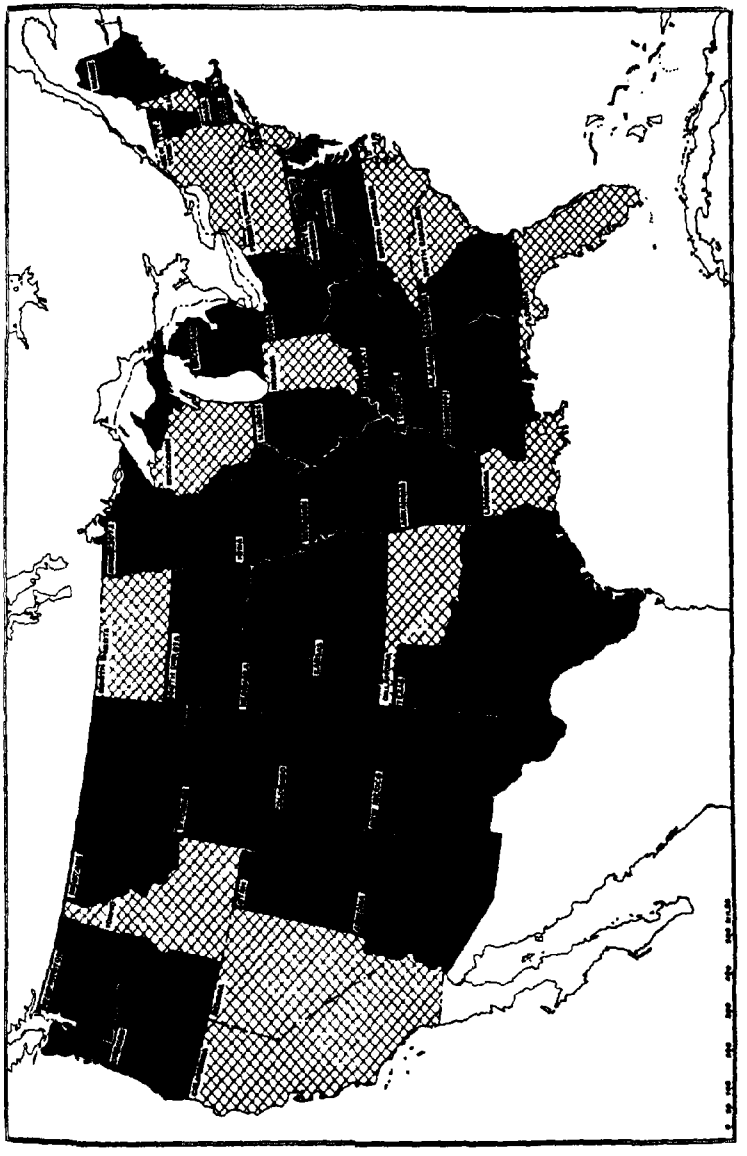
to the appellate term of superior trial courts. Appeals from Marion County Municipal Court go directly to the Appellate Court of *Indiana*. In *Massachusetts* the inferior courts such as district and municipal courts have appellate divisions. In *Vermont* all appeals from municipal courts go directly to the Supreme Court.

In all but a few instances on appeals from an inferior trial court the reviewing court tries the case *de novo* without regard to the proceeding below.[12] In *California* the character of the inferior court or the questions on appeal determine when there is to be a trial *de novo*, for instance, in appeals from the municipal court to the superior court there is not a trial *de novo*, but in appeals from a justice court to the superior court involving questions of fact there is a trial *de novo;* if questions of law only are found, the appeal is heard on a settled statement and there is no trial *de novo*. The *District of Columbia* Municipal Court is a court of record; no trial *de novo* may be had, but only an appeal on the record. In *Florida*, on appeal from the inferior trial courts the circuit court may treat the case as an appeal or try it *de novo* in its discretion. In *Indiana* there is review only on questions of law from the Marion County Municipal Court. In *Louisiana* a trial *de novo* exists only from district courts outside of Orleans Parish in cases where justices of the peace have jurisdiction, and in the Orleans Court of Appeal in certain cases from the New Orleans City Court.[13] In *New Jersey* only appeals from inferior courts of limited criminal jurisdiction result in trials *de novo*, other appeals from inferior courts generally being determined on the record below.[14] In *New Hampshire* and *North Carolina* certain civil cases are subject to review solely on the record for errors of law. In *Idaho* and *Nevada*, if only error in law is complained of, there is not a trial *de novo*, but merely a review on the record for such errors. In *Pennsylvania* an appeal

[12] As to Alabama, cf. supra n. 10; Utah, supra n. 8.

[13] E.g., La. Const. Art. VII, §§ 36, 51, 91. The proposed constitution would eliminate retrial in the Orleans Court of Appeals. See Miller, "'Minimum Judicial Procedural Standards'—How Met in Louisiana," 9 La.L.Rev. 382, 390 (1949).

[14] See supra n. 11.



APPEALS FROM INFERIOR TRIAL COURTS—TRIAL DE NOVO

Appeals from inferior courts of limited jurisdiction reviewed without trial *de novo* in

Appeals from inferior courts of limited jurisdiction tried *de novo*.

and *certiorari* are provided, and there is a trial *de novo* only on an appeal. In *North Dakota, South Carolina,* and *Wisconsin,*[15] the superior trial court merely reviews the record made by the inferior court for errors of law and fact. In *New York* full retrial *de novo* in a county court is allowed on any appeal from a justice of the peace where $100 or more is involved; few such cases occur as most cases over $100 are brought in the county court in the first instance; on other appeals from an inferior court the record is reviewed for errors of law and fact. In *Oklahoma* appeals from justice of the peace courts may be had upon a bill of exceptions, in which case only questions of law are reviewed.

An amazing example of the absurd lengths to which such appeals from inferior courts may be carried is provided by *North Carolina.* There it was reported that on appeal from the justice of the peace courts a trial *de novo* is permitted in the recorder's court and that an appeal as of right is allowed from that court to the superior court, in which a full second trial *de novo* may be had. Moreover, in the justice of the peace court and the recorders court a six-man jury may be requested, and in the superior court a twelve-man jury. This would seem to be an egregious example of inefficiency and a waste of effort of all persons involved in the various trials, and was so criticized by the reporters in that state.[16]

It is obvious that this first recommendation is so little embodied in practice that it might be stated that the recommended procedure is virtually nonexistent. Appeals from inferior courts by way of full retrial in a higher court as of right are cus-

[15] Wisconsin, except that any judgment of a justice of the peace court is tried de novo in the circuit court on appeal.

[16] It is to be noted that in some of the states, contrary to the North Carolina example discussed in the text, the right of appeal a second time from a case originating in a justice of the peace court or similar court is limited. Thus, in Arizona no appeal lies from the superior court to the Supreme Court from a judgment in a case appealed from an inferior court unless the action involves the validity of a tax assessment, statute, etc. Ariz. Code (1939) § 44-2507. In Utah the only limit on the right to appeal applies to cases originating in city courts, from which appeal to the Supreme Court is denied. The jurisdictional amount in such cases is $100. Utah Code Ann. (1943) § 20-4-18.

tomary in the greater number of the states. The majority of the reporters in these states concurred in criticism of this practice and joined in the plea for the improvement of inferior trial courts. It is to be noted, however, that lack of stenographic aid in such inferior courts makes requisite trials *de novo* in appeals therefrom in many instances. An example of popular dissatisfaction with the inferior quality of justice of the peace courts and the results it may lead to was reported from Florida as follows:

> Justice of the peace courts have proved in many instances in Florida highly unsatisfactory. In Leon County the justice of the peace courts have been virtually abolished because the justices of the peace and the constables of that court run on a "do-nothing" platform and after they are elected, they perform no duty unless they are compelled to do so. This procedure of abolishing a court created by the state constitution has proved effective in Leon County and has been followed by other counties in the state.

Pecuniary Limitations Upon the Right of Appeal

(2) That a pecuniary limit should be fixed for all courts, above which an appeal may be taken as of right and below which an appeal may be had only by leave of the reviewing court, on a showing that an important question of law is involved.

The explanation of this recommendation lies in the committee's finding that pecuniary limitations are justifiably placed on the right of appeal, since the cost of review of a civil judgment should not be disproportionate to the amounts or values involved. Important questions of law, however, which require decision may arise in cases involving small amounts, making it vital to dispense with pecuniary limitations on the right to appeal in proper cases.[17] It is extremely difficult, however, to apply general recommendations relating to the right and mode

[17] Thus in Indiana an appeal to either the Court of Appeals or Supreme Court is prohibited unless the amount in controversy is $50 or more, but this restriction is inapplicable when a question as to the validity of a franchise, ordinance, statute, etc. is presented. Ind. Stat. (Burns, 1946) §§ 4-211, 4-213. See Curran and Sunderland, op. cit. supra n 2 at 207 et seq.

of appeal from the superior trial courts of the forty-eight states because of the many variations between their court organizations and hierarchies.

Only thirteen states follow a scheme in accord with the recommendation, placing a pecuniary limit on the right to appeal from superior trial courts to the highest appellate court. The sums required for such appeal as of right to the highest appellate court in these states varies from $50 to $7500: *Alabama*, $1000; *Indiana*, $50; *Iowa*, $300; *Kansas*, $100; *Kentucky*, $500; *Louisiana*, $2000; *Michigan*, $500; *Mississippi*, $500; *Missouri*, $7500; *Nevada*, $300; *Oregon*, $250; *Washington*, $200 and *West Virginia*, $100.[18] It is to be noted that several of the states setting such limits permit appeal as of right to an intermediate appellate court: *Alabama*, *Louisiana*, and *Missouri*.[19]

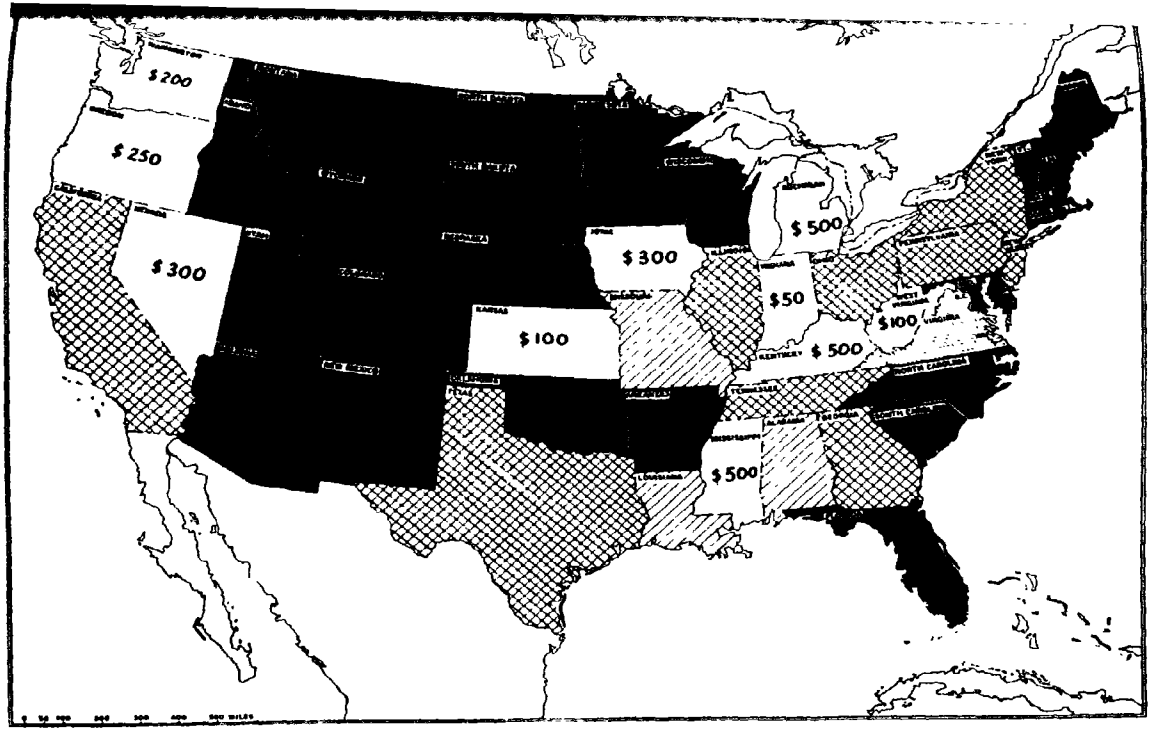
Similarly, as stated above, a pecuniary limit, so small as to be almost meaningless, is fixed for appeals from trial courts of limited jurisdiction in fourteen states, above which amount an appeal may be taken as of right: *Arizona*, *Georgia*, *Iowa*, *Kentucky*, *Minnesota*, *Nebraska*, *Oklahoma*, *Pennsylvania*, *Texas*, *Vermont*, *Virginia*, *Washington*, *West Virginia*, and *Wyoming*.[20] Thus, as to appeals from courts of limited jurisdiction as well as appeals from superior trial courts the recommendation is generally disregarded.

In twenty-six jurisdictions all cases may be appealed as of right from a superior trial court to the highest appellate court: *Arizona*, *Arkansas*, *Colorado*, *Connecticut*, *Delaware*, *Florida*, *Idaho*, *Maine*, *Maryland*, *Massachusetts*, *Minnesota*,

[18] E.g., Iowa R.Civ.P. 333; Kan. Gen. Stat. (1935) § 60-3303; La. Const. Art. VII, § 10, see 10 Tul.L.Rev. 307; Mich. Sup. Ct. Rule 60, § 1; Mo. Const. Art. V, § 3; W.Va. Code (1943) § 5707. To this list of states Virginia should probably be added, since appeal by permission is limited to cases involving more than $300. Cf. Ind. Stat. (Burns, 1946) §§ 4-214 to 4-217 (Ind. Sup. Ct. Rules, 1946), see Warren v. Ind. Tel. Co. 217 Ind. 93, 26 N.E. 2d 399 (1940) in which the Supreme Court held it was judge as to the limits of its own jurisdiction which could not be curtailed by the legislature and was coextensive with the limits of the state in appeals and writs of error, see also Seagram & Sons v. Bd. of Commissioners of Flood Control, 220 Ind. 604, 45 N.E. 2d 491 (1943).

[19] E.g., La. Const. Art. 7, § 29; Mo. Const. Art. V, § 13, Mo. Rev. Stat. Ann. (Supp.) § 847.126.

[20] See text supra at 391.



PECUNIARY LIMITATIONS UPON THE RIGHT OF APPEAL

Pecuniary limit set upon appeal as of right from superior trial courts to highest appellate court, amount of such limit

Appeal only by permission of cases involving more than set amount, or certain questions of law

Pecuniary limit set upon right to appeal from superior trial court to highest appellate court, but appeal may be had as of right to intermediate appellate court

Appeal as of right from superior trial court to intermediate appellate court

Appeal as of right from superior trial court

Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas (criminal cases), *Utah, Vermont, Wisconsin,* and *Wyoming.*[21] In *California* and *Georgia* there is appeal as of right in all cases, the character of the litigation determines whether the case will be heard by the intermediate or highest appellate court.[22] In ten states all cases may be appealed as of right from a superior trial court to an intermediate appellate court:[23] *Alabama* (under $1000),[24] *Illinois, Louisiana* (under $2000), *Missouri* (under $7500), *New Jersey, New York, Ohio, Pennsylvania, Tennessee,*[25] and *Texas* (civil cases).[26] In a majority of the states, contrary to the recommendation, there is an appeal as of right in all cases to some appellate court, thus imposing a burden upon the appellate courts without regard to the value of the property or amounts at issue or without consideration of the importance of the questions involved in the case.

It is to be noted before considering those instances in which appeal as of right is allowed in certain circumstances because

[21] E.g. Ariz. Code (1939) § 21-1702; Ark. Const. Art. VII, §§ 4-12, Amend. 24, § 2; Colo. R.Civ.P. 111(a); Neb. Const. Art. 1, §§ 23, 24; N.Dak. Rev. Code (1943) § 28-2701; R.I. except petition for habeas corpus; Utah Const. Art. 8, § 9, Utah Code Ann. (1943) § 104-41-1; Wyo. Comp. Stat. Ann. (1945) § 3-5402. It must be observed that whether or not the person against whom judgment is rendered is entitled to appellate review as of right in Massachusetts depends to a great extent on which remedy he uses, i.e., "appeal," "exceptions," "report," or "leave reserved." It depends on the factual situation involved and also depends on whether the case is at law or equity.

[22] In California appellate jurisdiction is divided between the Supreme Court and district courts of appeal. The Supreme Court may transfer cases from one court to another. In Georgia appellate jurisdiction is divided between the Supreme Court and Court of Appeals both of which have sat in divisions from time to time. Ga. Code (1933) §§ 24-4009 to 24-4015, 24-3025 to 24-3029.

[23] E.g., Ala. Code (1940) tit. 13, § 86; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, § 201; N.J. Rule 4:2; Tenn. Code Ann. (1934) § 10618.

[24] The intermediate Alabama appellate court has jurisdiction only of cases involving less than $1000 and not involving title to or possession of land. Ala. Code (1940) tit. 30, § 86.

[25] Jurisdiction of the Tennessee Court of Appeals extends to all civil cases except those involving constitutional questions, the right to hold a public office, workmen's compensation, and state revenue, which are appealed directly to the Supreme Court. Tenn. Code Ann. (1934) § 10618.

[26] If county court judgment was given in a case originating in a justice of the peace court, there is no right of appeal unless the judgment amount exceeds $100.

of the inherent importance of such types of cases that *Virginia*[27] permits appeals by petition only, in all cases upon the requisite showing of the importance of the legal questions involved (with one minor exception in the case of appeals by the state from decisions of the corporation commission). Except for this there is no appeal as of right and the classes of cases in which appeal is permissible is limited to those involving constitutional questions and other special instances such as cases involving title to land, taxes, statutory interpretation, equity and capital cases, and those involving more than $300.[28] It has been reported, however, that an appeal will be granted in all cases except when it is obvious that the lower court was right and denial of an appeal acts as a judgment of affirmation on the merits.

In some states appeal as of right to particular courts is permitted as to certain classes of cases no matter what amount or value is involved, and whether or not an important question of law is presented. It may be said that the premise for allowing appeals as of right in all such classes of cases is the belief that all those cases are of particular importance to the parties and the public so as to merit the right to appeal. Thus, in eleven states all cases involving title to land may be appealed from a superior trial court to the highest appellate court as a matter of right: *Alabama, California, Georgia, Illinois, Iowa, Kansas, Kentucky, Missouri, Nevada* (mining claims), *Washington,* and *West Virginia.*[29] In *Georgia, Illinois, Indiana, Kansas, Louisiana, Missouri, New Jersey, New York, Tennessee, Texas,* and *Washington* all cases involving questions of constitutional interpretation may be appealed from a superior trial court as a matter of right to the highest appellate court.[30] Other instances may be cited as examples of cases

[27] Va. Code (1942) §§ 6336, 6337.

[28] Ibid.

[29] E.g., Ala. Code (1940) tit. 13, §§ 86, 87; Calif. Const. Art. VI, §§ 4-4b (although Supreme Court can transfer such cases to district court of appeals); Ga. Code (Supp.) § 2-3704 (Ga. Const.); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, § 199; Iowa R.Civ.P. 333; Kan. Gen. Stat. (1935) § 60-3303; Ky. Rev. Stat. (1946) § 21.060; W.Va. Code (1943) § 5787.

[30] E.g., Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, § 199; Ind. Stat. (Burns, 1946) §§ 4-213, 4-214; Kan. Gen Stat. (1935) § 60-3303; N.J. Rule 1:2-1;

in which appeal lies as of right from a superior trial court directly to the highest appellate court: *California,* all cases involving validity of a tax, assessment or municipal fine and all equity cases; *Illinois,* cases in which the state is a party or a franchise is involved:[31] *Indiana,* all cases involving interpretation of a statute;[32] *Kansas,* cases of slander and malicious prosecution; *Missouri,* cases in which state, county, or political subdivision is a party;[33] *Nevada,* legality of tax or municipal fine, questions of law in felony cases, and all equity cases; *New Jersey,* capital cases;[34] *Tennessee,* enumerated list of special instances such as *habeas corpus,* cases involving state revenue; and *Virginia,* cases from the corporation commission.

In others of the states where appeal as of right is limited, examples of appeal by leave of the appellate court are: from interlocutory decrees in the *District of Columbia* and *South Dakota;* in all cases in *Kentucky* involving more than $200 and less than $500;[35] and in *Louisiana,* cases involving less than $100. It is to be noted that where an appeal is a matter of right, it is, of course, not necessary to procure the leave of either the trial or appellate court to take an appeal, and any such requirement is a matter of form only;[36] however, the jurisdictional requirements for the taking of an appeal must of course be satisfied.

From this survey it appears that in the majority of states

N.Y. Const. Art. 6, § 7; Tenn. Code Ann. (1934) § 10618; Tex. Const. Art. 5, § 3b, but cf. Tex. R.Civ.P. 499a (only questions of law, no determination of contested issues of fact will be recognized).

[31] Ill Rev. Stat. (Smith-Hurd, 1947) c. 110, § 199.

[32] Ind. Stat. (Burns, 1946) § 4-213.

[33] Mo. Const. Art. V, § 3.

[34] N.J. Rule 1:2-1.

[35] Where amount in controversy is less than $200, no appeal lies. Ky. Rev. Stat. (1946) § 21.060.

[36] In a case where leave must be obtained to appeal from a superior court trial to the highest appeal court, leave is obtained from the trial court in Iowa. Iowa R.Civ.P. 333; in Virginia and West Virginia it is obtained from the highest appellate court. Va. Code (1942) §§ 6336, 6337; W.Va. Code (1943) § 5787. And in cases where leave must be obtained to appeal from an intermediate court to the highest appellate court, leave is obtained from the latter, e.g., in California after decision in the District Court of Appeals, petition may be made to the Supreme Court to have it hear the case. Calif. Rules on Appeal, Rule 20; semble, Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, § 259.32.

at least one appeal to a higher court is a matter of right, either directly to the highest appellate court or to an intermediate appellate court. In some of the minority of states in which a pecuniary limit is set for the right to appeal to the highest court, it is set so low as to be absurd, while some of those states requiring such a jurisdictional amount for appeals to the highest court also allow appeals as of right to an intermediate appellate court regardless of the amount in controversy. Virginia represents the other extreme from the recommended practice and allow practically no appeals as of right. Thus, it may be said that this second recommendation is not completely embodied in practice anywhere. The courts in their rules and the legislatures by statutes seem to be loath to limit all right to appeal by any arbitrary pecuniary limit; thus, even as to the inferior trial courts such pecuniary limit is set only in a few states and there is set very low although usually resulting in a trial *de novo*. In commenting on the fact that this recommendation is not followed anywhere, it may be said that many of the reporters from the various states indicated their belief in the necessity for allowing appeals as of right even in cases involving small amounts if the appellants desired such appeals and assumed the burden of the costs involved therein.

Jurisdictional Requirements for Appeal

(3) That the filing of a simple notice of appeal, or of an application for leave to appeal, or some simple equivalent therefor, should be the sole step required to vest jurisdiction in the reviewing court, and that defects in the notice or application should not affect the jurisdiction. This notice should preferably be filed in the lower court in order to serve the convenience of the appellant and to constitute a more easily effective notice to the appellee and the clerk should be required to send a notice by mail to the appellee.

This recommendation, patterned on the present mode of appealing in the federal courts,[37] was based on the recognition that since jurisdictional defects are often fatal, the jurisdic-

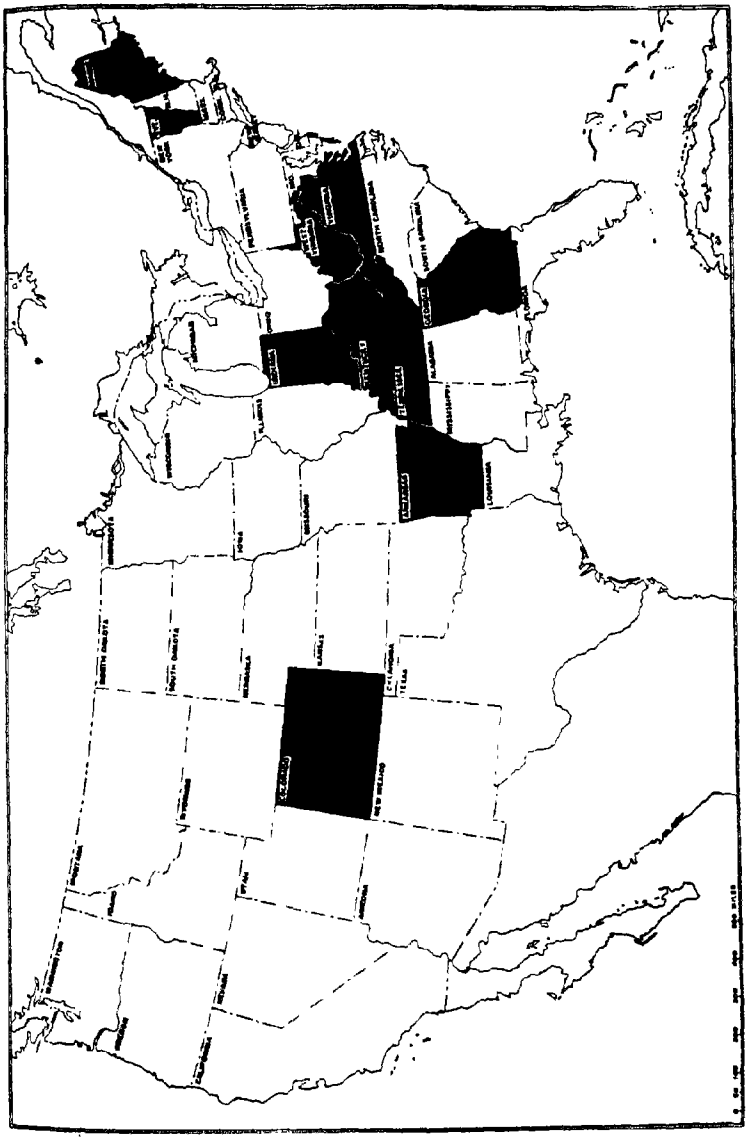
[37] See Fed. R.Civ.P. 73, Fed. R.Crim.P. 37(a).

tional step should be as free as possible from risk of error, and should not depend upon the form or legal sufficiency of any document or upon the performance of any condition precedent.[38] Under the recommended practice appellate jurisdiction which exists potentially is vested by the filing of the notice of appeal and the cause is hereby transferred to the appellate court for review.

In an overwhelming majority of the jurisdictions, thirty-nine, an appellate proceeding may be commenced as recommended by the filing of a written notice of appeal in the trial court: *Alabama, Arizona, California, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine* (equity cases), *Maryland, Massachusetts* (equity cases and law cases where facts are agreed), *Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska* (civil cases only), *Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island* (equity cases), *South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin,* and *Wyoming.*[39] In most instances a copy of this notice is not

[38] Appendix A at 592-593.

[39] E.g. Mich. Ct. Rules, Rule 58, § 1(c); Mo. Rev. Stat. Ann. (Supp.) § 847.129; N.J. Rules 1:2-4, 4:2-4; Wyo. Comp. Stat. Ann. (1945) § 3-5402. The following pertinent facts may be added. Alabama, in the usual case appellant merely files an appeal bond in the trial court as security for costs in the appellate court, or a supersedeas bond at appellant's option; the clerk of the trial court then issues a notice of appeal which is served upon the attorney of record for the appellee; in certain cases where security for costs in the appellate court are not required, the appeal may be begun by the filing of a written statement that an appeal is being taken from the judgment or decree in the case. Here, as above, the clerk issues the notice of appeal. Ala. Code (1940) tit. 7, §§ 766, 801. Louisiana, when the appeal is granted on motion in open court at the same session as judgment is rendered, no notice need be served on other parties. Nebraska, no notice to other parties is required. Montana and Nevada, appeal is ineffective unless undertaking for costs are filed in five days. See Mont. Rev. Code (1935) § 9733. Ohio, service of a copy on the adverse party is not required in an appeal to the courts of appeal (the usual court for most appeals). Oklahoma, notice of appeal must be given in open court within ten days after motion for a new trial, necessary in certain cases, is ruled on; notice is entered on trial court docket and is notice to everybody. In Pennsylvania the procedure on appeal is in effect simply a notice of appeal although the writ of certiorari still remains part of the proceedings; the appeal is filed on a very simple form directed to the prothonotary of the Supreme Court, requesting him to note the entry of an appeal, and is accom-



JURISDICTIONAL REQUIREMENTS FOR APPEAL

Appellate proceeding commenced by filing a written notice of appeal in the trial court, notice to appellee may or may not be re-

Jurisdiction vested in reviewing court by methods other than filing a written notice of appeal in trial court

mailed to the appellee by the clerk of the court as is recommended, but the appellant may be required to serve a copy of such notice on the other parties. In *Arizona, California, Connecticut, Iowa, Missouri, Oregon* (in criminal cases), and *Washington* the notice of commencement of an appellate proceeding by the filing of a notice of appeal in the trial court is mailed by the clerk of the court to the opposite party.[40] In *Alabama* the sheriff is required to serve the notice of the appeal.[41] In *Ohio* and *Texas* there does not seem to be any requirement of service of the notice of appeal on the other parties, although this is almost invariably done as a matter of courtesy.

In some of these jurisdictions authorizing the commencement of an appeal by filing of a notice of appeal, there are other procedures for the initiation of appellate review. Thus, in *Alabama* in criminal actions, in *Connecticut* in a limited number of types of cases, in *Texas* in those cases in which the appellant did not participate in the trial, and in *New Mexico* and *Wisconsin* in all cases, an appellate proceeding may be commenced by filing in the appellate court a writ of error, notice of such writ of error being filed in the lower court and served on the other parties. Other modes permitted in some of those jurisdictions authorizing the filing of a notice of appeal in the trial court are as follows: In *Alabama* and *Delaware* a notice of appeal may be filed in the appellate court, a copy being served on the opposite party. This mode of initiating an appeal prevails also in *Utah* for appeals from a justice of the peace and the city court. Appellate proceedings in

panied by an affidavit that it is not for delay; a praecipe for a writ of certiorari is then filed and a writ of certiorari is directed to the lower court to bring up the record; a simple notice of appeal is filed on the adverse party, and under rule of the Supreme Court a notice of appeal is served on the lower court, requiring the filing of an opinion, if not already done. Rhode Island, law case appeal is initiated by bill of exceptions, no notice to other persons is required. Texas, notice of appeal may be given orally in open court and noted in the docket or judgment, or may be filed with the clerk within ten days; there is no requirement that a copy be served on other parties. Tex. R.Civ.P. 353. Necessary cost bond or pauper's bond must be filed. Washington, notice of appeal may be given in open court.

[40] E.g., Ariz. Code (1939) § 21-1803; Mo. Rev. Stat. Ann. (Supp.) § 847.131.

[41] Ala. Code (1940) tit. 7, § 801.

Maine, in law cases, are initiated by writ of error, or *certiorari.*[42] In *Massachusetts* the commencement of appellate proceedings depends on the method employed; if appellate review is sought on a bill of exceptions, the initial step is the filing of the bill in the court in which the exceptions were taken and the serving of notice thereof on the other parties; if review is sought by "report," the trial judge must first exercise his discretion to reserve the case for report and then the report is initiated by the filing of a draft report in the lower court.[43] In *Nebraska* appeals in criminal cases are commenced by filing a petition in error and a transcript of the record with the clerk of the Supreme Court, who then must issue a writ of error to the district court.[44] In *Oklahoma* in certain cases, *Oregon* in criminal cases, *Texas,* and *Washington* notice of appeal may be given in open court. In *Wyoming* a petition of error may be used.[45]

In the remaining jurisdictions where an appellate proceeding cannot be commenced by such a simple act as filing a notice of appeal, diverse modes of initiating appellate review are used. In *Arkansas* review is obtained by appeal or writ of error as a matter of right.[46] In *Colorado* the sole method of commencing an appellate proceeding is by the use of the traditional writ of error.[47] The bill of exceptions certified by the trial judge is used as a writ of error to invoke appellate jurisdiction in *Georgia,*[48] a practice criticized by the reporter because of its technical requirements. In *Indiana* the appeal is initiated by filing in the office of the clerk of the trial court a *praecipe* designating what is to be embraced in the transcript on appeal.[49] Another mode of obtaining review is the petition for leave to appeal, used in *Kentucky,*[50] where appeals in certain

[42] Me. Rev. Stat. (1944) c. 95, §§ 20-21, 26, c. 116, §§ 1-16.

[43] Cf. Mass. Gen. Laws (1932) c. 231, §§ 111, 113 as amended L. 1945, p. 328.

[44] Neb. Rev. Stat. (1948) § 29-2306.

[45] Wyo. Comp. Stat. Ann. (1945) § 3-5306, cf. §§ 3-5323, 3-5401.

[46] Ark. Stat. Ann. (1947) §§ 27-2103 to 27-2105.

[47] Colo. R.Civ.P. 111. Summons to hear errors assigned must be served on each defendant in error, either by registered mail or by publication.

[48] Ga. Code Ann. (1933) §§ 6-801, 6-807, 6-808.

[49] Ind. Sup. Ct. Rules, Rule 2-3.

[50] Ky. Rules of Ct. of App., Rule 1.570.

cases (more than $200, less than $500) are permissive. In *Tennessee* an appeal in nature of a writ of error must be prayed for and granted by the trial court and its minutes must show the grant and a writ of error also lies where an appeal in the nature of a writ of error would be allowed.[51] Appellate proceedings in *Vermont* are started by filing a bill of exceptions or upon a writ of error.[52] In *Virginia* the petition for writ of error in law or petition for appeal in chancery must be accompanied by a transcript of the record.[53] An appeal, writ of error or *supersedeas* is utilized to secure appellate review in *West Virginia*.[54]

That part of the third recommendation relating to initiation of appellate proceedings by filing of a notice of appeal is embodied in the practice of more than two thirds of the states. As to the other jurisdictions, in which such simple notice is not authorized, it was reported that jurisdictional defects have serious effects and may result in the defeat of the appeal only in *Virginia*. Thus, it may be said that the purport of the recommendation is accepted with but minor exceptions.

Supersedeas Bonds

(4) That supersedeas bonds should be fixed by the court at such an amount only as will adequately secure to the appellee the full benefit of his judgment; that the filing of such bond should be permitted at any time before satisfaction of the judgment; and that enforcement of the judgment appealed from should not be stayed until the bond is filed.

This recommendation relates solely to the amount required for a supersedeas bond and is not directed at the discretion or obligation to grant or deny a stay of judgment. The common requirement of a supersedeas bond in twice the amount of a money judgment operates chiefly as a penalty. This was criticized by the committee studying appellate practice as being of direct benefit chiefly to surety companies while also often

[51] Tenn. Code Ann. (1934) §§ 9059, 9061, 9063, 9071.

[52] Vt. Stat. (1947) §§ 1355, 2124, 2128-2129.

[53] Va. Code (1942) §§ 6336, 6339.

[54] W.Va. Code (1943) §§ 5787, 5789.

being an insuperable obstacle to a stay which should be granted.[55] Even without the posting of a supersedeas bond the successful party may hesitate to enforce a judgment in event of an appeal being taken, because of the possibility of having to replace the property involved or its true value in the event of reversal of the judgment.[56]

In *Connecticut* all judgments are stayed pending an appeal except as the trial court orders otherwise. In *New Jersey* the grant or denial of a stay of judgment is discretionary with the court from which the appeal is taken or to which appeal is taken or certification is sought.[57] In *Oklahoma* in certain cases (other than money judgments) the trial court fixes the amount of the bond in its discretion; in any event, if given by a surety company, it need not be for more than judgment, interest and costs.[58] In *Rhode Island* and *Vermont* no supersedeas bond is used, in *Maine* a supersedeas bond is required only where a petition for review is filed (cases of fraud, mistake, etc.) and in *Massachusetts, New Hampshire,* and *South Carolina* a supersedeas bond is used only in specific proceedings as directed by the court. In *Tennessee* the amount of bond required varies with the type of judgment and method of review.[59]

In the following states the supersedeas bond may, as recommended, be required only in amount adequate to protect the appellee: *Arizona, Colorado* (other than money judgments), *District of Columbia, Florida, Illinois* (or equal to amount

[55] Appendix A at 593. Cf. Fed. R.Civ.P., Rule 73(d).

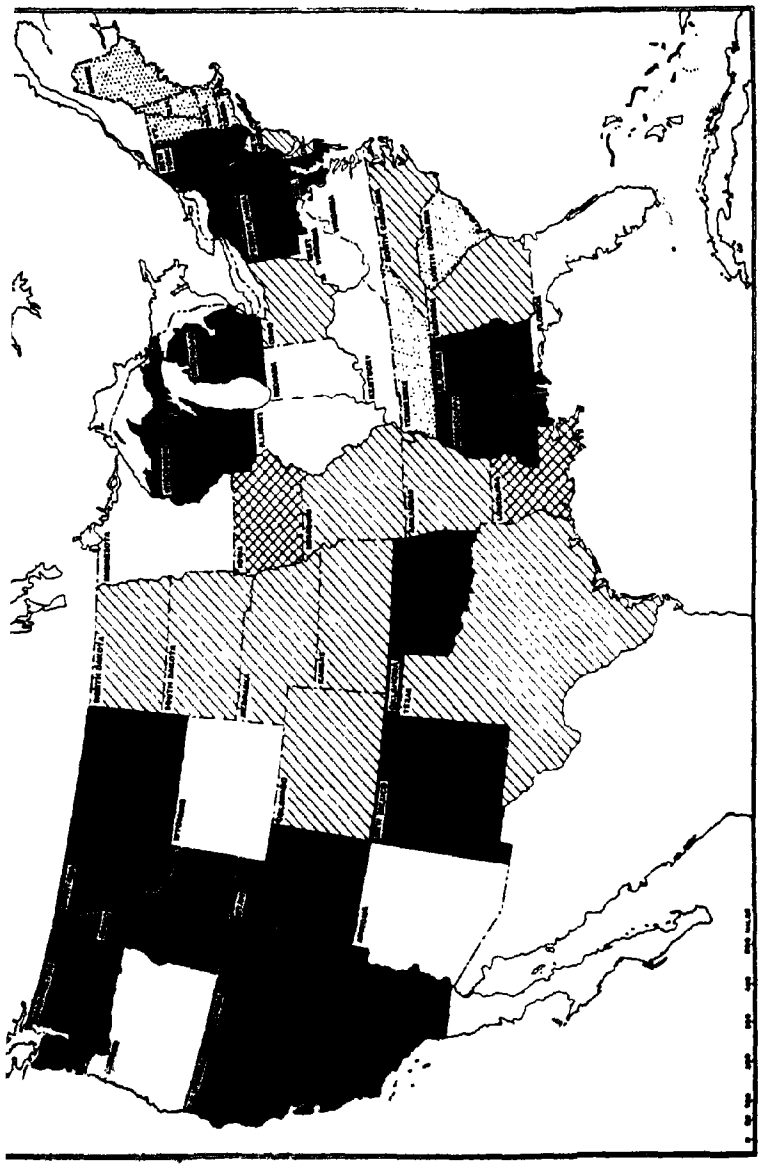
[56] Thus, one Alabama reporter stated as follows:

> ". . . the enforcement of a judgment pending appeal can be a dangerous thing for the plaintiff to do. One time we recovered a judgment in a damage suit against an undertaking firm. The defendant appealed without giving a supersedeas bond, and we promptly had execution issued and levied on six ambulances and all of the paraphernalia of the undertaking establishment. When we went to sell it we were faced with a grave problem. If the case were reversed on appeal, the judgment under which we were proceeding would be a nullity and the doctrine of restitution would step in. . . . Apparently the plaintiff would have to make restitution, not merely of the amount for which the goods were sold under the execution, but for their real value, and this would have to be done before the plaintiff could proceed further with his action. . . ."

[57] N.J. Rule 1:2-11.

[58] Okla. Stat. (1937) tit. 12, § 968, but if judgment is for money and a written undertaking is given, it must be for twice the money judgment.

[59] Cf. Tenn. Code Ann. (1934) §§ 9043, 9044, 9045.


SUPERSEDEAS BONDS
Supersedeas bonds fixed by court in amount as will adequately secure to appellee full benefit of his judgment
Special instances, supersedeas bonds used, if at all, only when ordered by court
cluding allowance for damages, interests, and costs
Supersedeas bond required in an amount more than amount of judgment but less than double such amount

of a money judgment), *Indiana, Kentucky, Maryland* (equity), *Minnesota, Nevada* (in cases other than money judgments and attachment proceedings), *New Jersey* (other than money judgments), *New York* (or equal to twice the judgment), *North Dakota* (judgments for delivery of personalty), *Oregon, Utah* (in cases other than money judgment), *Virginia, West Virginia,* and *Wyoming.*[60]

In fifteen jurisdictions the supersedeas bond is required in an amount equal to the amount of the judgment, sometimes including allowances for damages, interest and costs: *Arkansas, Colorado* (money judgments), *Delaware, Georgia, Kansas, Michigan* (chancery proceedings, in court's discretion, not less than amount of the money judgment), *Missouri, Nebraska, New Jersey* (money judgments), *North Carolina* (money judgments), *North Dakota, Ohio, South Dakota, Texas,* and *Wisconsin* (on appeal).[61] In *Iowa* the supersedeas bond is required to be 125% of a money judgment unless the trial court in certain cases fixes a larger amount.[62] In *Louisiana* the supersedeas bond required is in the amount of 150% of the judgment in what is known as a suspensive appeal, in a devolutive appeal a nominal cost bond suffices.[63]

In the following states the criticized requirement prevails, that the supersedeas bond be in an amount equal to twice the amount of the judgment: *Alabama* (money judgments), *California* (money judgments, unless given by a surety company), *Idaho, Maryland* (law cases), *Michigan* (law cases), *Mississippi, Montana, Nevada* (money judgments, etc.), *New Mexico, New York* (alternatively), *Oklahoma* (money judgments, unless given by surety company), *Pennsylvania, Utah* (money judgments), *Washington,* and *Wisconsin* (writ of error).[64]

[60] E.g., Minn. Stat. Ann. § 605.11; N.D. Rev. Code (1943) § 28-2712; Wyo. Comp. Stat. Ann. (1945) § 3-5412.

[61] E.g., Ark. Stat. Ann. (1947) § 27-2121; Ga. Code Ann. (1933) § 6-1002; Mich. Comp. Laws (1948) § 650.21; Mo. Rev. Stat. Ann. (Supp.) § 847.132; Neb. Rev. Stat. (1948) § 25-1916; N.J. Rule 1:2-13; N.D. Rev. Code (1943) § 28-2711; Ohio Gen. Code (1938) § 12223-9; Wis. Stat. (1947) § 274.17.

[62] Iowa R.Civ.P. 337b.

[63] La. Code Prac. Ann. (1942) §§ 575, 1132.

[64] E.g., Ala. Code (1940) tit. 7, §§ 793, 792; Calif. Code Civ. Proc.

On appeal, in addition to a supersedeas bond or if an appeal is taken without giving a supersedeas bond, a bond or undertaking to assure the payment of costs on appeal is required in amount adequate to protect the appellee in *Alabama, California* (if appellant is nonresident), *Florida, Georgia, Illinois* (if appellant is insolvent or nonresident), *Kentucky, Minnesota, Ohio* (chancery cases), *Oklahoma, Oregon, Pennsylvania, Virginia,* and *Wyoming* (if appellant is nonresident).[65] A limit as to the amount of such required cost bonds is set in eight states,[66] while in five states a set amount is fixed for cost bonds.[67]

It would seem that the fourth recommendation prevails in only those few states where it is within the discretion of the court to set the amount of the supersedeas and costs bond in an amount adequate to protect the appellee. In those jurisdictions where the required bond need only equal the amount of the judgment, it may be said that such provisions are consistent with the purpose of the recommendation, since the criticized practice of exacting a supersedeas bond double the amount of the judgment is not followed. Also, those states in which no supersedeas bond is required or one is exacted only under special circumstances cannot be said to be among the group using the criticized practice. Thus, although the recommended practice is only followed by a small number of jurisdictions, on the other hand many jurisdictions do not follow the criticized practice of requiring a bond of twice the amount of the judgment.

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§ 942, the bond required on appeal is only 1½ times the amount of judgment if a surety bond is used; Md. Code Ann. (1939) Art. 5, § 57; Mich. Comp. Laws (1948) §§ 650.2, 650.3; Nev. Comp. Laws (1941) § 9385.67; Okla. Stat. (1937) tit. 12, § 968; Wis. Stat. (1947) §§ 274.06, 274.07.

[65] E.g., Ala. Code (1940) tit. 7, § 792; Calif. Code Civ. Proc. § 1030; Ga. Code Ann. (1933) § 6-1002; Ohio Gen. Code (1938) § 12223-6 (chancery cases); Wyo. Comp. Stat. Ann. (1945) § 3-3719.

[66] Neb. $75 if no supersedeas bond given; Nev. $300; N.Y. $500; N.C. $250; N.D. $250; S.D. $250; Utah $300 appeals to Supreme Court, $100 appeals to superior trial court; Wis. $250.

[67] Ariz. $250 if no supersedeas bond given; Conn. $50; Idaho $300; Mont. $300; Wash. $200.

ASSIGNMENTS OF ERROR

(5) That assignments of error should be required prior to making up the record on appeal only when the appellant proposes to omit some portions of the proceedings and record of the trial court, and that in other cases errors as well as cross-errors should be assigned only in the briefs in the form of points relied upon for reversal. This is the method adopted by the new federal rules. Assignments of error made otherwise than in the briefs should not constitute limitation upon the scope of review except so far as may be necessary to protect parties from actual prejudice.

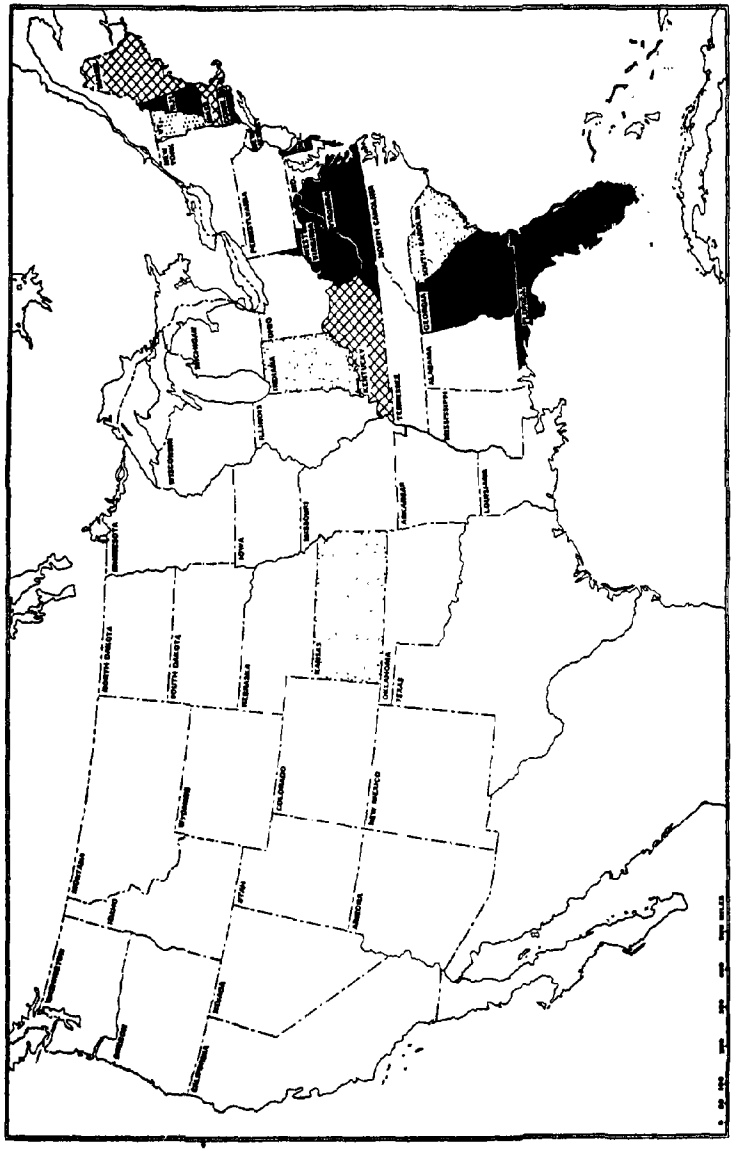
The basis of this recommendation was the conclusion that assignments of error serve only two useful purposes: first, enabling an appellee to determine what portions of the trial court record and proceedings should be incorporated into the appellate record; second, serving to inform the appellee as to the points relied upon as ground for reversal. Since frequently the record on appeal includes the entire proceedings and record of the trial court, however, assignments of error are purposeless except in appellant's brief. Particularly since assignments of error are often considered by appellate courts to limit the scope of review, it was considered that no assignments of error other than the statement of points in the brief should be required when the record on appeal includes the entire trial proceeding.[68] This is the method adopted in the federal rules.[69]

In cases in which the appellate record contains the complete stenographic record, a statement of the errors or grounds of appeal is made, as recommended, after the appellate record is prepared in all cases in *Alabama, Arizona, Arkansas, California, Colorado, District of Columbia, Illinois, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York* (except on appeal from certain interlocutory orders), *North Caro-*

[68] Cf. Appendix A at 593.

[69] See Fed. R.Civ.P. 75(d) as amended, Moore, Federal Practice 366, 375 et seq. (Supp.):

"(d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."


ASSIGNMENTS OF ERROR
Statement of errors or grounds of appeal made after appellate record is prepared in cases in which appellate record contains complete stenographic record
Statement of errors or grounds of appeal made at same time as appellate record is
Statement of errors is required before appellate record is prepared in certain cases
Statement of errors is required before appellate record prepared in all cases

lina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas (but rulings complained of must be included in the motion for a new trial in jury cases), *Washington, Wisconsin,* and *Wyoming.*[70] This is done in *Kentucky* in equity actions only, and in *Rhode Island* and *Utah* in all except equity actions.

In *Indiana, Kansas,* and *South Carolina* it would seem that the statement of errors or grounds of appeal is made at the same time as the appellate record is prepared and filed.[71] This would seem to be a practice somewhere between the recommended and the condemned practices. Similarly, in *Vermont* where there is no assignment of errors so-called, errors must be set forth in the bill of exceptions, which is in effect the appellate record.[72]

Contrary to the recommendation and the reasoning on which it is based, in cases in which the appellate record contains the complete stenographic record, a statement of the errors or grounds of appeal is required before the appellate

[70] E.g., Ala. Code (Supp.) tit. 7, § 827(1), Sup. Ct. Rules, Rules 1, 48, errors may be assigned in the transcript after it is completed, or if counsel desire to do so, errors may be assigned before the completion of the transcript, if assigned before the completion, the assignments may be typed and bound with the transcript, otherwise the result is that the assignments are written in longhand; Ark. Stat. Ann. (1947) §§ 27-2138, 27-2143; Colo. R.Civ.P. 111(f); Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, §§ 259.36, 259.39, in the brief; Iowa R.Civ.P. 340, 344, where whole record filed, errors listed only in the brief; Md., in the briefs; Mo. Sup. Ct. Rule 1.08, but claimed errors must be included in motion for new trial, Mo. Rev. Stat. Ann. (1939) § 847.40; Neb. Rev. Stat. (1943) § 25-1919; N.J. Rules 1:3-2, 1:3-3, in the briefs, assignments of error are abolished, points to be argued are set out in the briefs, ordinarily no point will be considered which is not in statement of questions in the brief; N.Y., in the brief; Ohio Sup. Ct. Rule II (2), assignments of error are to be filed at time of filing of appellant's brief; Wyo. Comp. Stat. Ann. (1945) § 3-5408.

[71] E.g., Ind. Stat. (Burns, 1946) § 2-3225, Sup. Ct. Rules 2-3, the assignment of errors is always prepared after the transcript has been completed, but must be filed attached to the transcript; S.C. Code (1942) § 781. More particularly as to Indiana practice, only one copy of the record is filed; this is usually the typewritten copy prepared by the clerk. There is no requirement that a copy be furnished adverse parties. The Indiana statutes permit appeal on less than the entire record but because of the presumption on appeal to the effect that omitted portions of the record cured errors presented, as a practical matter no one undertakes an appeal on less than the whole record. See also Iowa R.Civ.P. 340, if entire record is not transcribed, assignment of error must be filed with the record.

[72] Vt. Stat. (1947) § 2120.

record is prepared in all cases in seven states: *Connecticut, Delaware, Florida, Georgia, New Hampshire, Virginia* (in the brief applying for an appeal), and *West Virginia;*[73] and in all except equity actions in *Kentucky* and *Maine;* in criminal cases only in *Massachusetts;*[74] and in equity actions only in *Rhode Island.*

In cases in which the appellate record contains the stenographic record of only those rulings which are to be complained of in the appellate court, a statement of errors or grounds of appeal is made as recommended before the appellate record is prepared in all cases in thirteen jurisdictions: *California, Connecticut, District of Columbia, Florida, Georgia, Kentucky, Michigan, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania,* and *West Virginia.*[75] This is done in all except equity cases in three states: *Arkansas, Maine,* and *Ohio.* In five states, the statement of errors is made in such instances at the same time as the appellate record is prepared: *Indiana, Iowa, Kansas, South Carolina,* and *Vermont.*[76]

Contrary to the recommendation, in that instance where the appellate record contains the stenographic record of only those rulings which are to be complained of in the appellate court, a statement of errors is nevertheless made after the appellate record is prepared in all cases in twelve states:

[73] E.g. Ga. Code Ann. (1933) § 6-801, assignments of error in bills of exception; Va. Code (1942) § 6346; W.Va. Code (1943) § 5789.

[74] Mass. Gen. Laws (1932) c. 278, § 33D.

[75] E.g., Calif. Rules on Appeal, Rule 4(b): Ga. Code Ann. (1933) § 6-801; Neb. Rev. Stat. (1943) § 25-1140.1 et seq. It is to be noted that the appellate record must contain only those rulings complained of to the appellate court in California (by agreement), Colorado, Connecticut, Delaware, District of Columbia, Georgia Code Ann. (1933) § 6-801, Iowa R.Civ.P. 340, 343, Kansas, Louisiana (by designation of any party), Maine (except equity), Maryland, Michigan Court Rule 66(7), Minnesota, Montana, Missouri Rev. Stat. Ann. (1939) §§ 847.135, 847.136 (by agreement), New Hampshire, New Mexico, New York (seldom followed however), North Carolina, Ohio, Oregon (except equity), South Carolina, Tennessee, Texas, Utah, Washington, and West Virginia (by agreement). In Michigan appellant attaches to the proposed bill of exceptions the statement of reasons and grounds for appeal. Thus, the assignment is made before the bill is settled by the court but also is joined as part of the proposed bill.

[76] See supra n. 71 and n. 72.

Colorado, Illinois, Minnesota, Missouri, Montana, New York, Oklahoma, Tennessee, Texas, Utah, Washington, and *Wyoming.*[77]

Assignments of error are treated in the mode criticized in the recommendation, as limiting the scope of review, in *Georgia, Indiana, Kentucky* (except equity), *Missouri, Oklahoma* (except equity), *Oregon* (except equity), *Pennsylvania* (generally, except errors apparent on face of record), *Rhode Island, South Dakota, Vermont,* and *Virginia;*[78] and in all except capital cases in *Utah* and *Wyoming.*

While it would appear that the first section of this recommendation as to appellate records containing the complete stenographic record is the accepted practice in a majority of the states and assignments of error are treated as limiting the scope of review in only a minority of states, the converse of the recommendation as to the use of assignments of error where a partial stenographic record is employed is accepted by but a minority of the states.

Printed or Typewritten Records

(6) That the use of typewritten records, prepared in accordance with proper specifications, should be permissible in all cases, and that, if either party elects to print the record, the cost thereof should not be taxable as costs.

This recommendation refers primarily to testimony, which is normally the largest part of the record, while Recommendation (7), which will be discussed next, relates to pleadings and papers on file in the trial court. Both of these recommendations were made for the purpose of reducing the costs of an appeal, which are often a serious hardship to many litigants, without inconveniencing the court. A typewritten transcript

[77] E.g., Colo. R.Civ.P. 111(f) a specification of points shall be filed at or before time of filing of brief, no assignments of error as such required; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, §§ 259.36, 259.39, in brief; Wyo. Comp. Stat. Ann. (1945) § 3-5408.

[78] E.g., Ga. Code Ann. (1933) § 6-901; Ind. Rules Sup. Ct., Rule 2-17; Mo. Rev. Stat. Ann. (1939) §§ 847.122, 847.40; 9 Stand. Pa. Prac. § 351 at 277.

is always made by the stenographer as the first step in preparing the record. It was considered that if such a transcript were made according to court rules as to size of type, kind of paper used, etc., legible and standardized records would be secured appropriate for court use.[79] The federal rules of civil and criminal procedure authorize the circuit courts of appeal to dispense with the printing of the record on appeal and to review proceedings on the typewritten record.[80]

In 1943 the fourth circuit of the federal courts of appeal pioneered in this direction when it adopted its Rule 10, providing for the printing of relevant parts of the record in an appendix to the brief rather than printing the entire record. Since that time five other federal courts of appeals have adopted a comparable rule.[81] Similarly in *New Jersey* and *Wisconsin* the original typewritten transcript of testimony is sent to the appellate court and it is no longer necessary to print the entire record on appeal, but each party prints as his appendix only such parts of the record as he desires the court to read in connection with the questions presented in his brief.[82] It is to be noted that, as the practice developed in the fourth circuit indicates, this recommendation and No. (8) of this chapter are interdependent.

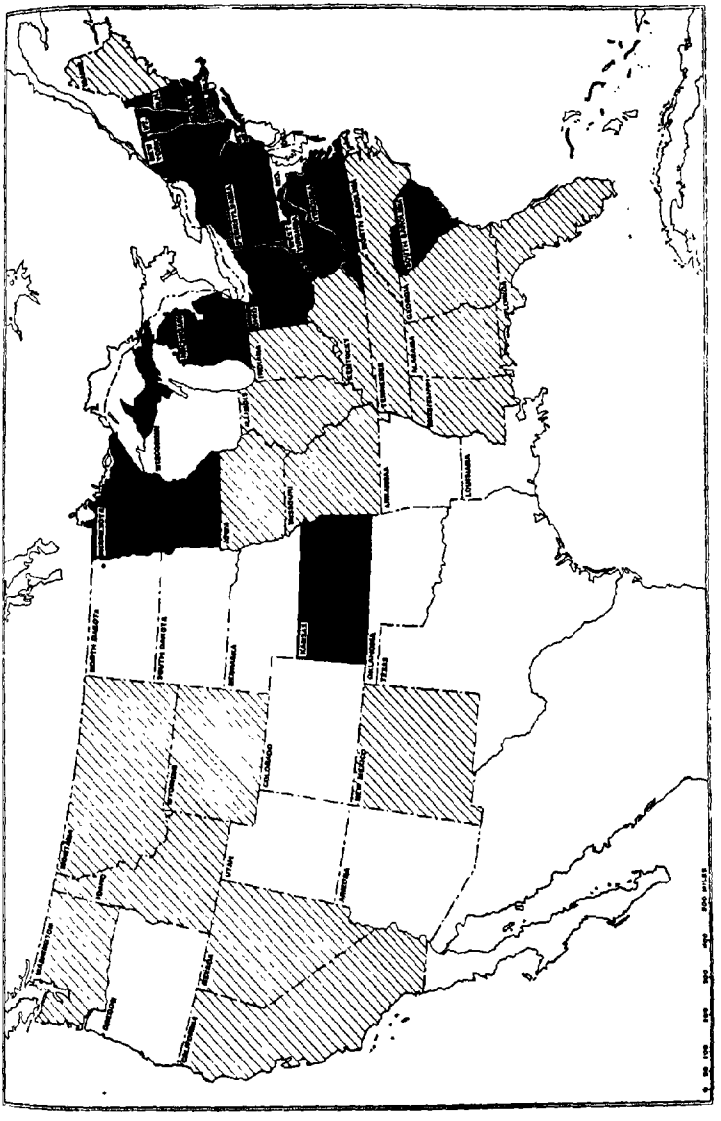
In accordance with the recommendation, the use of typewritten records also is authorized in thirty-two jurisdictions in all cases: *Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada* (except equity cases), *New Mexico, North Dakota, Ohio* (court of appeals, intermediate appellate court only), *Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington,* and *Wyo-*

[79] Appendix A at 594.

[80] Fed. R.Civ.P. 75, Fed. R.Crim.P. 39(b)(2).

[81] Nims, "Shortening Records on Appeal," 28 J. Am. Jud. Soc'y 73 (1944); Dean, "Fourth Circuit Rule 10 Reduces Brief Printing Costs," 26 id. 148 (1943).

[82] N.J. Rules 1:2-21, 1:2-22, 1:3-1, 1:3-2; Wis. Stat. (1947) § 251.26.


PRINTED OR TYPEWRITTEN RECORDS
Use of typewritten records (transcript of testimony) authorized
Use of printed records permissible, typewritten or mimeographed records also used
Required that record be printed, certain limited excerpts

ming.[83] In *Arkansas* and *Louisiana,* moreover, the use of typewritten records is obligatory.[84] In *North Carolina, South Carolina,* and *Virginia* typewritten records may be permitted in pauper cases only, and in *Kansas* only in special proceedings, such as appeals from workmen's compensation cases when approved by the Supreme Court.

Another method used in the preparation of the record to lighten costs of appeal, consistent with the recommendation, is in use in a few states. This is the practice of using mimeographed copies of the record, which is permissible in *Indiana, Iowa, Maine, North Carolina,* and *Oklahoma.* In *North Carolina,* moreover, it is the means most commonly used. Another mode permissible in four jurisdictions in preparing the record, which is consistent with the purpose of the recommendation, is the use of photostatic copies: *District of Columbia, Illinois, Nebraska,* and *Washington.*

Thirteen states, however, still require the printing of the record, the method which is most expensive and burdensome to the parties, and which was specifically condemned by the committee: *Connecticut, Kansas* (except by permission of the Supreme Court), *Massachusetts* (with the exception of the appellate division of district or municipal courts), *Michigan, Minnesota, New Hampshire* (in jury cases, but an exception may be made for paupers), *New York* (with an exception for paupers), *Ohio* (in the Supreme Court), *Pennsylvania* (with an exception for paupers on special petition), *South Carolina* (with an exception for paupers), *Vermont, Virginia* (with an

[83] E.g., Ala. Code (1940) tit. 7, Sup. Ct. Rule 26 at p. 1013, typewritten record universally used though printed record allowed, duty of making the record placed on court reporter and clerk, a certain fee per 100 words set, any cost in excess is borne by reporter or clerk, typewritten record therefore being cheaper is universally used; Calif. Rules on Appeal, Rule 26, printed record permissible, but amount recoverable as cost is limited to expense of a typewritten record in absence of a stipulation to the contrary; Ga. Code Ann. (Supp.) §§ 24-3612, 24-4510; Ind. Sup. Ct. Rules 2-5; Iowa R.Civ.P. 345 as amended 1945; Md. Code Ann. (Supp.) p. 2000, Ct. of Appeals Rules, Rule 36; Mo. Rev. Stat. Ann. (1939) § 847.135 costs allowed only for typewritten copies, Mo. Sup. Ct. Rule 1.20; N.D., typewritten records merely permissive but universally used; Utah, transcript of testimony is contained in bill of exceptions, which is typewritten.

[84] Ark. Stat. Ann. (1947) § 27-1728; La. Code Prac. Ann. (1942) § 585 et seq.

exception for paupers), and *West Virginia*.[85] In nineteen states the use of printed records is permissible: *Alabama, California, Florida, Georgia, Idaho, Illinois, Iowa, Indiana, Kentucky, Maine, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, Tennessee, Washington,* and *Wyoming*.[86]

Sending Up Original Records to Appellate Courts

(7) That, so far as possible, all papers on file in the trial court which are to constitute a part of the appellate record should be sent to the appellate court in their original form and copies thereof should not be required for the use of the court.

This recommendation was made because no persuasive reason could be found for requiring the use of copies, since the originals are available and because their use would save considerable expense and prevent economic waste and unnecessary duplication of effort.[87] Thus, under the recently promulgated *New Jersey* court rules the original record, including the pleadings and papers filed, a transcript of the clerk's docket, a copy of the judgment, the original copy of the transcript of testimony, if any, and such original exhibits as the parties may designate, constitute the record on appeal. As part of the appendix to his brief an appellant is required to print the judgment, order or determination appealed from, but it is not necessary to print any other portion of the record on appeal except the pleadings and parts of the record material to the question presented. The parties may alternatively prepare an agreed statement in lieu of the record, approved by the lower court; in such cases the statement is to be printed in an appendix to the briefs. For any infraction of the rule as to printing the appellate court is authorized to withhold costs from or impose them on offending attorneys or parties as

[85] E.g., Mich. Ct. Rules 69(1), subject to waiver by court order; Ohio Gen. Code (1938) §§ 12223-32, 12223-33, certain exceptions; Pa. Sup. Ct. Rule 38.

[86] E.g., Ala. Code (1940) tit. 7, Rule 26; Calif., see supra n. 83 re costs recoverable; Ga. Code Ann. (1933) §§ 24-3612, 24-4510; Iowa R.Civ.P. 345; Mo. Sup. Ct. Rule 1.04.

[87] Appendix A at 595.

circumstances of the cases and discouragement of like conduct in the future may require.[88] Similarly, under the Federal Rules of Civil Procedure whenever a circuit court provides for hearing of appeals on original papers, the clerk of the district court is directed to transmit them. The fourth circuit was the first to adopt a rule under this provision.[89]

Original pleadings and other papers on file in the trial courts, such as exhibits and depositions, are used in the appellate courts in twelve jurisdictions as recommended: *California, Colorado, Iowa, Minnesota, Nebraska, New Jersey, North Dakota, Ohio* (pleadings, etc., but not depositions or exhibits), *Rhode Island, South Dakota, Utah,* and *Wisconsin.*[90] In twelve jurisdictions original records may be used at the discretion of the parties or the court: *Arizona, District of Columbia, Florida, Illinois, Indiana* (exhibits), *Kentucky, Missouri, New Hampshire* (certain exhibits, exception for paupers), *Oklahoma, Texas, Washington,* and *Wyoming.*[91] In *New York* and *South Carolina* this may be done only on appeals from inferior trial courts.

[88] N.J. Rules 1:2-21, 4:2-6; 1:2-22, 4:2-6; 1:3-1, 1:3-2(f), 4:3-1. In the appellate division of the superior court if a brief or appendix would not exceed 20 pages, it may be typewritten. Id. 1:3-1.

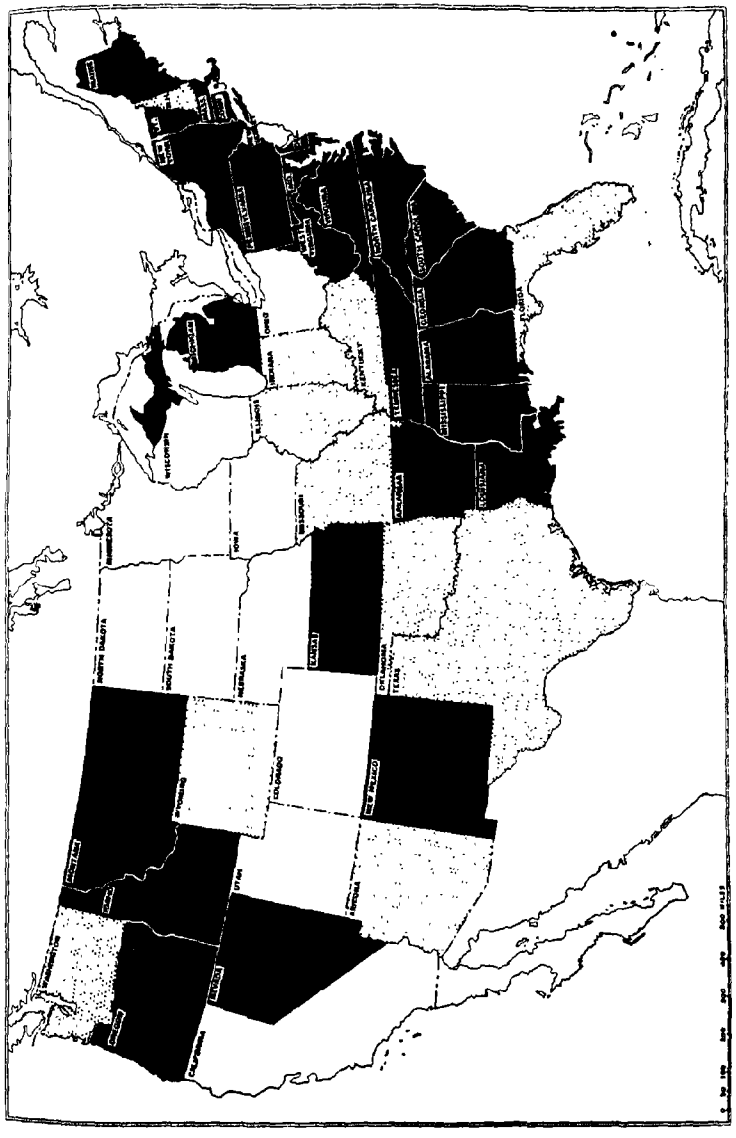
[89] See 32 J. Am. Jud. Soc'y 118 (1948); Fed. R.Civ.P. 75(o) as added, Moore, op. cit. supra n. 69 at 368:

> "Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. . . . The clerk shall transmit all the original papers in the file dealing with the action or the proceedings in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so."

See also Fed. Rule Crim. Pro. 39(b)(2).

[90] E.g., Calif. Rules on Appeal, Rule 5, certain papers; Colo. R.Civ.P. 112(a); Neb., exhibits, depositions, etc., not pleadings; N.J. Rule 1:2-21(a), except if appeal taken on agreed statement of facts, id. 1:2-21(b), but pleadings, the judgment appealed from must also be included in briefs, id. 1:3-1; 1:2-22; N.D., except if court directs use of copies; Ohio Gen. Code (1938) § 12223-8, other original pleadings, docket entires, journal entries, but not documents of evidentiary character such as depositions and exhibits, which must be incorporated into bill of exceptions; Wis., except if court directs use of copies.

[91] E.g., in Indiana original exhibits are frequently inserted without copy-


SENDING ORIGINAL RECORDS TO APPELLATE COURT
Original pleadings and other papers on file in trial courts are sent to appellate courts
Original records may, in discretion of parties or the court, be used in appellate courts
Original records not used as such by appellate courts

In the remaining jurisdictions papers on file in the trial court may not be used by the appellate court in their original form: *Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Mexico, New York* (except appeals from inferior trial courts), *North Carolina, Oregon, Pennsylvania, South Carolina* (except appeals from inferior trial courts), *Tennessee, Vermont, Virginia,* and *West Virginia.* Typical of the criticized provisions are those of *Alabama,* where pleadings and other papers on file in the trial court are ordinarily copied into the transcript.[92] The rules provide that originals *may* be sent to the appellate court when it is necessary for the appellate court to inspect them. It has been held, however, that the clerk must still include a copy of the original papers in the transcript. In *Pennsylvania* the original file *must* be transmitted to the appellate court, but this is in addition to the printed copies.[93]

As to the majority of the states, it is apparent that Recommendation (7) is not followed. Thus, the parties in these jurisdictions seem to be burdened with what is considered an unnecessary expense.

Abstracts of the Record

(8) That abstracts of the record should not be required, but that such matters in the record as the parties desire to bring to the attention of the court should be set forth in appendices to the brief, either by summarized statement or quotation.

This recommendation is directed at eliminating the practice of requiring the printing for the court's use of an abstract

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ing, the procedure generally contemplates copying but bulky exhibits, maps, etc. are frequently attached without copying; Mo. Rev. Stat. Ann. (1939 § 847.135 as amended 1948, Mo. Sup. Ct. Rules 1.03, 1.05; Tex. R.Civ.P. 378, Wyo. Comp. Stat. Ann. (1945) § 3-5406; cf. N.H., in discretion of parties as to use of original exhibits on appeal, court may order their use, in ordinary tort and contract cases pleadings are not included in the record, i.e., as copies or originals, the form of action is set out in the reserved case by a brief statement.

[92] Ala. Sup. Ct. Rules 24, 25, 47.

[93] Pa. Sup. Ct. Rule 38.

of the record in addition to the record itself. The Committee on Improvement of Appellate Practice recognized that abstracts of the record are often useful to the court in enabling it to ascertain the facts of the case without reading the record and aiding in locating references to the record. In view, however, of the expense involved it was considered that the court would enjoy every benefit derived from the abstract if the facts relied upon by the parties were stated in the briefs with ample reference to the pages of the record. Moreover, it was found that if the briefs were utilized in the recommended manner, objections to the use of a typewritten record would disappear as the judges would have little occasion to refer to the record itself.[94] This Recommendation (8) is closely related to the practice described in discussing the preferable use of typewritten records, Recommendation (6). Thus, if the typewritten record is used, the recommendation as to the use of appendices to the briefs is applicable, and only if the briefs are so used is the use of the typewritten record practicable. The practice in the fourth circuit of the federal courts of appeal, which pioneered in this direction, and that of the five other federal courts of appeal and the *New Jersey* and *Wisconsin* practice are illustrative of that recommended.[95]

Only a few states reported that the criticized requirement of abstracts of the record still exists: *Arkansas, Colorado, Illinois, Kansas,* and *Wyoming.*[96]

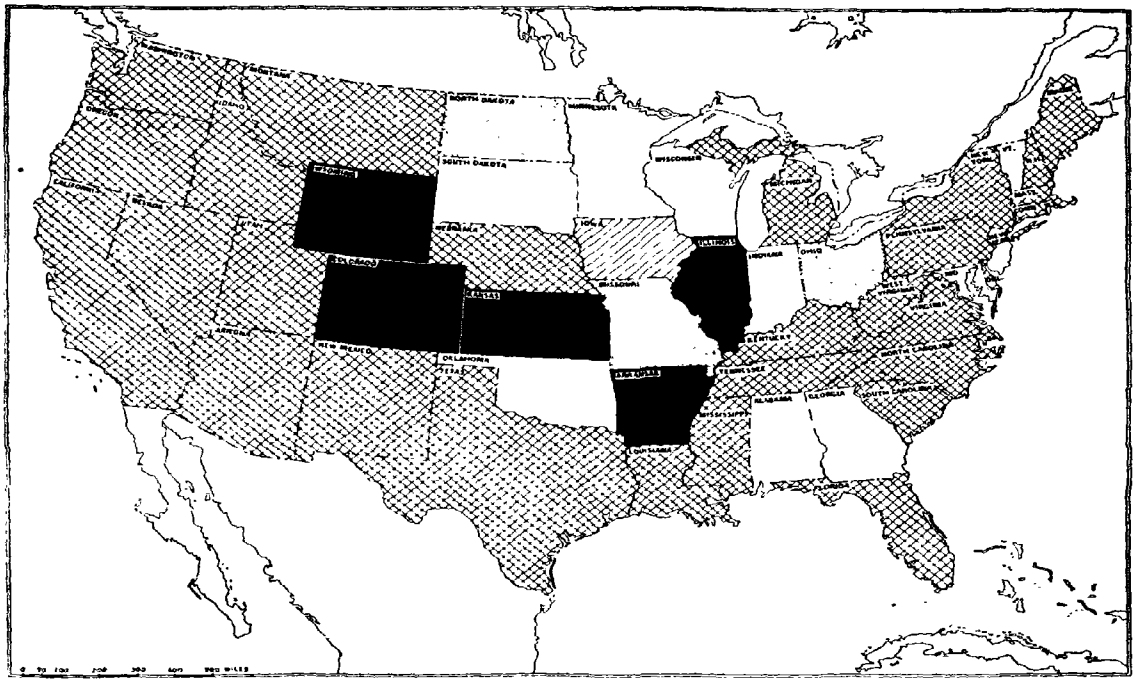
In some of the states where it was reported that abstracts of the record are not required, such matters in the record as the parties desired to bring to the attention of the court, as recommended, are set forth in the brief or in appendices thereto, either by summarized statement or by quotation: *Alabama, Georgia, Indiana, Maryland, Minnesota, New Jersey, Oklahoma, South Dakota, Vermont,* and *Wisconsin.*[97] In

[94] Appendix A at 595.

[95] See supra n. 81.

[96] Ark. Sup. Ct. Rule 9; Colo. R.Civ.P. 115; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, § 259.38; Kan. Gen. Stat. (1947 Supp.) § 60-3312; Wyo. Comp. Stat. Ann. (1945) § 1-437 (Sup. Ct. Rule 37).

[97] E.g., Ala. Code (1940) tit. 7, Sup. Ct. Rule 10, appellant's brief to contain a concise statement of record as presenting error relied on with reference to pages of transcript, if insufficiency of evidence relied on statement must contain condensed recital of evidence in narrative form; Ga.



ABSTRACTS OF THE RECORD

Abstracts of the record not required, relevant matters of record are set forth in brief, or appendices thereto, by summarized statement or quotation

Abstracts not required, facts stated in briefs with specific references to pages of record

Abstracts not required, pertinent matters not set forth in briefs or appendices, nor in discussing facts of case do briefs contain references to relevant pages of record

Abstracts of the record required

addition, among those states not making such a requirement, in *North Dakota* it is not necessary to print an abstract but the appellant is required to file in lieu of abstracts three copies of the statement of the case as settled and certified and in his brief a statement of the facts of the case, referring specifically to the page and line of the settled case;[98] in *Missouri* and *Ohio* by rule of court the briefs must contain a statement of facts with references to the pages of the record.[99]

According to the reports, however, other states dispensing with the use of abstracts of the record do not require the recommended inclusion in the brief of such pertinent matters in the record nor require reference to pages of the record in discussing the facts of the case. Thus, in those states in which abstracts are not required and the brief does not include pertinent matters from the record or reference to particular pages of the record, the conclusion would follow from the committee's reasoning that the record itself would have to be examined closely by the court and thus a provision for one typewritten copy of the record would be insufficient for the needs of the court. In such states the court receives no aid in studying the records from those persons most familiar with it, the attorneys representing the parties in the case, and the submission of a sufficient number of copies of the record in an easily readable and usable form would be a matter of necessity. Thus, it would seem that while only five states make the criticized requirement of abstracts of the record, in only ten states is the approved practice of inclusion in the brief of particular parts or summaries of the record required.

Form of Testimony in the Appellate Record

(9) That in preparing the record on appeal, the appellant should be permitted to set forth all or any part of the testimony in question

Code Ann. (1933) §§ 24-3617, 24-4515 (by reference only); Ind. Sup. Ct. Rules (1946 Revision) Rule 2-17; Minn. Stat. Ann. (1945) Vol. 27, Sup. Ct. Rule 8, p. 579; N.J. Rules 1:3-2(8); Okla. Sup. Ct. Rule 15; S.D. Code (1939) § 33.0709; Wis. Stat. (1947) § 251.26(5).

[98] N.D. Rev. Code (1943) §§ 28-2733, 28-2735.

[99] Mo. Sup. Ct. Rule 1.08, cf. Rule 1.04 in 356 Mo. ii, iii (1947); Ohio Sup. Ct. Rule II(2) in Ohio Gen. Code (1938) Vol. 9 at 529, Ohio Ct. App. Rule VII.

> and answer form, and the appellee should be permitted to require testimony in question and answer form to be substituted for any condensed statement in narrative form prepared by the appellant.

The common-law custom of presenting testimony on appeal in the bill of exceptions in narrative form, which developed because there were no stenographers to take down questions and answers, has survived in some states. This narrative translation has been much criticized as inferior to the stenographic record and as burdensome for counsel.[100] Because of this and the accuracy and completeness of a stenographic transcript, the above recommendation was made. This is similar to Federal Rule 75(c), which provides that

> Testimony of witnesses designated for inclusion need not be in narrative form but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.[101]

This recommendation, of course, applies only to those cases in which there is a court stenographer. It is to be noted that in several of the states[102] which have modeled their practice on the federal,[103] an agreed statement as to the case may be used as the record on appeal. In the employment of this device the recommendation here considered is of course inapplicable.

In viewing the practice in the states as to this recommendation, two questions must be considered: (1) whether the stenographer's transcript or the portion designated by counsel of the parties is used as part of the record on appeal, and (2) if the stenographer's transcript as such is not used, whether in the bill of exceptions or abstract of the record the testimony

[100] Appendix A at 596.

[101] Moore, Federal Practice 3398 et seq. (1938); See Stone, "The Scope of Review and Record on Appeal," IV Handbook, National Conference of Judicial Councils 98 (1942).

[102] E.g., Ariz. Code (1939) §21-1830; Calif. Rules on Appeal, Rules 6-7; Colo. R.Civ.P. 112(c); N.J. Rule 1:2-22; Wis. Stat. (1947) §251.2531.

[103] Fed. R.Civ.P. 76.

of witnesses may or must be in question and answer form or may or must be reduced to narrative form.

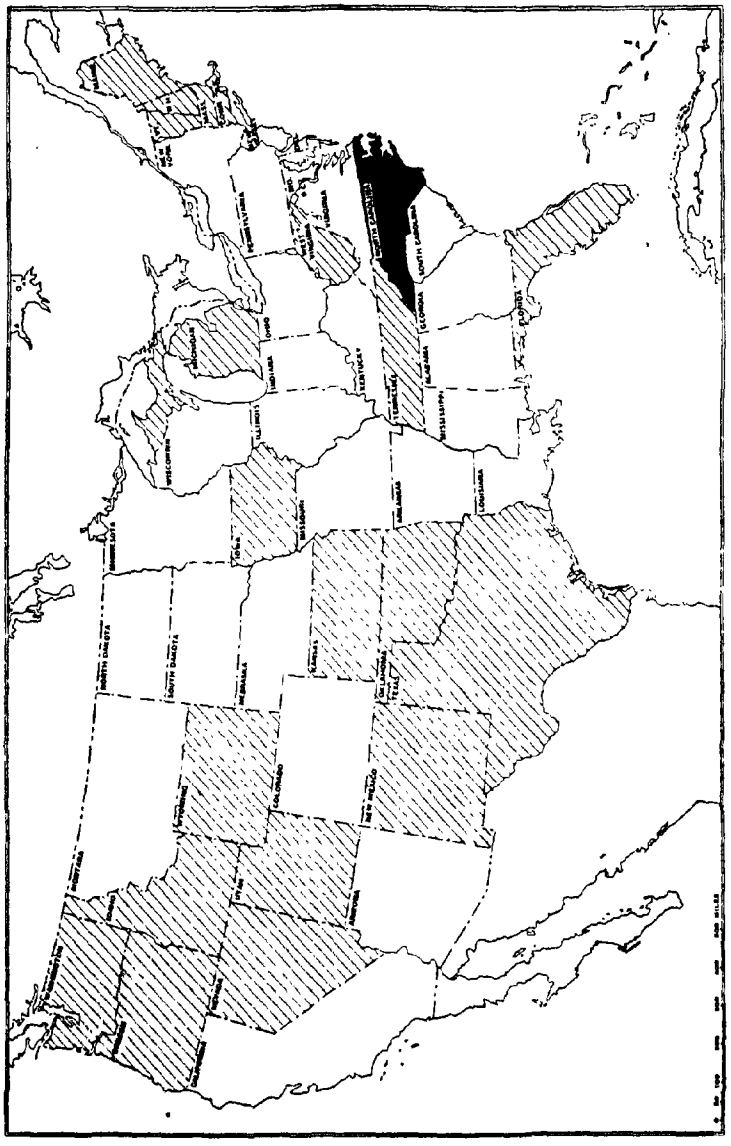
Naturally, in those jurisdictions where the entire stenographic record is used *verbatim*, the recommendation is embodied in practice and no further question arises, but in those jurisdictions in which an abstract of the record or a bill of exceptions is used to form the appellate record, the second question does arise. It appears that, other than where an agreed statement may be used, as permitted under the federal rules, the complete or the relevant parts of the stenographic record of all or pertinent rulings are employed in *Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Illinois, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota,* and *Wisconsin;*[104] and in *Maine* and *Massachusetts* in equity actions only. In *Arkansas, Kentucky,* and *Nebraska* the stenographic record is used although it is denominated a bill of exceptions.[105] As to these jurisdictions there can be no doubt that the recommendation is embodied in practice, since the stenographic transcript constitutes part of the appellate record.

It is in those states in which a bill of exceptions or an abstract of the record may or must be used that the question arises as to whether the recommendation is followed.[106] Among such

[104] E.g., Ala. Code (Supp.) tit 7, § 827(1) as enacted L. 1943, p. 423 (law cases), Ala. Sup. Ct. Rule 48, in equity cases questions and answers or narrative form used, Ala. Rules 55(b), 56; Ariz. Code (1939) §§ 21-1820, 21-1821; Calif. Rules on Appeal, Rules 4-8; Colo. R.Civ.P. 112; Ga. Code Ann. (Supp.) §§ 24-3611, 24-4509; Ill. Rev. Stat. (Smith-Hurd, 1947) c. 110, § 259.36(c); Md. Ct. of App. Rule 19; Minn. Sup. Ct. Rule 8; Mo. Sup. Ct. Rule 1.04, Mo. Rev. Stat. Ann. (Supp.) § 847.135; N.J. Rules 1:2-21, 1:2-22, 1:3-2, 4:2-6; Wis. Stat. (1947) § 270.44.

[105] Ark. Stat. Ann. (1947) § 27-1728; Ky. Rev. Stat. (1948) §§ 28.430, 28.470; Neb. Rev. Stat. (1948) § 25-1140.1.

[106] E.g., in a case tried with an official court stenographer, the stenographic record of a ruling must still be changed into a bill of exceptions in Michigan (law cases, in equity a settled case is used), Maine (law cases), Massachusetts (law cases), Montana, New Hampshire, New Mexico, North Carolina, Ohio (law cases, equity cases heard de novo on appeal), Oregon (law cases), Tennessee, Utah, Vermont, and Washington.


FORM OF TESTIMONY IN APPELLATE RECORD
Complete or relevant parts of the stenographic record of all or pertinent rulings form part of appellate record, or testimony of witnesses presented in question and answer form only
Testimony of witnesses presented either in question and answer form or reduced to narrative form
Testimony of witnesses must be reduced to narrative form

states various instances may be distinguished. Thus, in *Virginia* the appellate record may include the stenographic record of rulings questioned, or alternatively the record may be reduced to abstract form or changed into a bill of exceptions; and in *West Virginia* the appellate record may be in the form of a bill of exceptions or may be reduced to an abstract. In *Florida* the alternatives possible in making up the record are either the use of the appellate record without change or reduced to abbreviated statement.[107]

In these states in which the stenographic record may be reduced to abstract form or changed into a bill of exceptions, the testimony of witnesses, as recommended, must be presented in question and answer form only in *Montana* and *Virginia*.[108] In *Connecticut, Florida, Idaho, Iowa, Kansas, Massachusetts, Michigan, Nevada, New Hampshire, New Mexico, Oklahoma, Tennessee, Texas* (in civil cases), *Utah, Vermont, Washington, West Virginia*, and *Wyoming;*[109] and in *Maine, Michigan*, and *Oregon*, except in equity cases, the testimony of witnesses may be presented in either the approved question and answer form or may be reduced to the narrative form, and in some instances upon request the question and answer form must be used, as also authorized in the federal rules. Contrary to the recommendation, the testimony of witnesses must be reduced to narrative form in *North Carolina*, and in criminal cases in *Texas*.[110]

Correcting the Record on Appeal

(10) That either the trial or the appellate court should have power at any time to make an order authorizing any amendment of the record on appeal which is necessary to present the case fully and

[107] Fla. Sup. Ct. Rule 11.

[108] E.g., Mont. Rev. Code (1935) § 9388.

[109] E.g., Fla. Sup. Ct. Rule 12; Iowa R.Civ.P. 340(d); Mass. Gen. Laws (1932) c. 231, § 113 as amended 1945, see Petition of Graunstein, 305 Mass. 568, 26 N.E. 2d 535 (1940); Mich. Ct. Rule 66(9), narrative form unless certified by trial court that question and answer form should be used; N.M. Sup. Ct. Rules 12, 13; Tex. R.Civ.P. (Supp.) Rule 377; Wyo. Comp. Stat. Ann. (1945) § 1-437.

[110] N.C. Gen. Stat. (1943) § 1-282, see Thompson v. Williams, 175 N.C. 696, 95 S.E. 100 (1918). Tex., see Clark v. State, 208 S.W. 2d 637 (1948).

> correctly, upon such showing, in such manner and on such terms as may be just.

While the likelihood of reaching a just decision is more remote where the record on appeal is defective, the defeat of an appeal because of technical defects or omissions is unjust and reflects poorly on the mode of the administration of justice. It is indeed difficult for laymen to understand that a just claim may be defeated or may require proceedings involving delay because of technical imperfections. Since valid claims should not be defeated because of mere defects in the record, this recommendation was made with the purpose of eliminating "technical requirements, conditions and restrictions, and all procedural and jurisdictional hazards," thus making the amendment of an appellate record as simple a process as the amendment of a pleading in the trial court.[111] This is substantially the same as Federal Rule 75(h):

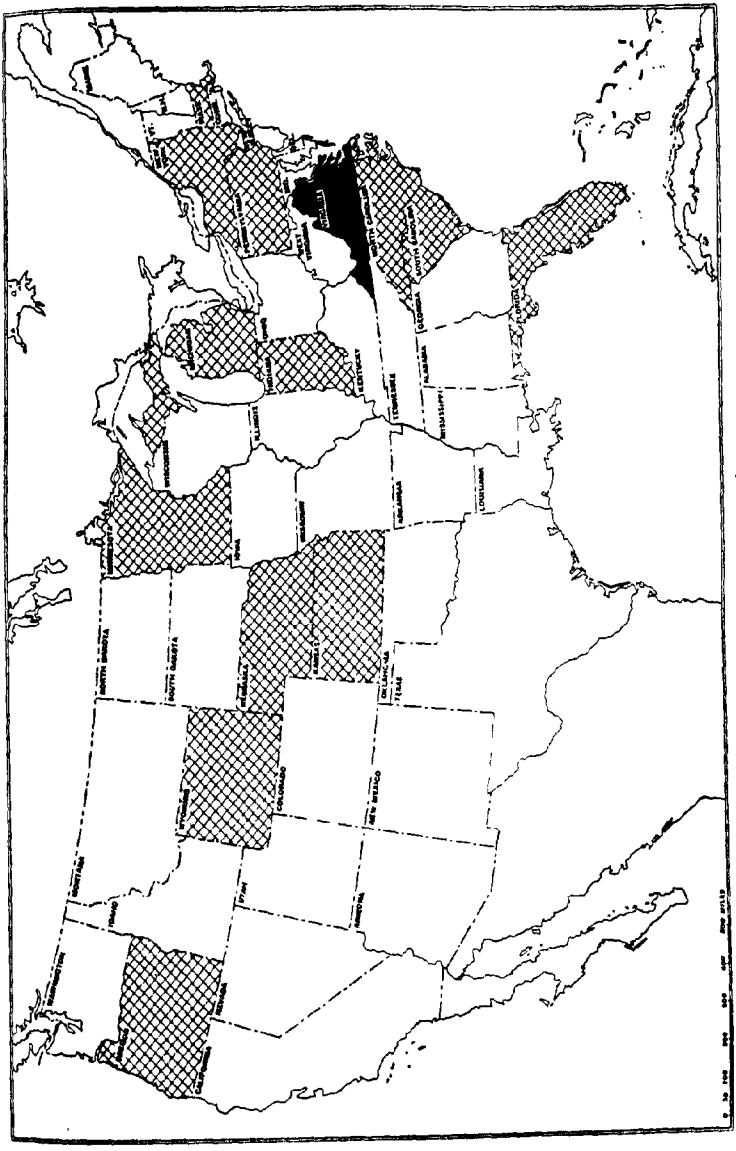
> If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the circuit court of appeals.[112]

In accordance with the recommendation, where the record on appeal is defective, the appellate court *must* permit the correction of the defects in *Louisiana, Montana,* and *Wisconsin;*[113] while the appellate court *may* do so in *Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Mis-*

[111] Appendix A at 596.

[112] Moore, op. cit. supra n. 69 at 367.

[113] La. Code Prac. Ann. (1942) art. 898.1, appellate court must permit correction where appellant files incomplete transcript, id. art. 898, appellate court may permit correction where copy of record is incomplete, no appeal dismissed if error or irregularity is not imputable to appellant; Mont. Rev. Code (1935) § 9747; Wis. Stat. (1947) §§ 251.251 to 251.255.



CORRECTING RECORD ON APPEAL

Appellate or trial court has power to authorize amendment of record on appeal when necessary to present the case fully and correctly

Appellate court may dismiss the appeal when the appellate record is defective

Appellate court must dismiss the appeal when appellate record is defective

souri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and *Wyoming;*[114] and may remand the appeal in eleven jurisdictions—*Alabama, California, Florida, Massachusetts, Minnesota, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont,* and *Wyoming.*[115]

Contrary to the recommendation, when the appellate record is defective, the appellate court *must* dismiss or quash the appeal in *Virginia,* and is permitted to do so in thirteen states: *Florida, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New York, North Carolina, Oregon, Pennsylvania, South Carolina,* and *Wyoming.*[116]

In no state was it reported that the trial court must dismiss the appeal where the record on appeal was defective. And affirmatively it was reported that where the record on appeal is defective, the trial court may permit correction of the defects in eighteen jurisdictions, *California, Connecticut, Delaware,*

[114] E.g., Ala. Sup. Ct. Rule 19 in Ala. Code (1940) tit. 7 at 1012, cf. id. tit. 7, §§ 805, 810; Ark. Rule 24, Ark. Stat. Ann. (1947) § 21-2129; Calif. Rules on Appeal, Rule 12; Colo. R.Civ.P. 112(a) Fla. Sup. Ct. Rule 11; Ga. Code Ann. (1933) §§ 6-1403, 6-810; Ind. by certiorari, cf. Ind. Stat. (Burns, 1946) § 2-3230; Iowa R.Civ.P. 341; Md. Rules of Ct. of App., Rules 45, 46; Mich. Comp. Laws (1948) § 616.9, Mich. Ct. Rule 66(14) no supplemental record considered unless certified by trial judge or ordered by Supreme Court; Mo. Sup. Ct. Rule 1.03, Mo. Rev. Stat. Ann. (Supp.) § 847.135, no correction after service of respondent's brief without consent of parties; Nev. Sup. Ct. Rule VII, Nev. Comp. Laws (1929) p. 2470; N.J. Rule 1; 2-26; N.Y.C.P.A. §§ 105, 107; Ohio Gen. Code (1938) § 11572(a); Pa., the power is discretionary and in certain types of amendments or compilation of record it will ordinarily be returned to the lower court for correction, 9 Standard Pa. Practice §§ 66, 308 at 538, 224 respectively; Utah Code Ann. (1943) § 104-41-21; Utah Sup. Ct. Rule 3; Wyo. Comp. Stat. Ann. (1945) § 1-42.

[115] One of these, Massachusetts, is a state in which the appellate court may not correct defects, therefore the remanding action is necessary if the record is to be corrected. The Supreme Judicial Court may continue the case on its docket and remand enough of the case to the lower court to enable amendment to be made and may retain the rest of the papers until after correction is made. This is the general practice.

[116] E.g., Indiana, where a material defect appears in the record and is pointed out and no effort is made to correct it in a reasonable time, the cause will be dismissed or affirmed; Wyo. Comp. Stat. Ann. § 1-437, if there is failure to comply with the provision of the rule as to abstracts of the record, the case may be dismissed or costs may be taxed.

Georgia, Kansas, Kentucky, Mississippi, Missouri, New Jersey, North Dakota, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and *Wyoming;*[117] and must certify the omissions in *North Carolina.* Thus it clearly appears that in the majority of jurisdictions in accord with the recommendation either the trial or appellate court may authorize any amendment necessary to present the case fully and correctly.

Length of Briefs

(11) That the number of pages in any brief taxable as costs should be limited by rule of court.

Again the purpose of this recommendation is to be found in the double desire to reduce the costs to the parties and to lighten the labor of the judges. Another reason for the recommendation is to be found in the view that excessively long briefs are usually poor. While an arbitrary limitation on the length of briefs was not recommended, it was found desirable to attempt to persuade counsel not to allow their briefs to run to excessive length, by limiting the taxable costs for printing.[118]

As recommended, the taxable costs of the brief are limited in some manner in fifteen jurisdictions: *Arkansas,* $15; *California,* $100; *District of Columbia,* 50 pages; *Idaho,* $1.00 per page, for 40 pages; *Illinois,* Appellate Court Cook County, 75 pages; *Maryland,* 50 pages; *Missouri,* appellant's brief 100 pages, appellee 90 pages; *Nebraska,* $1.80 per page, 75 pages, additional pages $1.25 per page; *New Jersey,* appellant 50 pages, appellee 20 pages; *New York,* Appellate Division, 50 pages; *North Carolina,* 60 pages; *North Dakota,* typewritten briefs $10 under 25 pages, $15 over 25 pages; *Virginia,* $50; *Washington,* $1.00 per page for first 24 pages, 85¢ each for next 24 pages, 75¢ each for remaining pages; and *Wis-*

[117] E.g., Calif. Rules on Appeal, Rule 12; Mo. Rev. Stat. Ann. (Supp.) § 847.135. N.J. Rules 1:2-26; N. Dak. Rev. Code (1943) § 28-2726, on such terms as are just; Wis. Stat. (1947) § 274.32; Wyo. Comp. Stat. Ann. (1945) § 1-412.

[118] Appendix A at 433.

consin, 50 pages.[119] Thus, the limitations vary from such a small fixed sum as $15 in Arkansas to various allowances per page up to a set number of pages, or the brief length is limited to a certain number of pages. The effectiveness of the device used in Nebraska [120] and Washington, of allowing costs for any number of pages, reducing the allowance per page over a certain number of pages, in achieving the purposes of the recommendation may be questioned. In *Iowa, Kentucky, Michigan,* and *South Dakota* the court is permitted in its discretion to limit allowable costs of a brief.[121] This is true in *Pennsylvania* as to equity matters.[122] It is questionable how valuable such regulations are, since attorneys have no guide for their actions unless as a matter of practice the court has established some clear standard of what is considered a permissible length. In *Alabama, Florida, Indiana, Kansas, Louisiana, Maine, Ohio, Oklahoma, Rhode Island, Texas,* and *Wyoming* it was reported that no costs of the brief are taxable. This would seem to be consistent with the purpose of the recommendation, since if the cost of printing briefs is borne by the parties, care as to length will undoubtedly be practiced in the interest of reducing costs. In six states, however, it was reported that all costs of the brief are taxable: *Montana, Nevada, New Hampshire, North Dakota* (printed briefs), *Pennsylvania* (other than equity), and *Utah.*[123]

It would seem that only in these states in which allowable costs or the number of pages of a brief are limited is the purpose of the recommendation being implemented, while in those eleven states in which no costs are allowed the aim of the recommendation would seem to be achieved. It is to be noted

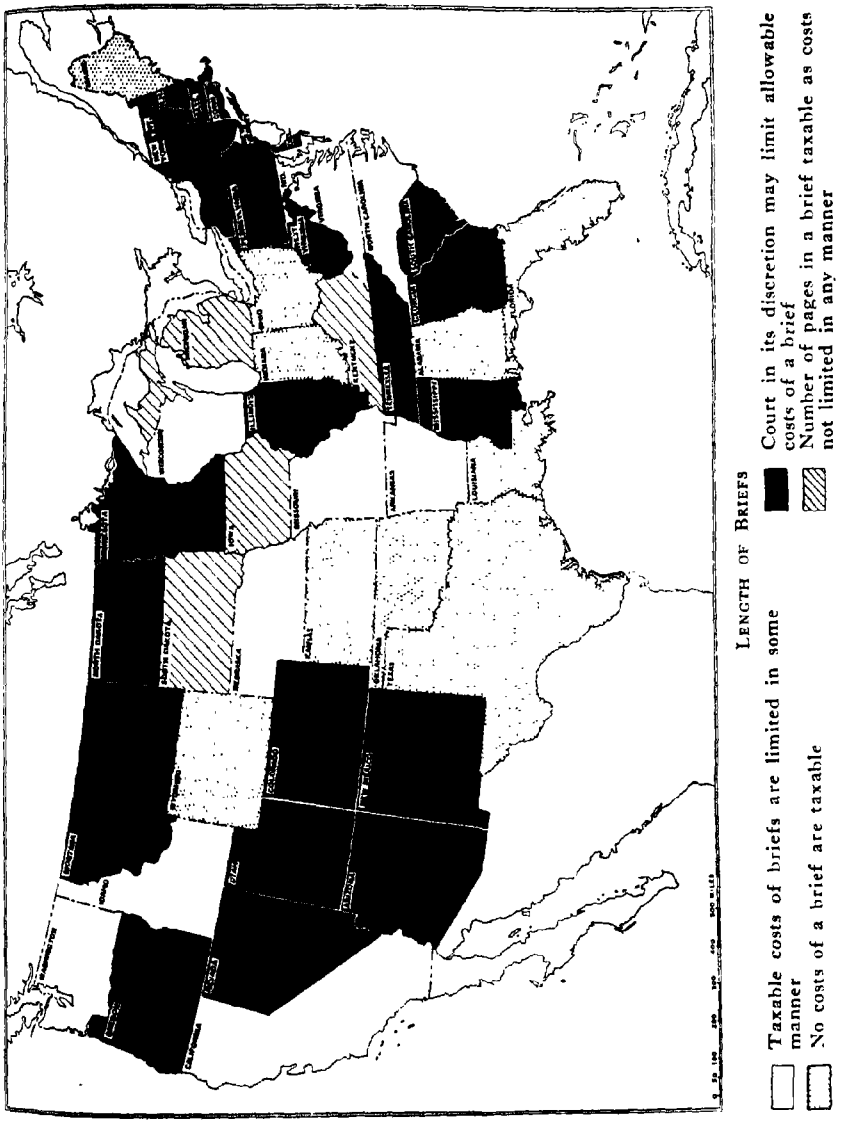
[119] E.g., Ark. Rules 11, 28; Calif. Rules on Appeal, Rule 26; Md. Ct. of App. Rule 39(5)(6); Mo. Sup. Ct. Rule 108, reply briefs 25 pp., can be increased only by leave of court; Neb. Sup. Ct. Rule 9d as amended 1947; N.J. Rules 1:3-7; N.D. Rev. Code (1943) § 28-2740, but actual costs allowed prevailing party for printed briefs; Wis. Stat. (1947) § 251.264.

[120] Neb. Sup. Ct. Rule 9d as amended 1947.

[121] E.g., Iowa R.Civ.P. 345, $1.00 per page, no set limit on pages but costs must be certified by court; Mich. Sup Ct. Rule 5(2), necessary expense of printing brief may be taxed unless otherwise ordered by court.

[122] 15 Standard Pa. Practice § 140 at 546.

[123] E.g., N.D., printed briefs actual costs; Utah, actual cost not exceeding $1.25 per page if printed, 50¢ per page if typed.


LENGTH OF BRIEFS
Taxable costs of briefs are limited in some manner
No costs of a brief are taxable
Court in its discretion may limit allowable costs of a brief
Number of pages in a brief taxable as costs not limited in any manner

in this respect that written argument is optional[124] in all instances in *Maine, Mississippi, Nevada,* and *Texas.* Filing a brief is optional for the appellee in *Utah* and *Washington,* in capital cases in *North Carolina,* and in criminal cases in *Alabama.*

Oral Argument

(12) That a systematic effort should be made by the bar and the appellate bench in each state and in each federal circuit, through joint committees of lawyers and appellate judges, to examine the causes which are operating to limit the effectiveness of the oral argument, and to adopt such measures as may seem proper to restore it to the position of importance which it ought to occupy in our system of jurisprudence.

The basis of this recommendation is the recognition that oral argument, correctly employed, is an effective aid to obtaining a correct decision. Comments and suggestions as to the value of oral argument and means by which its effectiveness could be increased were strangely few in the reports from the various states. It was observed by the reporters from *Georgia* and *Illinois* that oral argument was infrequent and subordinated to written argument. In contrast, it was reported from *Maine* and *Pennsylvania* that oral argument is preferred and the court usually wishes the benefit thereof. From *North Carolina* it was reported that oral argument is effectively used. In *Texas* and *Utah* one of the suggestions of the committee for increasing the effectiveness of oral argument is being utilized in that before the oral argument the judges are given a statement of the facts of the case as prepared by a clerk. Also, in the highest court in *California, Mississippi,* and *New York* one judge prepares a statement of the facts of the case and reads it before the oral argument to inform the other judges, thus making the use of oral argument more effective, though perhaps also furthering the criticized "one-man" decisions,

[124] In Kansas written briefs are required except by excuse of court in urgent cases. In New Hampshire, while a party desiring to be heard in oral argument is required to furnish a brief, no case will be dismissed for want of a brief. N.H. Rev. Laws (1942) c. 369, § 11.

the problem next to be discussed. In *Missouri* such a statement is not read to the judges, but is submitted to them. In *Oklahoma* such a statement is required to be made by counsel during oral argument before the Supreme Court.

It would seem that either oral argument is poor in quality or its value in furthering a correct decision is considered slight, since oral argument is not always required in the appellate courts of all states. In *Tennessee* it is required only in certain instances, such as when the reversal of a jury verdict is sought.[125] In *North Dakota* no oral argument is permitted in particular enumerated actions such as in suits on contract or in equity if the sum involved is $200 or less, unless the court orders otherwise.[126] In *Florida, Idaho,* and *Indiana*[127] it may be required by the court. In all other states it is optional, and in *Colorado, Kentucky,* and *Oklahoma*[128] leave of court must be obtained. In *New Hampshire* if briefs are not filed, there is no oral argument;[129] while in *Washington* if no brief is filed, oral argument is not permitted except by leave of court and in *Iowa* notice of intention to argue orally must be given in the brief. Only in *Connecticut* and *New Jersey*[130] is oral argument required in the appellate courts in all cases. In New Jersey, moreover, in addition to reading the briefs each judge of the appellate court prepares a memorandum of his study of the case and the court holds an informal discussion of the points to be argued prior to oral argument.[131] The effect of this preparation in increasing the value of, and also the quality of oral argument is easily apparent, since such court practices eliminate the need of counsel to familiarize the court with the facts and legal questions to be discussed, and require him to be accurate and succinct in his presentation of the case.

Also important to an understanding of the use of oral argument are the limits set on the time for such argument. In

[125] Tenn. Code Ann. (1934) § 10639.

[126] N.D. Rev. Code (1943) § 28-3105, moreover any party may submit an appeal without oral argument.

[127] In Indiana oral argument is a matter of right if request made within time for filing briefs

[128] In Oklahoma it was reported such permission is freely granted.

[129] N.H. Sup. Ct. Rule 7.

[130] N.J. Rules 1:4-1, 4:4-1.

[131] Id. A5. See 2 Rutgers U. L. Rev. 25-26 (1948).

Kentucky and Pennsylvania the total time allowed for oral argument for both parties is forty-five minutes or less, while in twenty jurisdictions one hour is divided between the parties.[132] From one to two hours is allowed the parties in twenty-three jurisdictions,[133] while more than two hours is allowed in Arizona and Connecticut.[134]

It is to be noted, of course, that the amount of time allowed for oral argument is particularly significant where judges have not read the briefs or discussed the cases to be heard. In such instances counsel necessarily require more time in order to establish the vital questions of the case at bar as well as to discuss them properly. In a state such as New Jersey, however, where the court has read the briefs and had a preliminary conference with respect to the issues involved in the appeal, counsel will naturally be required to be accurate in his presentation of facts and precise in his legal argument; and since there will be no need to familiarize the judges with the facts and questions at issue, less time will be necessary.

"One-Man" Decisions on Appeal

(13) That the problem presented by "one-man" decisions on appeal be made the subject of cooperative studies by the appellate bench and bar in the various jurisdictions.

The charge that appellate decisions are the work of one man springs largely from the practice in this country of having one judge speak for the court. In order to ensure participation of each judge in the consideration and decision of a case, it is basic that each judge be familiar with the facts and law of the

[132] Calif., Colo., Del., Ga. Code Ann. (1933) §§ 24-3604, 24-4504 (more time on request), Ind. (Ct. of App.), Kan., Mass., Mich. Ct. Rule 71(2) (cases involving less than $500), Iowa Ct. Rule 3, Neb., N.C., Ohio, Okla., Ore., Pa. Sup. Ct. Rule 72, S.C., Tenn., Utah Sup. Ct. Rule 10, Wash., Wis. Stat. (1947) § 251.34 (except in special cases).

[133] Ark. Rule 22, D.C., Ill., Ind. Sup. Ct., La., Md., Mich. Ct. Rule 71(2) (cases involving more than $500), Minn. Sup. Ct. Rule XIII, Mo. Sup. Ct. Rule 2.01, Mont., Nev., N.H., N.J. Rule 1:4-7, N.M. Sup. Ct. Rule 1(8), N.Y., N.D., R.I., S.D., Tex. R.Civ P. 498, Vt., Va., W.Va., Wyo. Comp. Stat. Ann. (1945) § 1-405.

[134] In Wisconsin if more than $5000 is involved appellant is allowed 1 hour, 15 minutes, and appellee one hour; in felony cases 2 hours are allowed to each side.

case, examining the briefs and record where necessary and hearing the oral argument. Thus, the holding of a court conference in itself was observed to be an inadequate safeguard unless based on prior study of the case by each judge. And the practice of having one member of the court prepare a statement of facts upon which the judges act in conference was censured as giving that judge a superior and controlling influence.[135] "One-man" decisions, written by one judge and concurred in by his colleagues without their sharing in the study of the records and briefs and other processes of decision, including court conferences, are frequently symptomatic of an overcrowded calendar with a consequent lack of time for all to participate in rendering each decision. It may be doubted that any rule by itself can prevent such decisions; that is, such a rule would not be self-operating and so the burden is on the courts to avoid one-man decisions. Given such determination, no such rule would seem necessary.[136] Since the problem is a complex one, an attempt was made to secure data on the pertinent aspects of the internal workings of the appellate courts in the various states, which are illustrative either of tendencies towards one-man decisions or which aid the courts in avoiding such decisions.

In *Arkansas, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia,* and *Wisconsin* cases in the highest appellate court are assigned to the judges for opinion writing in regular sequence.[137] This would seem to further one-man decisions, since the other judges, forewarned as to who would have the burden of opinion writing in each case, may feel less need to take a thorough interest in the case

[135] Appendix A at 599.

[136] See, "Methods of Reaching and Preparing Appellate Court Decisions," Report Presented to Section of Judicial Administration, A.B.A. at Annual Meeting, Aug. 1942; see also Sunderland, "Arguments, Decisions and Opinions on Appeal," IV Handbook, National Conference of Judicial Councils 129 (1942).

[137] In Arkansas, may exchange cases by agreement; in Indiana this is a very recent practice in order to distribute the burden evenly.

in preparation for the oral argument, in listening to the oral argument, or in conference discussions. In *Arkansas* and *Kansas* the justice to whom the case is assigned may write the majority opinion even if he dissents; he then may, and often does, write a dissenting opinion, as may others. The assignment of cases by the presiding judge prior to oral argument, the practice occurring in *New York, Oklahoma, South Dakota,* and *West Virginia,* is subject to the same criticism as the assigning of cases for opinion writing in regular sequence. A quotation from one of the narrative reports on which this survey is based provides an interesting commentary on these practices:

> In our Supreme Court the writing of opinions is usually assigned to the judges in rotation. While it is possible for such an estimate to be upset by an unexpected division of opinion among the court, a justice can usually tell several days in advance which of the cases on the calendar will fall to his lot. This enables a justice to listen to arguments on a case which he knows will not come to him with complete detachment. It also means that the more spritely ornaments of our bench may satify their variegated interests while still carrying their share of opinion writing, without religiously attending every session of the court. One justice used to be very difficult to find in the capitol on the days when no case was his to decide. The others took advantage of rotational foreknowledge less regularly.

Other practices seemingly subject to criticism as leading possibly to one-man decisions are followed in various other states. In nineteen jurisdictions the record is read by all the judges only in unusual circumstances.[138] In *Louisiana* the constitution provides that the record be read by at least two of the seven judges,[139] and individual comments are expressed only after assignment of the record to two judges for such reading has been made. Individual opinions as to the case are

[138] Ariz., Ark. (only in felony cases), Ga., Ky., Ill., Ind. (only if there is controversy as to the state of the record), Md., Mass., Mich., Mo., Mont., Neb. (see 22 Neb.L.Rev. p. 39 of Bar Association proceedings), N.C., N.D. (only where issue of fact is close and decisive of the case), Okla., Ore., Tex., Wash., and Wyoming (the judges do not usually even read the briefs before oral argument).

[139] La. Const. Art. 7, § 6.

expressed only after the case has been assigned to one judge in twenty jurisdictions,[140] all but three [141] of which, moreover, are jurisdictions in which assignment is made in rotation or before oral argument. In *Michigan* the judge to whom the case is assigned is required before oral argument, if there is any, to examine the record and briefs and state to the other members of the courts the facts of the case and the questions involved. It is obvious that in such circumstances a one-man decision is more likely.

Preferable practices lessening the chances of one-man decisions are utilized in various of the states. Thus, cases in the appellate court in *Arizona, Colorado, Connecticut, District of Columbia, Florida, Louisiana, Massachusetts, New Hampshire, New Jersey,*[142] *North Carolina, Oregon,* and *Pennsylvania* are assigned to individual judges by the presiding judge for consideration and the writing of an opinion only after oral argument and after discussion of the individual cases by the entire appellate bench. This would seem to be the best mode for eliminating one-man decisions.

In *Iowa, Kansas, New Jersey, Ohio, South Dakota,* and *Wisconsin* the record of a case in the highest appellate court is read by all of the judges of the court or division, as would seem preferable. In only one of these states, however, *New Jersey*, does the assignment for opinion occur after oral argument and court conference and not by rotation. In *North Carolina* the record is read by all the judges either before or after oral argument. The record is read by all the judges after oral argument in nine other jurisdictions, *Connecticut, District of Columbia, Florida, Kansas, Maine, New Hampshire, New Mexico, South Carolina, and Vermont;* in only four of which, however, *Connecticut, District of Columbia, Florida,* and *New Hampshire*, is the opinion of the court written by a judge

[140] Ala., Ark., D.C., Ga., Kan., Ky., Me., Md., Mich., Minn., Neb., N.H., N.M., N.Y., S.C., S.D., Tenn., Vt., Va., and Wis.

[141] Ala., D.C., and N.H.

[142] See comment in Rutgers U. L. Rev. (Spec. No. Nov. 1948) at 9 et seq. In Texas the manner of assignment for opinion varies among the several appellate courts, and in Wyoming the chief justice selects the cases on which he wishes to write opinions and the other judges select from those remaining.

selected after oral argument and not selected by mere rotation. In *Pennsylvania* the record is read by all the judges, but may be read before or after assignment for opinion writing. The record is read after such assignment in four other jurisdictions: *Alabama, California, New York,* and *Utah.* In *Nevada* the record is probably read by all the judges but the reporters were uncertain at what point this occurred.

The expression of tentative individual opinions before the case is assigned to one judge for the writing of an opinion, another preferable practice, is utilized in fourteen of the states: *Connecticut, Florida, Illinois, Massachusetts, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah,* and *Washington.* Six of these, *Illinois, Missouri, Nebraska, Ohio, Utah,* and *Washington* however, are states in which the case is assigned in rotation, thus lessening the beneficial effects of this desired practice. Separate opinions may be written by each judge at his discretion in *North Carolina, South Dakota,* and *Wisconsin;* thus, in those states it is recognized practice for each judge to speak for himself.

The writing of minority opinions and the practices connected therewith would seem to be indicative of the absence of one-man decisions, since minority opinions show a divergence of opinion or of reasoning characteristically absent from a court in which there are one-man decisions. In the highest appellate courts of the various states, the writing of minority opinions does not seem to follow any set practice. A judge is selected from the minority by the minority to write the dissenting opinion in six states: *Georgia, North Carolina, Ohio, South Carolina, Vermont,* and *Wisconsin.* Each dissenting judge commonly writes a separate dissenting opinion in *Alabama, California, District of Columbia, Kentucky, Maine, Mississippi, New Hampshire, Utah, Washington, West Virginia,* and *Wisconsin;* while any dissenting judge may write a separate opinion in eighteen jurisdictions, *Arkansas, Connecticut, Idaho, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska,*[148] *Nevada, New York, North Carolina,*

[148] See 22 Neb.L.Rev. p. 39 of Bar Association proceedings.

Oklahoma, Oregon, Pennsylvania, and *South Dakota.* No settled policy as to dissenting opinions exists in *Florida, Maryland, New Jersey, New Mexico, Ohio,* and *Texas.*

In conclusion it may be said that many practices are being utilized which tend to diminish the possibility of one-man decisions. The assignment of a case to one judge for opinion writing in rotation or before oral argument, however, and the failure of all judges to familiarize themselves with the record of the case in various states are practices which encourage one-man decisions.

Memorandum Opinions

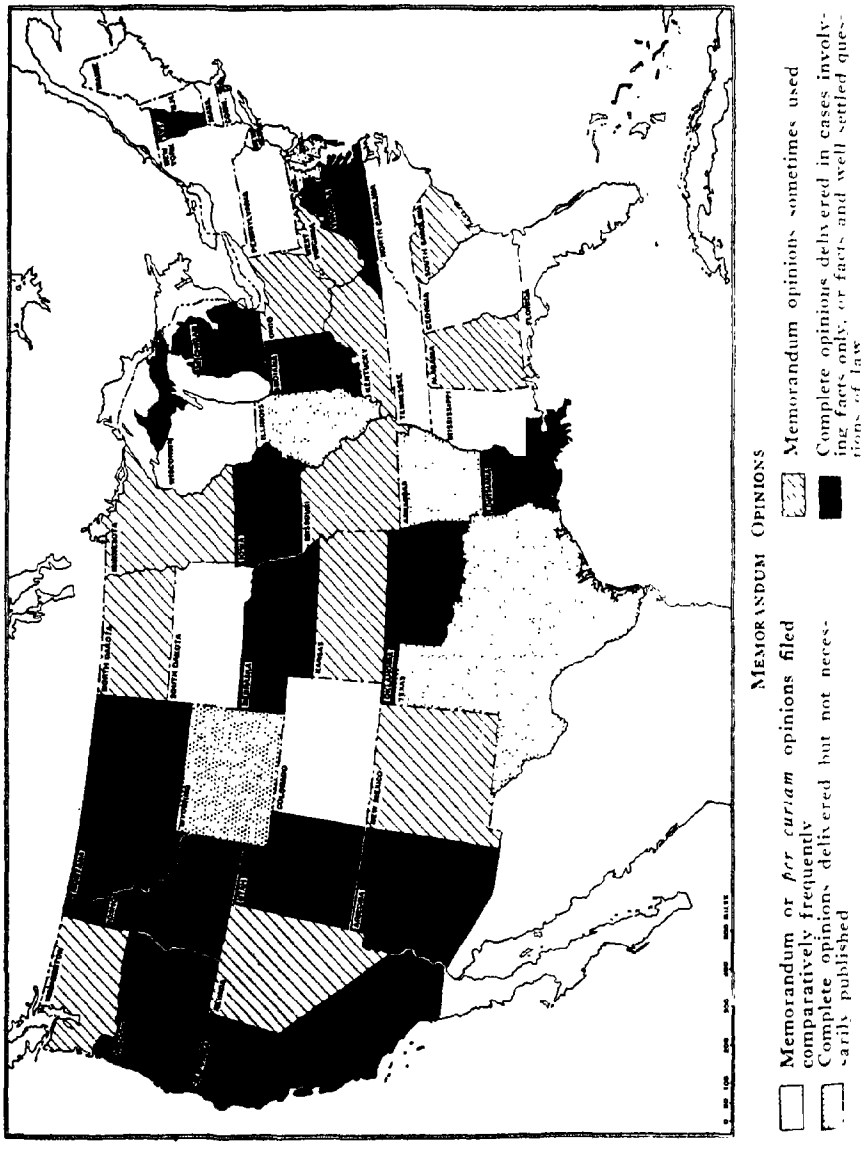
(14) That where no new principle or novel application of law is involved, and the decision is fully and clearly controlled by certain statutes or cases, an effort should be made to limit the opinions to a brief summary of the facts followed by a reference to such statutes or cases.

This recommendation is self-explanatory and is aimed primarily at reducing the volume of opinions published each year.[144] It is discouraging to relate that, contrary to the recommendation, in cases involving facts only or facts and well settled questions of law, full opinions are delivered in twenty-eight jurisdictions: *Alabama, Arizona, Arkansas, California, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, Ohio* (some appellate courts), *Oklahoma, Oregon, South Carolina, Texas, Utah, Vermont, Virginia, Washington,* and *Wyoming.*[145] In ten of these, however, Alabama, Kansas, Kentucky, Minnesota, Missouri,[146] New Mexico, Ohio (some courts), South Carolina, Texas (intermediate appellate courts sometimes) and Washington, memorandum or *per curiam* opinions are also sometimes used; and in Arkansas, Illinois, Maryland, Texas, and Wyoming the

[144] Cf. "Recommendations for Fewer and Shorter Judicial Opinions," 33 J. Am. Jud. Soc'y 5 (1949) with Manley, "Nonpareil Among Judges," 34 Corn.L.Q. 50 (1948).

[145] E.g., Neb. Rev. Stat. (1943) § 24-208, Wyo. Comp. Stat. Ann. (1945) §§ 1-110, 1-422.

[146] In decisions on habeas corpus and other original writs.


MEMORANDUM OPINIONS
Memorandum or per curiam opinions filed comparatively frequently
Complete opinions delivered but not necessarily published
Memorandum opinions sometimes used
Complete opinions delivered in cases involving facts only, or facts and well settled questions of law

full opinions are not necessarily published.[147] It is to be noted that in some of these states, Indiana, Kansas, Oklahoma, Texas (in the Court of Criminal Appeals), and Wyoming, for example, the writing of decisions is required by statute or constitution.[148] This would not, however, seem to preclude the use of memorandum judgments in well settled cases.

In accordance with the recommendation, besides the ten states sometimes doing so, mentioned above, memoranda or orders or *per curiam* opinions are filed comparatively frequently in *Colorado* (except if lower court judgment reversed), *Connecticut, Florida, Georgia, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Dakota, Tennessee*, and *Wisconsin;*[149] and are particularly widely used in the intermediate and highest appellate courts in *New York*.[150]

Review of Nonjury Cases

(15) That findings of fact should have the same effect on appeal in all cases tried by the court without a jury, whether they are cases at law or cases in equity.

This recommendation has its basis in the recognition that it is not the distinction between law and equity (a distinction now abolished in most states) which should produce differences in the mode of trial or review, but the distinction between jury and nonjury determination of questions of fact. In this recommendation the question of the relative merits of the principle traditionally employed in equity courts of allowing a full review of the facts and the contrary principle that the decision

[147] Ark., opinions not published in official reports if in opinion of judges they are of no value as a precedent; Ill. Ct. Rule 57, only important appellate opinions are to be published (not followed); Md., all opinions are not published in state reports; Tex., opinions may be ordered not to be published by judges in some of the intermediate appellate courts.

[148] E.g., Ind. Const. Art. 7, § 5.

[149] E.g., Ga. Code Ann. (1933) § 24-4204. In Tennessee moreover only those opinions are published which discuss some new question or construe a statute.

[150] See criticism, Manley "Nonpareil Among Judges," 34 Corn.L.Q. 50 (1948).

of the court is always to be given the same effect as the verdict of a jury, was left open with the recognition that it is a matter subject to legitimate argument. But it was considered that whatever view was taken regarding the advantages of allowing or denying a review of facts, nothing could "be said in favor of a rule under which the review would depend on whether the case technically falls within the field of equity or the field of law." [151]

In the following situations the purport of the recommendation has been heeded in that all nonjury cases are treated similarly on review. In considering a case the appellate court reviews the case on the evidence presented in the appellate record in *Kentucky, Louisiana, Maryland, Minnesota, Missouri, Montana, North Dakota, Tennessee, Texas,* and *Washington.*[152] In eleven jurisdictions the appellate court in reviewing a case searches the record for errors of law and fact in all cases in *California, Florida, Illinois, Maryland, Mississippi, Nevada, New Jersey, New York, Oklahoma, South Dakota,* and *Wisconsin.*[153] The presumption on review in *Pennsylvania* on appeal where a jury was waived are in favor of the correctness of the findings if there is evidence to sustain them.[154] In *Georgia, Kansas,* and *Wyoming,*[155] moreover, the appellate court may hold the verdict contrary to the weight of the evidence. In *Idaho* no distinction is made between law and equity cases as such, but a distinction is made between cases where all evidence was documentary; the Supreme Court then examines the whole record. Thus, in these jurisdictions it would seem that findings of fact have the same

[151] Appendix A at 603. See Fed. Rule 52, Moore, op. cit. supra n. 69 at 141:

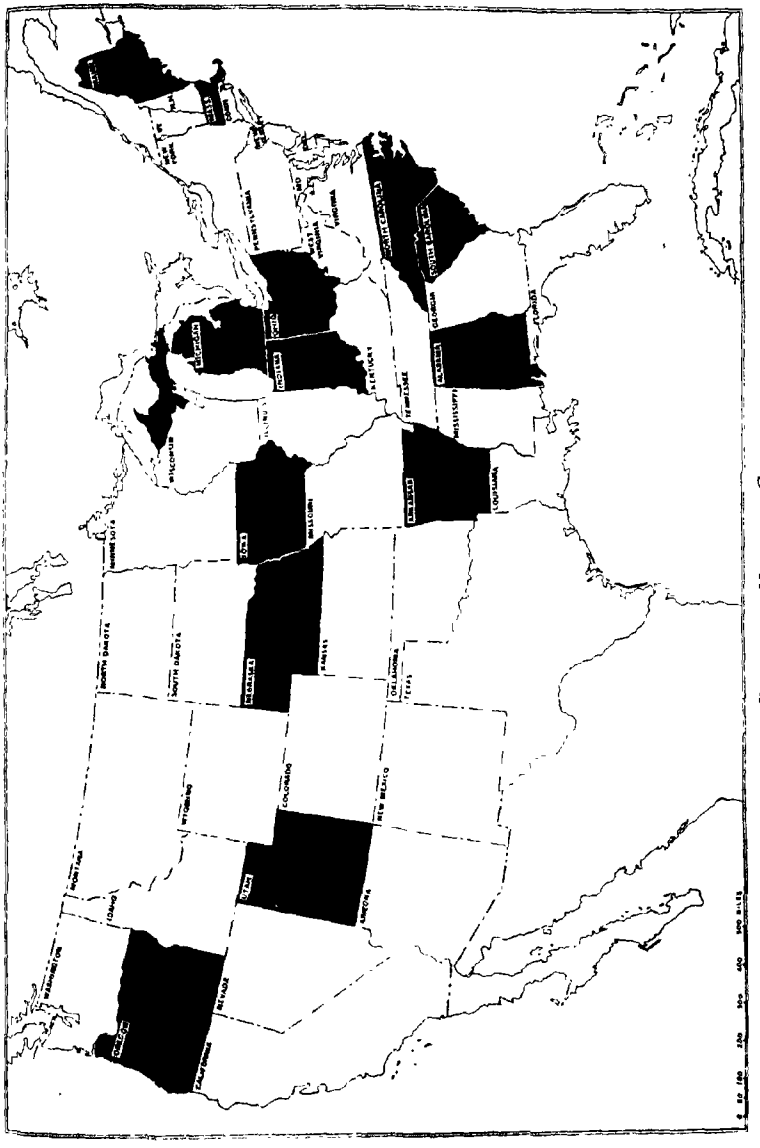
> "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

[152] E.g., Mo. Rev. Stat. Ann. (Supp.) § 847.14; Tex. Cts. of Civ. App. have final jurisdiction to review facts.

[153] E.g., N.J. Rule 1:2-20; cf. Illinois, not as to facts in cases appealed from intermediate appellate court to Supreme Court.

[154] 9 Standard Pa. Practice § 413 at 340, no requirement for appellate court to search record for errors of fact.

[155] E.g., Wyo. Comp. Stat. Ann. (1945) § 3-3605.


REVIEW OF NONJURY CASES
All nonjury cases treated similarly on review by the appellate court
Distinction made in review accorded equity and nonjury law cases

effect on appeal in all cases tried by the court without a jury whether they are cases at law or cases in equity.

In contrast with the recommendation, several jurisdictions distinguish the review of equity cases and nonjury law cases. Thus, in twelve jurisdictions the appellate court retries the case or reviews it on the evidence presented in the appellate record for errors of law and fact only in equity cases: *Arkansas,*[156] *Indiana,*[157] *Iowa,*[158] *Maine, Massachusetts,*[159] *Michigan, Nebraska,*[160] *North Carolina, Ohio,*[161] *Oregon, South Carolina,* and *Utah. Alabama* courts purportedly treat both equity and nonjury law cases similarly on review; in practice, however, the scope of review in the usual equity case is greater than the scope of review in the usual nonjury law case.[162]

[156] Review is trial de novo in equity actions, in nonjury law cases the court will examine the record only on a charge of insufficiency of evidence to support the judgment.

[157] E.g., Ind. Stat. (Burns, 1934) § 2-3229.

[158] Similar to Arkansas, see supra n. 156.

[159] In equity reversal only if lower court plainly wrong, lip service only paid to trial de novo.

[160] Neb. Rev. Stat. (1948) § 25-1925, in nonjury law cases the judge's decision has the same effect as findings of a jury, see In re Johnson's Estate, 144 Neb. 372, 13 N.W. 2d 412, 413 (1944).

[161] Ohio Gen. Code (1938) § 12223-21. See Steveley v. Stoll, 57 O.App. 401, 14 N.E. 2d 419, 423 (1937), Youngstown Mun. Ry. Co. v. Youngstown, 147 O.S. 221, 70 N.E. 2d 649 (1946).

[162] All nonjury cases, whether law or equity, are treated substantially the same, and the nature of the review by the appellate court is determined by the manner in which the evidence was presented in the trial court. When the evidence is given by deposition or before the register in chancery, the presumption in favor of the findings of fact (as of a jury) does not apply in equity cases. In the nonjury law cases where the evidence is not taken orally before the judge, Ala. Code (1940), tit 7, § 260, the conclusions of the trial court are reviewed without any presumption in their favor. However, since seldom, if ever, is a nonjury law case submitted entirely upon evidence taken outside of court, and the submission of equity cases either on deposition or report of the register in chancery is quite common, if not in the majority, it becomes clear that in practice, as distinguished from theory, the scope of review in the usual equity case is greater than the scope of review in the usual nonjury law case.

POWER OF THE APPELLATE COURT

(16) That appellate courts should have power to enter or order the proper judgment without a new trial when the record of the proceedings shows as a matter of law what such judgment should be; and when error affects only a part of a case, the court should have power to remand for a new trial of that part only, if such remand will not prejudice the substantial rights of any litigant.

The basis of this recommendation is the desire to eliminate the economic waste of a new trial if justice can be satisfactorily administered without it.[161] It should be stated that in thirty-one jurisdictions, Alabama, Arizona, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Ohio (law cases), Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Washington, in the situation in which the appellate court searches the appellate record for errors of law and fact and an error is found, the appellant has the burden of showing that the claimed error was prejudicial.[164] In twenty-four states the appellate court will affirm if right and justice have been done: Alabama, Arizona, Colorado, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and Wisconsin.[165]

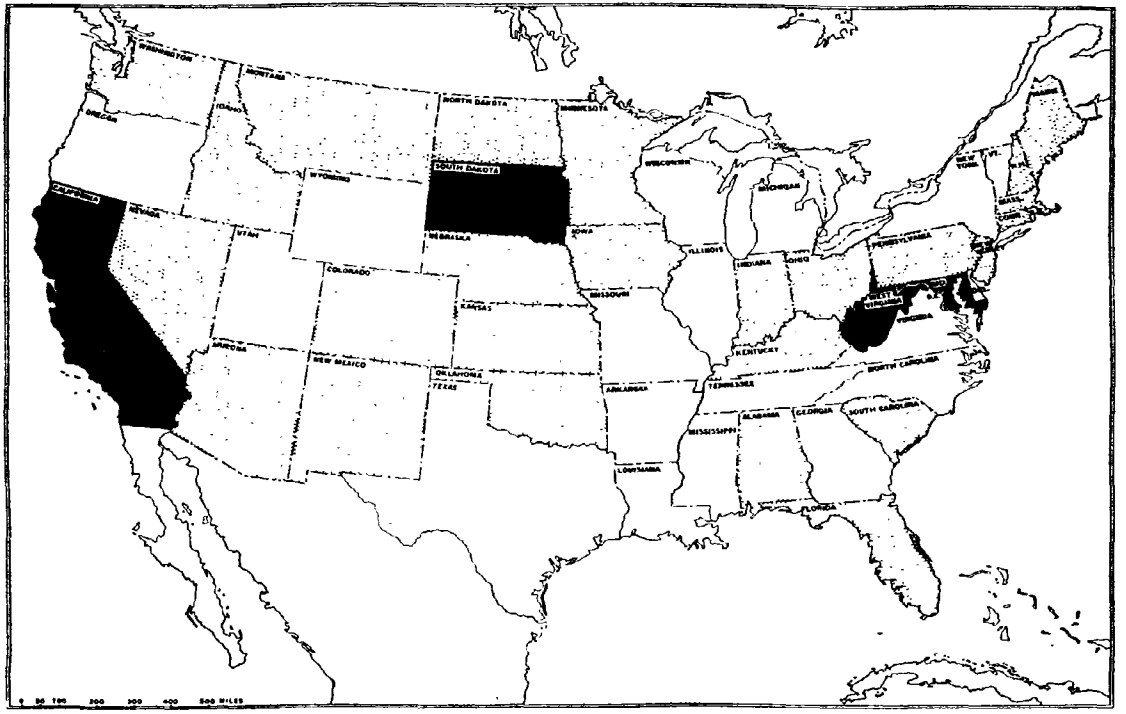
Whenever an appellate court determines that a judgment or decree is erroneous and must be reversed[166] and the appellate record contains material from which a correct judgment or

[163] Cf. recommendations relating to judgment *non obstante veredicto* and partial new trials, chapter on Trial Practice infra at 604.

[164] E.g., Studstill v. Growers Finance Corp., 165 Ga. 304, 140 S.E. 859 (1927); Mo. Rev. Stat. Ann. (Supp.) § 847.123 as added L. 1943 § 123, p. 353.

[165] E.g., Ala. Sup. Ct. Rule, 45, Ala. Code (1940) tit. 7 at p. 1022; Neb. Rev. Stat. (1948) § 25-853; Ohio Gen Code (1938) § 11364; Tex. R.Civ.P. (Supp.) Rule 434.

[166] In several states the reviewing court may receive testimony and additional evidence if necessary for final determination of the case. Calif. Code Civ. Proc. (Supp.) § 956a as amended L. 1945, c. 40 (nonjury cases); Mich. Comp. Laws (1948) § 601.29 (all cases); Mass. Gen. Laws (1932) c. 231, § 125 (nonjury questions).



POWER OF APPELLATE COURT

Appellate court will enter proper judgment or decree whenever the appellate record contains material from which it may be formed

Appellate court will remand to lower court for entry of proper judgment, or may enter proper judgment or remand to lower court, when the appellate record contains material from which judgment or decree may be formed

Appellate court will remand for a new trial in all jury cases when it finds a judgment is erroneous although the appellate record contains materials from which a court judgment may be formed

decree may be formed, the appellate court will enter the proper judgment or decree, as recommended above, in twenty jurisdictions: *Arkansas, Delaware, District of Columbia, Georgia, Illinois, Louisiana, Michigan, Mississippi, Missouri, New York, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin,* and *Wyoming.*[167] In twelve other jurisdictions in such a situation the case will be remanded to the lower court with direction for the entry of the proper judgment: *Arizona, Idaho, Indiana, Kentucky* (law), *Maine* (law), *Massachusetts, Minnesota, New Jersey, North Dakota, South Carolina, South Dakota* (except jury cases), and *Washington.*[168] This latter practice is substantially in accord with the recommendation, since it obviates the necessity for a new trial. In certain other states it is within the discretion of the appellate court to enter the proper judgment or remand to the lower court for entry of the proper judgment: *Alabama, Colorado, Connecticut, Florida, Iowa, Kansas, Kentucky* (equity), *Maine* (equity), *Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma,* and *Pennsylvania.*[169] The appellate court will enter the proper judgment in all nonjury cases at law and in equity in *California, Indiana,* and *Maryland.* The practice in the majority of jurisdictions is thus completely or substantially in accord with the recommendation.

When, however, an appellate court determines that a judgment or decree is erroneous and must be reversed, although the appellate record contains materials from which a correct judgment or decree may be formed, contrary to the recommendation, the appellate court remands for a complete new trial in all jury cases in four jurisdictions: *California, Mary-*

[167] E.g., Mo. Rev. Stat. Ann. (Supp.) § 847.40; Wyo. Comp. Stat. Ann. (1945) § 3-5303. Cf. in Idaho the appellate court will enter the proper judgment if all the evidence was documentary. In New York the appellate court may finally dispose of a jury-tried case if a motion for a directed verdict was erroneously denied.

[168] E.g., N.J. Rule 1:4-9.

[169] E.g., Ala. Code (1940) tit 7, § 810; Iowa R.Civ.P., Rule 349, when a judgment is reversed for error in overruling a motion to direct a verdict, a motion for judgment notwithstanding verdict, or a motion to withdraw an issue from the jury; Neb. Rev. Stat. (1948) § 25-1315.03; Ohio Gen. Code (1938) § 12223-38.

land, South Dakota, and *West Virginia.* The practice in these states is clearly contrary to the recommendations.

As recommended, the court will remand for a partial new trial where error affects a separable part of the case in twenty-one jurisdictions: *Alabama, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Pennsylvania, Tennessee, Texas, Vermont, Wisconsin,* and *Wyoming.*[170] A partial new trial where error affects a separable part of the case will be ordered in equity cases in *Nebraska,* in all law cases in *Maine, South Dakota,* and *Utah,* and in jury cases in *California* and *Rhode Island,* thus affecting some saving of the costs of a new trial and partially effectuating the recommendation.

Conclusion

The above survey indicates clearly that the majority of the recommendations relating to appellate practice which were approved by the American Bar Association in 1938 as suggestions of minimum standards for judicial administration are not followed in most states. Thus, contrary to the recommendations in the majority of jurisdictions appeals from inferior courts by way of trial *de novo* in superior trial courts are allowed; pecuniary limits are not set on the right to appeal; fixing the amount of supersedeas bonds is not within the discretion of the court; papers on file in the trial court are not sent to the appellate court in their original form, but copies are commonly required; parties are not required to set forth important portions of the record in the appendices to briefs; the number of pages in any brief taxable as costs is not limited; a systematic effort has not been made by the bar and bench to aid in making oral argument more effective; the problems presented by "one-man" decisions on appeal have not been met; and memorandum opinions are not used as frequently as

[170] E.g., Conn. Gen. Stat. (1949) § 8007; Mich. Ct. Rule 47(2); N.D. Rev. Code (1943) § 28-2729; Tex. R.Civ.P. 434. See also discussion of power of trial judge to grant a partial new trial, chapter on Trial Practice infra at 243.

they could be. The principal criticisms voiced by the reporters from the various jurisdictions were directed at the existence of the many technicalities of the rules of procedure hampering appellate practice; it was felt that the continued persistence of such technicalities made most difficult the attainment of the goal of achieving prompt, effective, and inexpensive service for the public. In few instances, moreover, were there any reports of action taken in the period since 1938 to remedy many of the glaring defects burdening appellate practice in the several states.

CHAPTER X

STATE ADMINISTRATIVE AGENCIES AND TRIBUNALS

INTRODUCTION

In 1938 the Section of Judicial Administration of the American Bar Association made no specific recommendations regarding state administrative agencies and tribunals, but merely advised that the Committee on Administrative Agencies and Tribunals be continued.[1] At that time this committee had found it possible only to make a study of the scope of judicial review of administrative determinations,[2] but in 1939 its report set forth a proposed act dealing with various important aspects of state administrative procedure.[3] This proposed act was the source of the Model State Administrative Procedure Act, formulated by the National Conference of Commissioners on Uniform State Laws, which was adopted in most details in Missouri and Wisconsin even prior to its approval as a model act in 1946.[4] Also of outstanding importance in this field is the Federal Administrative Procedure Act, which was passed in the same year[5] and provides a pattern for the general reform of administrative procedure. Since definite recommendations as to state administrative agencies and tribunals were not formu-

[1] Appendix A at 512.

[2] 63 A.B.A. Rep. 632-656 (1938).

[3] 64 A.B.A. Rep. 407-447 (1939). The 1939 report of this committee represented a completion of its earlier studies and contained a series of conclusions and recommendations. Appendix B at 625. The Section of Judicial Administration approved certain of these principles. 64 A.B.A. Rep. at 404. The proposed act is to be found id. at 432-434. As to present position of the Section of Judicial Administration, see A.B.A. Handbook, The Improvement of the Administration of Justice 70-75 (1949).

[4] Stason, "The Model State Administrative Procedure Act," 33 Iowa L.Rev. 196, 209 n.19 (1948). See Schwartz, "An Administrative Procedure Act for New York," 24 N.Y.U.L.Q. Rev. 55, 57 (1949).

[5] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (Supp. 1948). See The Federal Administrative Procedure Act and the Administrative Agencies, VII New York University School of Law Institute Proceedings (Warren, ed. 1947).

lated in 1938, this chapter merely presents some of the most significant facts regarding such administrative bodies, their organization, their activities of rule-making and of adjudication, and of the scope of judicial review of their determinations, together with comparison of such facts and the relevant sections of the Model State Administrative Procedure Act and the Federal Administrative Procedure Act.

Organization of State Agencies

The way in which a particular administrative agency is set up—whether it is a department subject to gubernatorial control, or an independent agency, whether the agency heads are elected by the people or chosen by the governor, how they may be removed from office—undoubtedly has a good deal to do with the efficiency of the agency's operations. While the evaluation of these factors is more the task of the political scientist than of the lawyer,[6] they cannot be overlooked in any general survey of the field.

Broadly speaking, the key to the position of administrative agencies in the governmental structure of a state is to be found in the status of the chief executive of that state. Where the state constitution provides for a "strong" governor, modeled upon the president under the Federal Constitution, the administrative agencies in that state are normally under his control and direction. Their members are appointed by him and he has the power of removal. On the other hand, where the leading purpose of the framers of the state constitution was to limit the power of the governor, the administrative agencies in that state are to a large extent independent of the executive.

From the point of view of effective administration, the position of the governor is thus very important. The multiplication of independent agencies within the state not subject to his control cannot but hinder the effective over-all management of the executive branch and mean a relative weakening of the

[6] See Fesler, The Independence of State Regulatory Agencies (1942), for the views of a leading political scientist.

governor, in whom is vested "the executive power." As such agencies "grow in number his stature is bound to diminish. He will no longer be in reality *the executive*, but only one of many executives, threading his way around obstacles which he has no power to overcome." [7] These administrative considerations do not, of course, apply with equal force to all agencies. The same factors which influenced the United States Supreme Court in the *Humphrey* case [8] might very well lead one to desire a degree of "independence" similar to that accorded members of the Federal Trade Commission by that decision for state agencies exercising analogous quasi-judicial functions.

For the most part, members of administrative agencies in the states are appointed by the governor, usually with the advice and consent of the upper or both houses of the state legislature. The more important agencies are commonly declared to be "independent," but agencies are often set up as ordinary executive departments or as subdivisions of an executive department. Thus, in Illinois, the Commerce Commission is set up as an independent agency, the members of which are appointed by the governor. The Department of Labor, on the other hand, is an executive department, under the Director of Labor, who is under the direct control of the chief executive of the state. Workmen's compensation and unemployment compensation cases, which in many states are entrusted to independent agencies, are determined in Illinois by two bureaus within the Department of Labor, which are under the supervision of the Director of Labor. This situation is duplicated in the other states, although the actual proportion of agencies which are "independent" as against those which are set up as executive departments or within such departments may vary greatly from state to state.

Under the Federal Constitution the power of appointment is conceived of as "in its nature an executive power." [9] This

[7] Report of the President's Committee on Administrative Management 41 (1937).

[8] Humphrey's Executor v. United States, 295 U.S. 602, 55 Sup. Ct. 869, 78 L. Ed. 1611 (1935).

[9] Myers v. United States, 272 U.S. 52, 161, 47 Sup. Ct. 21, 71 L.Ed. 160 (1926).

principle does not, however, apply under most of our state constitutions and though, as has been indicated, members of state administrative agencies are in most cases appointed by the relevant governor, other methods of appointment are often provided. Thus, the members of the Public Utilities Commission of Connecticut are appointed by the General Assembly of that state, upon the nomination of the governor. Or the relevant constitution or statute may simply provide for election by the state legislature, as is true of the Unemployment Compensation Commission of South Carolina and the Corporation Commission of Virginia. Another method of appointment is that used in connection with the Public Service Commission of Nevada. That commission consists of three members, two of whom are appointed by a Public Service Board consisting of the governor, lieutenant governor, and attorney general; the third is the state engineer, who is appointed by the governor.

In at least twenty-one states, the members of one or more administrative agencies are elected directly by the people.[10] The agencies whose members are chosen in this manner are for the most part those engaged in the field of public utility regulation;[11] yet in some cases provision is made for the direct election of the members of other types of agencies. In Mississippi election seems to be a common mode of choosing the members of the more important administrative agencies. This is the method prescribed with regard to that state's Public Service Commission, Commissioner of Insurance, and County Boards of Supervisors. On the other hand its Oil and Gas Board and Workmen's Compensation Commission are appointed. The situation in North Dakota is somewhat unique, for most of the administrative functions of that state are performed by some division of the attorney general's office, al-

[10] Ala., Ariz., Fla., Ga., Iowa, Ky., La., Minn., Miss., Mont., Neb., Nev., N.M., N.C., N.D., Okla., S.D., Tenn., Tex., Va., and Wyo.

[11] According to Prof. Fesler, "The selection of utility commissioners is by gubernatorial appointment in 27 states, by popular election in 17 states, by legislative election in 2 states, and by indirect appointment in 2 states." Op. cit. supra n.6 at 7.

though these divisions appear to have a large degree of autonomy in carrying on their work.

The power of removal may be of even greater importance from a practical standpoint than that of appointment as far as executive control over particular administrative agencies is concerned. "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." [12] In the case of those administrative agencies whose members are elected by the people, the guiding consideration has been the desire to make these agencies as independent as possible of the chief executive, and the authority to remove their members from office is not vested in the governor. They are normally removable in the same manner as other elected officials under the relevant state constitution, *i.e.*, by impeachment or recall. There may, however, be other means of removal prescribed for elected agency heads in certain cases. Thus, the members of the Minnesota Railroad and Warehouse Commission, who are directly elected, can be removed from office by the governor on specified grounds; and the members of the Louisiana Public Service Commission, who are likewise elected, can be removed from office only upon a charge of malfeasance, misfeasance, or incompetency brought before a court of competent jurisdiction.

As far as the vast majority of state administrative agencies are concerned, the removal power is vested in the governor. In many cases his power in this respect is an unlimited one, *i.e.*, the officers concerned are removable at the governor's pleasure. With regard to the more important agencies, however, and especially with regard to those which are not set up within an ordinary executive department, the gubernatorial power of removal is normally not an unlimited one. He is authorized to remove agency members only for cause or, as is the more usual, on specified grounds only (*e.g.*, such as those specified in the statute at issue in the *Humphrey* case), and often only after hearing.

[12] Humphrey's Executor v. United States, supra n. 8.

In a number of states, however, the power of removal is normally not thought of as an incident of "the executive power," and in a number of instances the power to remove members of administrative agencies from office is vested in either the legislative or judicial branches. Thus, the members of the Public Utilities Commission of California may be removed from office by the state legislature, and the same is true of the Unemployment Compensation Commission of South Carolina. Members of the Public Utilities Commission of Connecticut, on the other hand, may be removed on specified grounds only by a judgment of the superior court upon the written complaint of the attorney general, and a similar method of judicial removal is provided for with regard to members of the Corporation Commission of Kansas. Sometimes more than one method of removal is provided. To take one instance, members of the Missouri Public Service Commission may be removed from office on specified grounds either by the governor or by a two-thirds vote of the legislature.

It should not be assumed from the foregoing that there are always express statutory provisions covering the matter of removal of members of agencies. Often no provision is made in the relevant enabling act with regard to the question of removal, and it is thus not certain where the removal power resides. Such lacunae in the law governing administrative agencies create great uncertainty in the absence of specific cases—an uncertainty which can readily be eliminated by specific provisions with respect to removal by the legislature.

One of the advantages which administrative agencies are commonly stated to have over courts is the fact that the agency personnel consists of or includes experts in the particular field of regulation. As far as the members of the agency itself are concerned, however, this is true in only a limited sense.

> When reference is made to the "expert administrative agency," it is surely not intended to mean that the necessary expertness is lodged in the head or heads of the agency or that they, in their own person, possess every *expertise* needed for the informed discharge of the manifold duties imposed upon the modern administrative organiza-

> tion. . . . Reluctant as their friends may be to admit the fact, many agency heads are only experts ex officio.[13]

Thus, expert knowledge in the special field of regulation is not usually a qualification for membership in a state administrative agency. This is true, generally speaking, although in some cases a certain amount of expert knowledge may be required.[14] The normal type of statute may indeed tend to preclude a possible source of expert administrators. A common clause in legislation relating to public utility regulation, for example, provides that "no person owning securities, or interested in the business of any public utility, ... either directly or indirectly, shall be eligible to the office of public service commissioner." [15] It might be argued that, in seeking to obtain impartiality, such a provision eliminates from the public service many of those who might be best qualified to serve on the administrative tribunal.[16] The relative lack of expertness of members of state agencies is especially apparent with regard to those who are chosen by the electorate. The method of direct election is surely not the one best calculated to the securing of expert administrators.

What has been said of the *expertise* of agency members does not, of course, apply to subordinate officials within the agency. If the agency heads do not possess the required expertness, they must of necessity rely upon a staff of experts in the field, if the scheme of administrative regulation is to be carried out effectively. It is for this reason that the subordinate personnel of state agencies are generally appointed under the merit system.[17] This clearly is the proper means of selection, if the *desideratum* is the securing of proper personnel through an impartial method of selection based upon qualifications of par-

[13] Gellhorn, Federal Administrative Proceedings 27, 28 (1941).

[14] E.g., the Nevada Public Service Commission, which consists of three members, one of whom shall have a general knowledge of railroads, and another of whom shall have a general knowledge of fares and tolls and charges by public utilities.

[15] N.M. Code (1941) § 72-404; see Idaho Code (1947) § 61-207.

[16] Another important factor militating against the securing of proper agency personnel is the generally low scale of compensation provided for most agency members. See e.g., Fesler, op. cit. supra n.6 at 10.

[17] There are, however, some notable exceptions, e.g., the Montana Railroad Commission and the Nevada Public Service Commission.

ticular applicants, uninfluenced by political or other considerations. Criticisms directed against the calibre of agency personnel in the states, where such personnel are chosen under the merit system, are arguments for improving the effectiveness of that system, and do not militate against its widespread use in this field.

Rule-Making

The authority of administrative agencies to make rules and regulations having statutory effect is a power of enormous consequences. In its effect upon the community its exercise is of scarcely less importance than the actions of the legislature itself. Rules and regulations, no less than statutes, lay down patterns of conduct to which those affected must conform.

> Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails.[18]

The importance of the administrative rule-making power and the need for its exercise under modern conditions have led to increasing emphasis upon the safeguards necessary to ensure against abuses. If we agree, as we must, that delegation of authority to administrative agencies is necessary, the problem becomes largely one of safeguards.

From the point of view of the citizen affected, one of the primary safeguards to ensure the proper exercise of powers of delegated legislation lies in the development of adequate procedures to be followed by the administrative process in the formulation of rules and regulations. The development of such rule-making procedure has in the past been largely a matter

[18] Columbia Broadcasting System v. United States, 316 U.S. 407, 418, 62 Sup. Ct. 1194, 86 L. Ed. 1563 (1942).

for the administrative agency concerned. The absence of express statutory requirements has not, however, militated against the development of specific rule-making procedures. The purpose of such procedures has been to ensure some participation to those affected by delegated legislation in the rule-making process. The basic problem here has been the democratization of the rule-making process "without, at the same time, imposing such burdensome requirements that rules will either not be made or policy will be driven underground, as it were, and remain inarticulate or secret." [19]

Perhaps the prime procedural safeguard which has developed in connection with administrative rule-making has been the public hearing. The use of hearings has become a common feature of the American administrative process, both in the federal and state fields. The hearing or auditive technique enables interests who might not otherwise be reached to present their point of view with regard to proposed rules. Such hearings "are valuable to the extent that notice of them can be brought home to affected parties, that they are accessible to these parties, and that the questions involved are susceptible to intelligent discussion by those who do appear." [20]

Hearings are held prior to a large number of rule-making proceedings in the states. In many cases such hearings are always held, for they are required either by statute or by court decision. In the normal case, however, hearings are held as a matter of administrative discretion, and the proportion of cases in which such hearings are held varies from agency to agency and state to state. One can safely state that, at least as far as the more important agencies are concerned, the tendency has been in the direction of holding hearings wherever possible. Yet one should note certain glaring exceptions to this general trend. Thus, it is the policy of the Maine Liquor Control Commission never to hold hearings before the promulgation of

[19] Report of the Attorney General's Committee on Administrative Procedure 225 (1941). On procedure in rule-making, see Schwartz, "Delegated Legislation in America—Procedure and Safeguards," 11 Mod.L.Rev. 449 (1948).

[20] Fuchs, "Procedure in Administrative Rule Making," 52 Harv.L.Rev. 259, 276 (1938).

rules, and the same is true of the Georgia Public Service Commission.

Even where hearings are not held, agencies do not normally issue rules without some attempt to consult those whose interests may be affected. The technique of consultation is, indeed, almost an inevitable consequence of the growth of delegated legislation.

> As economic and other groups in the community became organized and vocal, and as legislation affecting them came more and more into existence, administrators, in contact with those upon whom their authority bore, turned to them for information and their points of view.[21]

Such consultation of interests has tended to become a regular feature of the rule-making process in the states. Few agencies whose work affects organized groups, especially economic groups, fail to maintain some contact with them. These consultative practices have often tended to become standardized through the establishment of advisory committees drawn from an industry or locality. These bodies have varied from *ad hoc* or temporary committees formed by the agency concerned to aid it in the drafting of specific rules to more or less permanent advisory committees, whose composition and functions are prescribed by statute. Thus, the Industrial Commission of Wisconsin has had the assistance of such advisory bodies, representing both employers and employees, in the drafting of regulations pertaining to physical safety of work places and public buildings. And the relevant statute requires the appointment of a similar advisory committee by that state's Employment Relations Board to advise on matters having to do with employee relations.

The public hearing technique differs from these types of consultative techniques in that such hearings are publicly announced in advance and any interested party is permitted to attend and testify. The hearing technique thus allows participation in the rule-making process by interests and individuals who

[21] Report, op. cit. supra n. 19 at 103.

might not otherwise be consulted. That being the case, hearings held in connection with rule-making should normally be open to the public. The practice of an agency, such as the North Carolina Banking Department, whose hearings are not open to the public at large, thus tends to defeat one of the cardinal purposes of the hearing procedure. In addition, if the hearing is to enable those who might not otherwise be consulted to articulate their views, wide notice should be given prior to the hearing and such notice should state either the terms or substance of the proposed rules or a description of the subjects and issues involved. The notice practice of the various state agencies is not uniform. Although some notice is almost invariably given prior to hearings held in connection with rule-making proceedings, in the majority of cases, such notice is given only to those who are known by the agency to have an interest in the proposed rules. Many agencies, however, realizing that such a narrow notice practice may lead to the overlooking of some who may be concerned in the proceeding, give notice by publication, as well as personal notice to those known to be interested. Such notice may be published in the relevant official journal, in newspapers, or in trade journals. Publication in the latter is often especially useful, for, though limited in circulation, they normally reach most of those interested in a particular trade or industry.

Section 4 of the Federal Administrative Procedure Act elevates the notice type of antecedent publicity to the level of a general statutory requirement, for the requisite notice must be published in the Federal Register prior to the promulgation of administrative rules. Such "antecedent publicity is undoubtedly a safeguard of the highest value";[22] and a general statutory requirement in the states similar to that in Section 4 of the Federal Act would provide a valuable safeguard to ensure adequate consultation of interests.

The hearings which are held in connection with the rule-making process in the states have in general been informal in nature. They are treated similarly to hearings before a legis-

[22] Report of the Committee on Ministers' Powers 44 (Cond. 4060, 1932).

lative committee and bear little relation to a judicial proceeding. As such, there are normally no specific issues or rules of evidence or formalities of any kind except such as are necessary to assure order. Such hearings

> are usually either investigatory or designed to permit persons who may not have been reached in a previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency and to protect private interests against uninformed or unwise action.[23]

Rule-making proceedings may, however, often assume an adversary character. The proposed rules may affect defined groups with clearly competing interests, which stand to benefit or lose by their issue. In such cases it may well be advisable for the hearing held in connection with such rules to take on a definite adversary character, more like a judicial than a legislative proceeding. Such formal adversary hearings are held in many cases by state agencies (particularly in the field of public utility regulation), although one feels that the possibilities of this kind of hearing have not been explored as thoroughly as they might. The adversary type of hearing can indeed be carried one step further, so that the hearing which is afforded prior to the promulgation of the administrative rule is assimilated to that required in connection with the exercise of judicial functions. A hearing of this character is required before the formulation of rules under certain federal statutes, such as the Food, Drug and Cosmetic Act of 1938; there are, however, few if any similar state statutes which contain such prescription for trial methods in rule-making.[24]

The safeguards of notice and hearing which have been discussed above may be considered as "ante-natal," [25] in that they are effective prior to the exercise of the administrative rule-making power. The chief "post-natal" safeguards which have been developed in connection with delegated legislation are

[23] Report, op. cit. supra n. 19 at 108.

[24] See Austern, "The Formulation of Mandatory Food Standards," 2 Food Drug Cosmetic L.Q. 532, 574 (1947).

[25] Compare Carr, Delegated Legislation 34 (1921).

those growing out of the requirements of administrative publicity and judicial control. From the point of view of publicity the most important thing, of course, is the adequate publication of the delegated legislation itself. For,

> it would be intolerable if it could be said that obscure clerks in [the agency] poured forth streams of departmental legislation, which nobody had any means of knowing. This would be the method attributed to Caligula of writing his law in very small characters and hanging them up on high pillars "the more effectively to ensnare the people." [26]

Despite the clear desirability of providing for the publication of all administrative rules, it is surprising to see how many states do not have an adequate filing and publication system. It is true that important steps in the direction of securing such a system, modeled upon the Federal Register Act of 1935, have been taken in a number of states; but they still constitute a comparatively small minority. In the majority of states there is still no general system for the publication of delegated legislation. Thus, it is in most cases discretionary with the agency concerned whether its rules are to be made available for public distribution in the form of pamphlets or otherwise, whether its rules are available for public inspection, or whether its rules are to remain buried in the recesses of the agency, available to private parties only upon specific request. To take an example of the latter type of agency, the rules of the Massachusetts Commissioner of Corporations and Taxation are not available for public inspection nor are copies of them available for public distribution. The only way to find out about a particular rule is to write or telephone the agency. "Of course," comments one observer, with almost classic understatement, "with this step-by-step method, one must spend a great deal of time to learn the rules of the Department."

Another means of ensuring that delegated legislation will be brought to the attention of those who are affected is by

[26] Mr. (now Sir) Cecil Carr, in utes of Evidence 208 (1932). Committee on Ministers' Powers, Min-

providing for the deferred effectiveness of administrative rules and regulations, such as is contained in Section 4(c) of the Federal Administrative Procedure Act. Rules and regulations, unlike a statute, may often come into effect without adequate knowledge on the part of those concerned. Proposed legislation must go through a highly formal procedure to ensure adequate consideration of the issues involved and to preclude hardships caused by surprise to the interests concerned.

> Even the least significant statute must be formally introduced as a bill, printed, referred to a committee and reported on, often after hearing, read three times before each House, discussed in committee of the whole, passed by each House, and approved by the Executive. . . . Administrative rule-making is in striking contrast. The first knowledge that those affected have of a rule is usually after it has gone into effect. The first opportunity they have to challenge it is usually after it is enforced against him and they can attack it in the courts.[27]

These considerations led to the provisions of Section 4(c) of the federal act and like considerations have led to the use of similar provisions for the deferred effectiveness of administrative rules in certain states. A number of statutes there provide for the deferred effectiveness of rules promulgated under them, and in addition varying periods of deferred effectiveness are prescribed by certain of the agencies themselves. Thus, rules and regulations of the Wisconsin Industrial Commission and Employment Relations Board do not become effective until a specified period after publication. In other cases all rules in that state become effective upon being filed with the secretary of state, or at a later date, if specified. It should be noted that state statutes do not make deferred effectiveness a uniform requirement of all administrative rule making, as does the federal act, although such a general statutory provision would appear to provide a most useful safeguard to interested private parties.

From the point of view of those affected by delegated legislation, it is of the utmost importance that there be adequate

[27] Pound, Administrative Law 66 (1942).

provision for judicial review of administrative exercises of the rule-making power. The function of the courts here, broadly speaking, is to ensure that the authority exercised has not been broader than the terms of the delegation. The judicial power in this field is based upon the doctrine of *ultra vires*. The reviewing court is concerned not with the rule-making procedure (except where specific procedural requirements, such as the consultation of advisory committees or the holding of public hearings, are imposed by the enabling act or by the demands of due process), but with the question of whether or not the administrative sublegislation was within the power conferred.

There are various methods by which judicial review of rule-making can be obtained in the states. In the first place, the statute conferring the rule-making power upon the administrative agency may provide for such review. Thus, any person in interest may commence an action in the appropriate circuit court to set aside or enjoin a rule of the Alabama Department of Industrial Relations on the ground that it is invalid or unreasonable. In the case of most state agencies, however, there is no statutory provision for judicial review of rule-making. This does not, of course, mean that there are no nonstatutory methods of obtaining such review. The validity of administrative rules can be attacked in actions brought to enforce them, in injunction suits to retain their enforcement, in declaratory judgment proceedings, or in habeas corpus actions to obtain release from arrests for violation.[28] In most states actions for declaratory judgments or injunctions constitute the chief methods for obtaining review of administrative rules in the absence of express provisions for such review in the relevant enabling acts.

In view of the importance of judicial review as a check upon *ultra vires* delegated legislation, it would seem to be most desirable to provide a uniform, expeditious mode of obtaining such review of all administrative rules and regulations. The procedural device which would appear to be best suited to

[28] Report, op. cit. supra n. 19 at 115.

obtain this end is the declaratory judgment. The development of the declaration in actions to place in issue the validity of administrative action has been a matter of slow growth. Yet the advantages of such procedure in the field of administrative law seem almost self-evident. Especially is this true in those states where the burden is on those affected to attack the validity of the rule when it is applied in a specific case. For,

> it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the [rule-making] power . . . can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty.[29]

The procedural vehicles by which administrative rules are normally submitted to judicial review, "namely, the extraordinary legal remedies and injunctions, have accumulated so vast a cargo of technicalities that the citizen desirous of challenging an administrative power . . . . finds himself frequently engulfed in a procedural bog which bars him from his goal."[30] The use of the declaratory judgment procedure in this field would do away with these difficulties, while at the same time establishing a uniform and simple means of securing the judicial review of all administrative rules. The general use of such procedure could be obtained through the enactment of a statutory provision such as that contained in Section 6 of the Model State Administrative Procedure Act, drafted by the National Conference of Commissioners on Uniform State Laws in 1946, which reads:

> The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the [appropriate court], when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner.

Such a provision has, in fact, been enacted in several states,[31] and the same result is accomplished by the statutory provision

[29] Paraphrasing Farwell, L.J., in Dyson v. Attorney General, [1911] 1 K.B. 410, 421.

[30] Borchard, Declaratory Judgments xv (2d ed. 1941).

[31] E.g., Ill., Mo., and Wis.

in Ohio that any person adversely affected by an order of an agency adopting, amending or rescinding a rule may appeal to the appropriate court from such order.

The scope of review on such proceeding should extend to the questions of *ultra vires* (constitutional or statutory), conformity to procedural requirements (constitutional or statutory), and reasonableness (*i.e.*, whether or not there is a rational relationship between the rule and the governing statute). For, as stated by Mr. Justice Sutherland:

> The power of an administrative officer or board to administer a . . . statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of [the legislature] as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. And not only must a regulation, in order to be valid, be consistent with the statute, it must be reasonable.[32]

In addition, where the rule in question is an interpretive one, the reviewing court should give effect to the limits of correct interpretation.

Mention should, finally, be made of one significant, though rarely discussed, aspect of the subject of delegated legislation, namely, the problem of the actual drafting of administrative rules and regulations. The practice in the various state agencies is, generally speaking, most unsystematized. In most cases rules are drawn up by the section of the agency interested in the subject matter, and very often without any legal assistance. In other cases—a far less number—rules are drafted by agency counsel or others with a legal background, or the technical staffs which draft the rules are members of the legal profession. In view of the many complaints which are often directed against the language of delegated legislation, it is of the utmost importance that rules and regulations be drawn up with some care.

> Good draftsmanship is an art which calls for special qualifications and long experience. By it we mean the power of clear, lucid and

[32] Manhattan Gen. Equipment Co. v. Commissioner, 297 U.S. 129, 134, 56 Sup. Ct. 397, 80 L. Ed. 528 (1936).

> simple expression of the intended purport of the draft, and of keeping within the legal limitations intended by [the legislature].[33]

Drafting is a skilled task, which requires a legal background. The importance of careful drafting cannot be overemphasized, and the need for it applies as much to delegated as to original legislation. Whenever practicable, therefore, the work of drafting administrative rules and regulations should be entrusted to experienced attorneys. Some attention might also be given to the possibility of establishing a central pool of trained draftsmen in a state, who would be available to assist agencies in that state in the drawing up of at least the more important rules and regulations.

Adjudications

Perhaps the fundamental principle upon which justice in the common-law world is based is the right to be heard—*audi alteram partem.*

> It is a rule founded upon the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule.[34]

Implicit in this is the requirement of due notice as a condition precedent to the proper exercise of administrative power. The right to a hearing, however generously preserved, is of little use unless those affected are informed beforehand of the contemplated action. "Notice, in short, must be given; and it must fairly indicate what the respondent is to meet." [35]

The Section of Judicial Administration of the American Bar Association recommended:

> that in administrative proceedings which are initiated by the tribunal itself, all parties must be furnished with a written specification of the issues which will be considered and determined, and opportunity

[33] Minutes, op. cit. supra n. 26 at 49. (1878).
[34] Stuart v. Palmer, 74 N.Y. 183, 190
[35] Report, op. cit. supra n. 19 at 63.

> shall be afforded them to present evidence and arguments upon those precise issues,[36]

and such notice has been made a uniform prerequisite to all administrative adjudications under Section 5 (a) of the Federal Administrative Procedure Act and Section 8 of the Model State Administrative Procedure Act.

Notice of hearing is normally required by statute prior to the exercise of adjudicatory functions by administrative agencies in the states, and the statutes provide for the giving of a stated number of days' notice. The statute may also indicate how notice is to be given; the usual means is by mail and/or publication, with personal service being used in many cases where it is deemed appropriate. Since many administrative agencies "deal largely with the vindication of public interest and not the enforcement of private rights,"[37] there may often be a much greater interest in an administrative proceeding from a public point of view than that of the formal parties. Notice of hearing should consequently be given as wide a range as it practicable. The most feasible means of doing this is through adequate publication of the notice. In addition, a practice such as that of the Georgia Public Service Commission, which sends its notices, not only to all affected parties, but also to all utilities and attorneys on the commission's mailing list, might well be followed.

One should perhaps interpose a *caveat* here. The power to publicize notices may often cause undue harm to particular respondents. Thus, where the sale of or dealing in securities is involved in a proceeding under a state blue-sky law, the suspicion which attaches to a public notice may effectively do the damage before the final order,[38] and the same is true in many occupational licensing proceedings. In such cases at least the notice should not be publicized, and the relevant state agencies do not in fact normally give a wider notice of hearing

[36] Appendix B at 628.

[37] Mr. Justice Frankfurter, dissenting, in Ashbacker v. Federal Communications Commission, 326 U.S. 327, 335, 66 Sup. Ct. 148, 90 L. Ed. 119 (1945).

[38] Cf. Bank of America v. Douglas, 105 F. (2d) 100 (App. D.C., 1939).

than that to the respondent and others who may be directly concerned in the proceeding.

Although, as indicated above, most state statutes require the giving of some notice prior to the exercise of the adjudicatory function, the form of notice of hearing is in the great majority of cases left to administrative discretion. It is with regard to the form of notice that the notice practices of most state agencies fail to meet the standards of the Federal and Model State Administrative Procedure Acts. The notice of hearing should state the matters in issue clearly, concisely, and with some particularity (and this is, indeed, made a general requirement for administrative notices in Wisconsin); yet, all too frequently, state agencies state the issues in vague, general language, often merely parroting the language of the relevant statute. In many cases the notice, in effect, does little more than inform those affected of the time and place of the hearing. In the majority of cases the parties are not notified of their right to representation by counsel and, what may often be of very great importance, of the proposed action by the agency. Notices given by state agencies thus fall far short of the requirements for analogous notices and pleadings in court cases; they do not even come up to the standards imposed by the Supreme Court in the *Gratz* case [39] or to those contained in Section 5(a) of the Federal Administrative Procedure Act.

In most state agencies there are no formal pleadings, other than the issuance of notice of hearing by the agency prior to the adjudicatory hearings. The only specification of the issues before the actual hearing is that contained in the administrative notice and, as pointed out above, this is often far from adequate. A possible way out of the difficulties arising from the inadequacies of the notices furnished by many state agencies is through provision in the agency rules of practice for enabling the respondent to request bills of particulars where the notice afforded him is deficient. State agencies are, how-

[39] Federal Trade Commission v. Gratz, 253 U.S. 421, 40 Sup. Ct. 572, 64 L. Ed 993 (1920).

ever, reluctant to adopt any such provision in their rules, "because of fear that a litigious party might make use of such rules to hamper the effective conduct of quasi-judicial proceedings." [40]

Both the majority and minority of the Attorney General's Committee on Administrative Procedure recommended a wide use of prehearing procedures, similar to the pretrial conferences in the federal and many state courts, looking toward the settlement of cases or the elimination or simplification of issues. Many agencies in the states employ such prehearing techniques. Settlements may also be brought about by less formal consultations between the agency and the parties. Thus, the Massachusetts Labor Relations Commission relies heavily on methods of consultation and settlement. In the period from July, 1945, to June 20, 1946, of the 134 cases filed with the commission, 55 were settled at informal conferences or withdrawn or dismissed before the stage of formal hearing had been reached, and 8 other cases were settled during or after the formal hearings were conducted. Despite the use of these techniques in many agencies, one feels that state agencies do not make as wide a use of them as they might. In addition, these techniques can be used profitably even after the stage of formal hearing has been reached. The agency should then avoid unnecessary proof of undisputed facts by the use of stipulations. It should be noted that, in the case of practically all state agencies, stipulations as to the facts are admitted in evidence. One could, however, wish that more agencies took the initiative in the securing of such stipulations.

The right to be heard is, as has been indicated, the fundamental principle upon which the administration of justice in the common-law world is based.

> No party ought to have his case decided without being afforded an opportunity of hearing the case which he has to meet as well as stating his own case. Even God himself did not pass sentence on Adam before he was called upon to make his defense. "Adam," says

[40] Benjamin, Administrative Adjudication in New York 82 (1942).

God, "where art thou? Hast thou not eaten of the tree that thou shouldst not eat?" [41]

In most cases state agencies are required by statute to hold hearings before exercising adjudicatory functions. In a smaller number the holding of hearings is discretionary, although they are generally held. The form of hearing is normally discretionary with the agency; statutes prescribe the form of hearing in relatively few cases. The hearings actually held vary in the degree of their formality or informality according to the type of proceeding involved. Thus, hearings before public service commissions tend to be adversary in character (similar to court proceedings), and attain a high degree of formality, while hearings held in connection with claims under schemes of social insurance (*e.g.*, unemployment compensation and workmen's compensation) tend to be rather informal in character. These tendencies are, of course, not uniform in all the states. In some, public service commission hearings may be informal, while highly formalized hearings are often held by agencies administering workmen's compensation laws. In addition, it should be emphasized that any discussion of the degree of formality in administrative hearings is a relative matter by comparison with the judicial process; even the most formal administrative hearing will rarely be anywhere nearly as formal as a trial in court.[42]

In the federal field administrative hearings are usually held before examiners appointed under Section 11 of the Federal Administrative Procedure Act. In the states the volume of administrative adjudications is often not so great, and hearings are more frequently held before the members of the relevant agency themselves—either before the full membership of the agency or before one or more of its members. This is true even in some cases where the agency is given the express statutory power to appoint hearing officers, such as those under the federal act. Thus, the Public Utilities Commission of Colo-

[41] Wade and Phillips, Constitutional Law 276 (3d ed. 1946).

[42] Benjamin, op. cit. supra n. 40 at 107n.

rado is authorized to name persons on its staff to act as examiners. Up to the present time, however, no such examiners have been appointed, for all hearings are conducted before one or more commissioners. In some of the larger states, of course, the press of administrative business is so great as to require that most hearings be conducted by subordinates of the agency. In such cases the hearing officer is normally not responsible for the decision in the case; his function is to serve as a conduit for the transmission of evidence and argument to the agency members who make the actual decision. In other instances (notably workmen's and unemployment compensation proceedings), the volume of hearings is such as to require that power of initial decision be vested in a number of hearing officers, subject to administrative review by the agency members.

State agencies are normally given express statutory power to issue subpoenas and compel testimony. Such subpoenas are issued upon the request of a party to the hearing. Complaints such as those which have been directed against the subpoena practices of federal agencies, especially the National Labor Relations Board, are not often heard against the subpoena procedures of state agencies, for no more onerous conditions are usually imposed upon the issuance of subpoenas at the request of a private party than upon applications for subpoenas by the agency's attorneys. In some states the mere disobedience of certain administrative subpoenas will render the recalcitrant liable to criminal penalties.[43] In the normal case, however, provision is made for the agency to enforce its subpoenas by court action in cases of contumacy; if the noncompliance continues, punishment may be imposed for contempt of court.

One of the important problems in the field of administrative justice is the question of how far the common-law rules of evidence which have been developed with regard to judicial proceedings should be considered as binding upon the administrative process. As a general proposition it seems clear that the strict evidentiary rules which govern the judicial process

[43] See, e.g., id. at 152.

are not inveterately to be applied to administrative proceedings.

> The rules of evidence at common law are the product of trial by jury. They aim to protect from false reasoning a temporarily convened tribunal of laymen. Manifestly these rules as such should have no application before permanent administrative tribunals.[44]

It is only in the comparatively rare case that the relevant state statute requires an agency to follow the courtroom rules of evidence.[45] Most of these statutes occur in the field of public utility regulation where, as has been noted, the hearing procedure tends to be more formal than in other types of hearings. In most cases where there is statutory provision upon the subject, the statute provides explicitly that the agency is not bound by the common-law rules of evidence and/or allows the agency to make its own rules of evidence. Often there is the statutory exhortation that the administrative hearing shall be simple and summary. In many cases the statutory provisions under which the agency operates make no reference to rules of evidence. This should not, however, change the normal rule that, in the absence of express statutory command, administrative agencies are not required to apply the strict rules of evidence that govern trials at common law.

The need for some administrative latitude here does not, at the same time, justify going to the other extreme of sweeping away all evidentiary rules, as is done too often at administrative hearings. In many cases, there are no restrictions upon the admissibility of evidence—the agency practice being to let in all evidence "for what it is worth." One should differentiate in this field between the technical common-law rules of evidence and the fundamental principles of justice upon which they are based; the former need not be applied with rigor, the latter are as essential to administrative justice as they are to that dispensed by the courts. Surely, the "assurance of a desirable

[44] Vanderbilt, "The Technique of Proof Before Administrative Bodies," 24 Iowa L.Rev. 464, 467 (1939).

[45] E.g., Mississippi Public Service Commission, North Carolina Utilities Commission, Ohio Public Utilities Commission, and Wisconsin Employment Relations Board

flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force." [46] Or, as Dean Pound has expressed it:

> No one urges that an administrative hearing or investigation be conducted in all respects as a trial at law. No one today objects to any reasonable informality or application of common sense to the ascertainment of facts. What is objected to is the tendencies . . . which ignore what long experience has shown to be fundamental in justice. To say that these elementary requirements of justice are technical "legalism" and that seeking to make available to all who are adversely affected the constitutional guarantee that a decision against them shall have a basis in evidence of rational probative force and not in prejudice, preformed opinions without hearing the other side, gossip and made-to-order interviews under the name of investigation, is insistence on "technical rules of evidence," is simply to say that all rights are to be at the mercy of administrative agencies.[47]

In actual practice many state agencies tend to follow "some rules of evidence." In some cases this goes to the extent of following the rules of evidence administered in the courts, although the agency is not bound to do so by the governing statute.[48] In at least one state the agency is required to follow the courtroom rules as to admissibility of evidence by judicial decision in spite of an express statutory provision that the commission shall not be bound by technical rules of evidence.[49] In most cases, however, the key tests seem to be those of relevancy, materiality, and probative force. Unless these standards are adhered to, hearings tend to become unduly long, in large part spent on matters not wholly relevant to the issues. State agencies do in many cases (especially where the hearing is held before a member of the legal profession) limit the admissibility of evidence on the basis of these standards, and in Wisconsin by statute basic principles of relevancy, materiality

[46] Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 230, 59 Sup. Ct 206, 83 L. Ed. 126 (1938).

[47] Pound, Administrative Law 78 (1942).

[48] E.g., Pennsylvania Public Commission, Rhode Island Public Utility Administrator, Wisconsin Public Service Commission.

[49] Chicago and N.W.R. Co. v. Commerce Commission, 326 Ill. 625, 158 N.E. 376 (1927).

and probative force, as recognized in equitable proceedings, are to govern the proof of all questions of fact before that state's agencies.

By Section 9 of the Model State Administrative Procedure Act, administrative agencies "shall give effect to the rules of privilege recognized by law." Notwithstanding this, it is surprising to note how many state agencies do not recognize the common-law and statutory privileges. They constitute at least a substantial minority of those surveyed. With regard to the "best-evidence" rule, the administrative practice is even looser. The great majority of agencies do not follow the rule, though one should note a tendency the other way in the case of agencies administering workmen's compensation laws. One should, of course, realize that the bases for the successful application of many of the evidentiary rules are often lacking in administrative proceedings. Administrative hearing officers are frequently not trained lawyers; in addition, parties to an administrative proceeding are often not represented by counsel.[50]

The evidentiary rule most frequently relaxed at administrative hearings is that against the admission of hearsay. It is only in the small minority of cases that hearsay evidence is not admissible before state agencies. At the same time, recognizing that such evidence is usually of slight probative value, most agencies do not make findings which are based wholly upon hearsay evidence. In some cases the prohibition against findings resting solely upon hearsay has been judicially imposed. Thus, under the so-called "legal residuum" rule in New York "there must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings," and findings based wholly upon hearsay are set aside.[51]

[50] Benjamin, op. cit. supra n. 40 at 174.

[51] Matter of Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 440, 113 N.E. 507 (1916). There have been indications in recent years that the adherence of the New York courts to the "legal residuum" rule is not as strong as it once was. Schwartz, supra n. 4 at 71. See, e.g., Matter of Altschuller v. Bressler, 289 N.Y. 463, 46 N.E. (2d) 886 (1943).

The cardinal principle which should govern all adjudicatory proceedings, as has been indicated, is that contained in the maxim; *audi alteram partem*. A decision based upon *ex parte* evidence clearly does not conform to common-law ideas of justice. At administrative hearings *ex parte* statements, if admitted at all, should be admitted only upon consent of the parties. This is the general practice followed by state agencies; yet there are some exceptions.[52] An aspect of the problem which is often most acute in the administrative field arises out of the practice of many agencies to engage in *ex parte* consultations with their employees who are deemed to be experts in the particular proceeding.[53] All too frequently such consultations will have an even greater influence upon the agency's decision than the evidence presented at the public hearing.

The great objection to *ex parte* evidence is that it is not subject to the safeguard provided by cross-examination—a safeguard which under our system is conceived of as a fundamental one. As recently stated by the New York court:

> cross-examination of adverse witnesses is a matter of right, in every trial of a disputed issue of fact. . . . That right, of course, can be exercised before administrative fact-finding tribunals, and denial thereof by such a tribunal is error of law.[54]

Recognizing this, state agencies have afforded adequate opportunities for cross-examination, except in the cases referred to above where *ex parte* evidence has been admitted. This does not, to be sure, mean that the right of cross-examination is an unlimited one. All that is required is cross-examination "to a reasonable extent," and the administrative tribunal has at least as much discretion in the matter as a trial court.

Closely related to this is the problem of "official notice." In the majority of cases state agencies do not take "official notice" of facts not formally introduced in evidence and which would

[52] E.g., Georgia Public Service Commission, Iowa Commerce Commission. See Burlington Transp. Co. v. Commerce Comm'n, 230 Iowa 570, 298 N.W. 631 (1941).

[53] E.g., Indiana Board of Tax Commissioners, New Hampshire Tax Commission, and Wisconsin Public Service Commission.

[54] Matter of Friedel v. Board of Regents, 73 N.E. (2d) 545, 547 (N.Y. 1947).

not be cognizable by judicial notice in a court. One feels, indeed, that many state agencies do not make as wide a use of the doctrine of "official notice" as they might, following the example of many federal agencies. At the same time, while more liberality in this respect would make for greater expedition and for fuller utilization of administrative skills, such extension of the doctrine should be accompanied by safeguarding mechanics.[55] Foremost among these is the obligation of the agency to afford private parties an opportunity to rebut or explain the facts of which "official notice" is taken. For even those facts which seem "obvious and notorious" to the administrator may be wrong or susceptible of differing interpretations. That is the basis for the provision in Section 7(d) of the Federal Administrative Procedure Act, that "where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

"In the entire quasi-judicial process, the process of decision is of paramount importance." [56] In many state agencies, as has been indicated above, it is the agency itself which hears the evidence and makes the decision. The process of decision, in such cases is similar to that in the judicial process, and serious problems do not arise. It is where the hearing is held before a subordinate officer, with the actual power of decision being vested somewhere else in the agency, that difficulties may come up. Normally, where such is the case, the hearing officer is merely an adviser—a means through which the evidence and arguments are transmitted to the agency itself. "Because the agencies have required the person who heard the evidence to play a more or less subordinate role in deciding, they have had to use other instrumentalities for shaping a decision." [57] The general device used is that of intermediate reports by the hearing officer and the use of subordinates to aid the agency in sifting the evidence, digesting the record, and preparing draft findings and opinions. Where this procedure is used by the agency, it would seem to be essential both that the deciding

[55] Report, op. cit. supra n. 19 at 72.
[56] Benjamin, op. cit. supra n. 40 at 221.
[57] Report, op. cit. supra n. 19 at 45.

authority personally familiarize himself to some extent with the transcript of evidence and that there be some opportunity of oral argument before the deciding authority.[58] Otherwise the decision will tend to be a vicarious one, and this cannot fail to have a deleterious effect both upon public confidence and the justness of the decision itself. Despite these obvious factors one must note a tendency upon the part of at least some state agencies toward a vicarious process of decision, with parties having the right of oral argument only before the subordinate hearing officer.

In certain cases, notably in the field of workmen's and unemployment compensation, states have created a hierarchy of administrative tribunals to decide claims. The volume of hearings is such in these cases as to require that power of final decision be vested in a number of hearing officers subject to the right to appeal to a higher administrative authority. Thus, in Alabama claims for unemployment compensation are initially determined by a deputy designated by the Director of Industrial Relations. There is a right to appeal from his decision to an appeals tribunal consisting of an officer or employee of the Department of Industrial Relations, with a further appeal to a board of appeals set up under the statute, on motion of that body or with its permission.[59] We have here an elaborate hierarchy of administrative tribunals—original, intermediate appellate, and, in many cases, ultimate appellate—to decide unemployment compensation claims.

Where this type of administrative review procedure is provided for, such review may be a very broad one, equivalent to a trial *de novo,* or a more narrow one, limited to the record before the lower tribunal and its findings of fact. Thus, in proceedings under the Workmen's Compensation Act of Georgia the initial decision is made by a director or deputy, with a right in the parties to appeal to the full Board of Workmen's Compensation. The appeal to the board opens up the case as a

[58] This was recommended by the Section of Judicial Administration (Appendix B at 627) and was enacted in Section 12 of the Wisconsin Administrative Procedure Act.

[59] See similarly, the procedure described in Benjamin, op. cit. supra n. 40 at 223.

de novo proceeding.[60] In New York, on the other hand, the volume of initial adjudications in a field such as unemployment compensation is so great as to make a wide review impracticable in every case in which the parties might seek it. Thus, though any party may appeal in such cases to an appeal board from any decision of a referee, the statute provides that the appeal board may decide any case so appealed on the basis of the record before the referee, and without hearing argument or holding a further hearing unless in its discretion it decides to do so.

A question which should be given particular attention in any discussion of the process of administrative decision is that arising out of the merger of the prosecuting and adjudicating functions in many agencies. While segregation of functions may be practicable in the case of the large federal agencies, it may often be a more acute problem in state agencies with small staffs. The volume of business conducted, for example, by administrative agencies in a state like Vermont makes an adequate separation of the prosecuting and adjudicating functions impracticable in most agencies. Yet even with these considerations in mind, state agencies should do as much as is practicable under the circumstances in the direction of separation of functions.

A possible solution of the problem here lies in the direction of "complete" separation, such as was urged by the President's Committee on Administrative Management. This can best be exemplified by an agency such as the Wisconsin Board of Tax Appeals.

> Prior to the enactment of ch. 412, Laws of 1939, the Wisconsin Tax Commission exercised administrative powers and exercised quasi-judicial functions by holding hearings for review as provided by law. In 1939 the legislature created two separate and distinct departments. The administrative work was placed in the Wisconsin Department of Taxation, and the quasi-judicial functions were transferred to the Wisconsin Board of Tax Appeals.[61]

[60] Burel v. Liberty Mutual Insurance Co., 56 Ga. App. 716, 193 S.E. 791 (1937).

[61] Kaukana v. Dept. of Taxation, 250 Wis. 196, 26 N.W. (2d) 637, 638 (1947).

A like separation of the functions of prosecution and adjudication is also feasible in other fields. Thus, there is a distinct difference between the prosecuting and adjudicative functions of the Colorado Public Utilities Commission. The former are ordinarily conducted by the attorney for the commission, who is a member of the attorney general's staff, and the latter by the members of the commission themselves. In a similar manner, the Massachusetts Labor Relations Commission is divided into branches, with the prosecuting functions vested in a people's counsel, while the commissioners act as adjudicators—an arrangement, it should be noted, not unlike that prevailing in the National Labor Relations Board since the Labor Management Relations Act of 1947.

Such examples of more or less complete separation are, however, comparatively rare. Where efforts are made to solve the problem of concentration of functions, they are more usually along the lines of "internal" separation, such as is provided for in the Federal Administrative Procedure Act. Such separation is, for example, provided for in the California Administrative Procedure Act;[62] and the same result is accomplished in the procedure of individual agencies in some states. It should perhaps be emphasized that in the majority of cases where the problem has arisen, attempts even at "internal" separation have not been made. In addition, such "internal" separation, though undoubtedly of value as far as it goes, deals with the problem only at the level of recommended decision. The crux of the matter lies in the concentration of functions in the agency itself, and with this no attempt is made to deal through methods of purely "internal"[63] separation.

The culmination of the adjudicatory process is the decision which is rendered by the agency. Such decision should normally contain some statement of the reasons upon which it is based.

[62] See Hohreiter v. Garrison, 181 Calif. App. (2d) 384, 184 P. (2d) 323 (1947). It should be noted that the California Administrative Procedure Act does not contain a provision like Section 5(c) of the Federal Act, although the provisions for disqualification of hearing officers on account of bias are meant to serve the same purpose to some extent.

[63] See Schwartz, "The American Administrative Procedure Act, 1946," 63 L.Q.Rev. 43, 60 (1947).

"When another person takes some action affecting our interests we naturally desire to know the reasons which motivated him." [64] The satisfaction of this desire is fundamental to the bringing into existence of a feeling that justice is being done. In addition, "intelligent judicial review of a quasi-judicial determination is possible only if the deciding officer has made findings of fact which show the actual grounds of decision." [65] Because of these considerations most agencies make findings of fact, articulating the basis of their determinations. In the normal case, indeed, such findings are made pursuant to statutory requirement, and findings are frequently required by court decisions, where the governing statute is silent. One should, however, note that the agency practice in many cases does not come up to the recommendation of the Section of Judicial Administration on this point. Findings are often stated in general terms, couched in the language of the regulatory statute itself. Furthermore, in some cases no findings at all are made. Thus, there is no statutory requirement that the Georgia Public Service Commission make specific findings of fact. The governing act merely provides that the commission *may*, if it deems desirable, make such findings. The Supreme Court of that state has held that such findings are unnecessary,[66] and they are commonly not made.

A related point deals with the publication of agency decisions. In comparatively few cases are there provisions for the uniform publication of such decisions. Yet, the publication of at least the more important administrative decisions can prove of the greatest value. Not only do they serve to apprise those affected of the grounds of the administrative decision, but, even more important, they also "enable the private interests concerned, and the bar that advises them, to obtain additional guidance for their future conduct." [67] A statutory provision such as that which requires the Missouri Public Service Commission to publish its decisions is thus to be highly

[64] Feller, "Prospectus for the Further Study of Federal Administrative Law," 47 Yale L.J. 647, 665 (1938).

[65] Benjamin, op. cit. supra n. 40 at 251.

[66] Coleman v. Drake, 183 Ga. 682, 188 S.E. 897 (1936).

[67] Report, op. cit. supra n. 19 at 30.

commended—although it is unfortunately not a common requirement.

Judicial Review of Adjudications

Judicial review in the states in general follows the classification of the Attorney General's Committee on Administrative Procedure into: *statutory* and *nonstatutory* review, i.e., those provisions contained in statutes and those developed by the courts in the absence of legislation.[68] As a broad proposition, statutory review provisions take over the field insofar as they do not conflict with constitutional demands. Review in the federal field has seen the gradual superseding of nonstatutory review by applicable legislation. The trend in the states, while undoubtedly similar in character, has not gone quite as far, so that except for those states where uniform review legislation has been adopted, review of the nonstatutory type is often the more important.

(A) Nonstatutory review.

Direct review of administrative action is, in the absence of statutory provisions for review, generally obtained through the so-called "extraordinary" or "prerogative" writs of certiorari, mandamus, prohibition, or injunction. Though originally developed as a means of controlling inferior courts, their use has been expanded so that they are the normal method of controlling administrative agencies in the states where there is no statute governing review.

Judicial review of actions of state agencies in the absence of statute tends to be narrow in scope. The view of the Kentucky Court of Appeals[69] that a statutory review provision is a curb upon its inherent broad power of review, is a rare one. In most states the inherent review power is construed as a limited one, statutory authorization being necessary to broaden it. This view is stated in an extreme form by the Supreme

[68] Id. at 80.

[69] Kendall v. Beiling, 295 Ky. 782, 786, 175 S.W. (2d) 489 (1943).

Court of Kansas, to the effect that that state's court of general jurisdiction

> has no inherent appellate jurisdiction over the official acts of boards or public officers. Where the latter do not transcend their statutory powers nor act fraudulently or oppressively, their official acts cannot be challenged in court except where the legislature has made some special provision for a judicial review.[70]

The scope of review under the "prerogative" writs is in most states similar to what it was at common law. The applicable statutes normally authorize the bare use of the relevant writs or state their functions in conventional terms, their availability and scope usually being left for the courts to determine. Such provisions are generally construed as restating the common law; they do not provide for granting any other relief than that recognized by the common law, nor do they authorize the writs in any additional cases.[71] The scope of such review is well stated by the Minnesota court:

> In reviewing the determinations of administrative boards such as the optometry board this court will inquire no further than to determine whether the board kept within its jurisdiction, whether it proceeded upon a proper theory of law, whether its action was arbitrary or oppressive, and whether the evidence affords a reasonable and substantial basis for the order sought to be reviewed.[72]

In many states this is phrased in terms of the "substantial evidence" rule, as it was stated by the Supreme Court in the *Consolidated Edison* case.[73] Some state courts, indeed, limit review even more narrowly than the substantial evidence rule, upholding the administrative findings where there is *any* evidence to support them. Under this view the reviewing court may examine the evidence only to determine the question of jurisdiction—"not to weigh conflicting evidence but to determine whether the order appealed from is supported by any

[70] In re Chicago, R.I. & P.R. Co., 140 Kan. 465, 467, 37 P. (2d) 7 (1934).

[71] Max J. Winkler Co. v. Coursoro, 160 Ala. 374, 49 So. 341 (1909).

[72] State v. Jenson, 205 Minn. 410, 286 N.W. 305 (1939).

[73] 305 U.S. 197, 59 Sup. Ct. 206, 83 L. Ed. 126 (1938).

evidence, and whether the body reviewed had jurisdiction to do the act complained of." [74]

These general rules apply even though there have been statutory changes in the form of action, so that the prerogative writs have been abolished or changed in name. Thus, by statute in Pennsylvania "all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal or certiorari, shall hereafter be taken in a proceeding to be called an appeal." [75] This, however, has been held not to change the legal effect of what was formerly the writ of *certiorari,* the change being one in name only.[76] This has, by and large, been the judicial attitude to statutory alterations of the writs. They have been held not to change their essential nature, their scope being the same as at common law.

The inadequacies of the type of nonstatutory review that we have been discussing are well illustrated by the situation prevailing with regard to review of the orders of the Georgia Public Service Commission. There are no statutory review provisions applicable to orders of that agency, and review of its orders must be obtained through the nonstatutory methods just discussed. The Georgia courts have held that the writ of certiorari is available only to review a *judicial* act of the commission and the courts have very narrowly restricted the definition of judicial acts.[77] This leaves the remedy of *certiorari* available only in a comparatively limited number of cases. In addition, the scope of review under the writ is a very narrow one.[78]

As far as the other prerogative writs are concerned, *mandamus* is only available to compel the commission to take some

[74] In re Mark, 115 Pa. Super. 256, 176 Atl. 254 (1934). See Bolton v. Newnan, 22 Ga. App. 15, 95 S.E. 472 (1918); Hawley v. Bottolfsen, 61 Idaho 101, 98 P. (2d) 634 (1940); Marinelli v. Board, 275 Mass. 169, 175 N.E. 479 (1931); State v. Caulfield, 333 Mo. 270, 62 S.W. (2d) 818 (1933). It should be noted that the Pennsylvania rules as stated in the Mark case, supra, has since been changed by statute. Pa. Stat. (Supp.) tit. 71, § 1710.44.

[75] Pa. Stat. (Purdon, 1933) tit. 12, § 1131.

[76] Rand v. King, 134 Pa. 641, 19 Atl. 806 (1890).

[77] Southeastern Lines v. Public Service Comm'n, 181 Ga. 75, 181 S.E. 834 (1935).

[78] Bolton v. Newnan, 22 Ga. App. 15, 95 S.E. 472 (1918).

action where it has an affirmative duty to act.[79] It does not lie to control the exercise of discretion vested in the agency. This leaves relief by way of injunction as the only general method of review. Yet even this is not very satisfactory, for the Georgia courts have stated that they will not interfere with an order of the Public Service Commission made within its jurisdiction unless it is clearly shown that such order is unreasonable, arbitrary or confiscatory, or fraud or corruption is alleged.[80] When it is considered that there is nearly always some conflicting evidence in every case and that the Georgia Commission seldom, if ever, makes detailed findings of fact, it is apparent that the remedy by way of injunction is often of little use.

Nonstatutory methods of review are thus generally wanting from the point of view of providing adequate judicial review of administrative action. The inadequacies of such methods have led some states to broaden nonstatutory review by legislative provisions expanding the scope of review. Such statutory expansion seems necessary if more liberal review is to be provided, for few courts follow the Kentucky view of a broad inherent review power in the judiciary in the absence of statute, with relevant legislation in that view being conceived of as a curb upon this inherent power.[81]

Where there has been such statutory expansion, the court may be authorized to "determine disputed questions of fact as well as of law, and inquire into the facts by depositions taken on notice or in such other manner as may be according to the practice of the court."[82] This mode of review was formerly provided in New Jersey on a writ of *certiorari* to review administrative decisions, and in effect it permitted a trial *de novo* by the reviewing court, except in the comparatively few cases where there has been some statutory limitation upon the scope of review. Similar provisions, though perhaps not quite as broad, are contained in the statutes of other states, dealing

[79] Atlanta v. Wright, 119 Ga. 207, 45 S.E. 994 (1903).

[80] Coleman v. Drake, 183 Ga. 682, 188 S.E. 897 (1936).

[81] Supra n. 69.

[82] N.J. Rev. Stat. (1937) § 2:81-8.

with the scope of review under the prerogative writs.[83] Under its new constitution of 1947 prerogative writs were superseded in New Jersey, and in lieu thereof proceedings as of right were set up by rule of court,[84] which provides the broadest possible review free of the element of discretion which hedged about the use of the ancient prerogative writs.

(B) Statutory review.

In the federal field "statutes creating administrative tribunals generally provide methods by which their determinations may be judicially reviewed." [85] In the states, too, there are usually statutory provisions governing review of at least the more important agencies, though nonstatutory review still tends to cover a good portion of the field.

A common type of statutory provision reiterates, as it were, the right to nonstatutory review, providing that the action of the particular agency shall be reviewable by *certiorari*. Where nothing more is said, the scope of review is usually held to be the same as that under the writ available in the absence of statute. In Tennessee, however, there is held to be a difference between the ordinary writ and the writ granted by a statute to review the decisions of a particular agency. Although review under the former is no broader than that under the writ at common law, that under the latter has been held to be in the nature of a hearing *de novo*.[86]

In other states, too, the mere use of the label *certiorari* to designate the review proceeding does not necessarily mean that the scope of review is the same as that under the writ available in the absence of statute, for the statute in question may broaden the scope of the review available. Thus, review

[83] E.g., Neb. Rev. Stat. (1943) § 25-1901; Wash. Rev. Stat. (Remington, 1932) § 1010; W.Va. Code (1943) § 5320. Article 78 of the New York Civil Practice Act (§ 1296) seems to broaden the scope of review, but it has been narrowly interpreted by the New York courts. See Benjamin, op. cit, supra n. 40 at 331, Schwartz, supra n. 4 at 74.

[84] N.J. Const. (1947) Art. VI, § 5, par. 4. N.J. Rules 3:81.

[85] Report, op. cit. n. 19 at 82.

[86] Anderson v. Memphis, 167 Tenn. 648, 72 S.W. (2d) 1059 (1934).

of physicians' license revocation cases in Florida is by *certiorari* to the court of general jurisdiction, with the statute expressly conferring upon the licensee the right to a trial *de novo*.[87] Likewise, under the review provisions of the workmen's compensation and unemployment compensation laws of Illinois, the court of general jurisdiction in that state is given the power by *certiorari* to review all questions of law and fact presented by the record.[88] This has been held to provide for a much broader review than that available under the common-law writ. The court exercises its own independent judgment both as to law and facts, weighs the evidence, and is under a duty to set aside an award which is against the manifest weight of the evidence.[89]

Another kind of statutory review provision which is often met with is one providing for an "appeal" from the decision of the relevant agency. In Connecticut, in the case of most agencies, the applicable statutes simply give the right of "appeal," without any indication of the scope of the review.[90] The Connecticut courts have tended to construe such provisions as furnishing only a limited review, seemingly similar to that upon *certiorari* in most states.[91]

Appeal provisions in other states, however, specifically provide for a broader review. Thus, the statutes relating to certain agencies in Rhode Island provide for "appeals" from decisions or orders of such agencies, upon which the court is to hear *de novo* all questions of law and fact.[92] Likewise, in South Dakota statutory review provisions provide for "appeals" from administrative adjudications. Under a general statute in

[87] Fla. Stat. Ann. (1943) § 458.12. See State v. Driskell, 117 Fla. 717, 158 So. 277 (1934).

[88] Ill. Stat. Ann. (Jones, 1936) §§ 143.34, 45.141.

[89] Gannson v. Industrial Comm'n, 383 Ill. 231, 48 N.E. (2d) 938 (1943); Republic Casualty Co. v. Industrial Comm'n, 322 Ill. 169, 152 N.E. 479 (1926); Durkin v. Luecht & Co., 397 Ill. 227, 40 N.E. (2d) 69 (1942).

[90] E.g., Conn. Gen. Stat. (1949) § 5425, Public Utilities Commission; § 7450, Workmen's Compensation; § 851, zoning.

[91] Modeste v. Public Utilities Comm'n, 97 Conn. 453, 117 Atl. 494 (1922).

[92] E.g., R.I. Gen. Laws (1938) c. 300, Art. III, § 6, Workmen's Compensation; c. 284, § 9, Unemployment Compensation; c. 289, § 15, Wages and Hour Law.

that state, which governs in all cases of such appeals from administrative decisions, the court upon such appeal

> may affirm, reverse, or modify the order or decision appealed from; or may substitute therefor any order which in its opinion should have been made by the officer or department from whose order or decision the appeal was taken; or may remand the matter to such officer or department with directions to make such order.[93]

In many cases statutory review provisions expressly provide for a trial *de novo* in the reviewing court, although the review is often confined to the record made before the agency. Even under such statutes, however, one should note "a tendency on the part of the courts to narrow their own power regardless of the breadth of authority given them in the statute." [94] The prevailing trend in the states is accordingly in the direction of the federal rule on the scope of review, as expressed by the Supreme Court in the *Consolidated Edison* case.

> Thus it may be laid down as a generally established rule of judicial policy—subject to sharp exception in a few of the states—that regardless of the breadth of judicial review authorized by the particular statute, the courts are reluctant to go farther than to decide questions of law and jurisdiction, and to make sufficient examination of the facts to see that the order appealed from has some degree of support—variously characterized as "substantial," "sufficient," "adequate" etc.—in the evidence.[95]

This result is often forced upon the courts by a common type of statutory review provision, which restricts the scope of review to what is, in effect, the federal "substantial evidence" rule. These statutes have, in the main, been modeled upon federal review provisions of the type contained in the Federal Communications Act of 1934. Under this kind of provision, as it is generally phrased, the hands of the reviewing court are tied, and it cannot widen the scope of review, even where the judicial policy is in favor of broad review. It is best illustrated by the statutes in New York, where most of the statutory

[93] S.D. Code (1939) § 33.4214.

[94] Hoyt, in Brochure on Administrative Law 26 (1943).

[95] Id. at 28.

review provisions are of this character. Thus, review of orders of the New York Labor Relations Board is obtained by a petition in the Supreme Court of that state praying that the order of the board be modified or set aside. "The findings of the board as to facts, if supported by evidence, shall be conclusive." [96] Review under this statute is governed by the "substantial evidence" rule,[97] and the same result is reached in other states under similar statutory provisions.[98]

Aside from the limitations upon the scope of review available in many states, perhaps the major deficiency in this field has been the lack of uniformity with regard to the procedures for obtaining review. Recognizing this, the Section of Judicial Administration strongly urged "that the method of judicial review of the determinations of state administrative tribunals should be prescribed in a single uniform statute." [99] It is of great practical importance that a uniform and simple procedure should be established for the review of agencies within a state, and in recent years some states have come to recognize this.

This type of uniform review procedure is provided for under Section 12 of the Model State Administrative Procedure Act, under which "any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act." Such review is to be had by filing a petition in the state's court of general jurisdiction, with a right in aggrieved

[96] N.Y. Labor Law, § 707.

[97] Matter of Stork Restaurant v. Boland, 282 N.Y. 256, 26 N.E. (2d) 247 (1940).

[98] See, e.g., Public Utilities Comm'n v. Loveland, 87 Colo. 556, 289 P. 1090 (1930); Wolfe v. Unemployment Comp. Comm'n, 232 Iowa 1254, 7 N.W. (2d) 799 (1943); Weymouth v. Burnham, 136 Me. 42, 1 Atl. (2d) 343 (1938); Jordan Marsh Co. v. Labor Rel. Comm'n, 316 Mass. 748, 56 N.E. (2d) 915 (1944); King v. Paper Co., 224 Mich. 691, 195 N.W. 812 (1923); Mississippi Unemployment Compensation Comm'n v. Avent, 192 Miss. 85, 4 So. (2d) 684 (1941); Kresge & Co v. Unemployment Compensation Comm'n, 349 Mo. 590, 162 S.W. (2d) 838 (1942); State v. Willis B. & B., 219 N.C. 709, 15 S.E. (2d) 4 (1941); Nelson v. Carter Oil Co., 195 Okla. 317, 157 P. (2d) 163 (1945); Latham v. Unemployment Comp. Board, 146 Pa. Super. 237, 22 Atl. (2d) 57; Los Angeles and S.L.R. Co. v. Public Utilities Comm'n, 80 Utah 455, 15 P. (2d) 358 (1932).

[99] Appendix B at 627.

parties to secure a further review by appeal to the highest court of the state. It is to be noted that this general review procedure does not supersede other express statutory review provisions applicable to specific agencies. The intent of the act, however, is that the review provided by it shall govern most agencies, with statutory exceptions where the nature of particular agencies require them.

This type of uniform review procedure has been established in those states which have adopted statutes comparable to the Federal and Model State Administrative Procedure Acts. Under these statutes parties aggrieved by administrative adjudications can obtain judicial review by filing a petition in the appropriate court. A uniform and simple mode of obtaining review is thus set up with regard to the administrative process as a whole within the state. One must, however, concede that this type of statute has been enacted in only a small minority of the states, although the trend is clearly in the direction of adopting such comprehensive review provisions. As Ralph M. Hoyt stated in 1943:

> It is not too much to expect that within a comparatively short time the confusing situation that now prevails in practically every state with regard to the method and scope of judicial review will be generally supplanted by a fairly uniform and a clearly defined system. In any given state, it would be a very great boon to the bar and the public to have the present three or four score of different statutory provisions for judicial review of the orders of as many different agencies, reduced to a single comparatively uniform and simple system that could be found all in one place in the statute book.[100]

[100] Brochure on Administrative Law 42 (1943). The best survey of recent legislative developments in the field of state administrative law is to be found in Nathanson, "Recent Statutory Developments in State Administrative Law," 33 Iowa L.Rev. 252 (1948). Prof. Nathanson's valuable discussion should be used to supplement the material in this chapter.

APPENDIX A

AMERICAN BAR ASSOCIATION

REPORTS

OF THE

SECTION OF JUDICIAL ADMINISTRATION

AS ADOPTED BY THE SECTION
AND APPROVED BY
THE ASSEMBLY AND THE HOUSE OF DELEGATES

AT THE
ANNUAL MEETING
CLEVELAND, OHIO
July 27, 1938

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FOREWORD

BY

ARTHUR T. VANDERBILT

PRESIDENT, AMERICAN BAR ASSOCIATION
1937-1938

The reports, to which these few lines of mine are designed to be a foreword, represent labor out of all proportion to the number of pages of print. It is no exaggeration to say that each of these reports embodies a lifetime of study and of judicial, professional or professorial activity on the part of the chairman whose name is affixed to it. To take but a single example, Wigmore on Evidence, including the Supplement to the Second Edition, covers 6049 pages. Many years were devoted to the preparation of each edition. Yet in the brief compass of the 33 pages of his report Dean Wigmore presents to the American bench and bar the *minimum* requirements that are needed in a *practical* way to make our Law of Evidence workable in the twentieth century.

Note well the words "minimum" and "practical." The reports of these seven committees make no attempt to scale the heights of perfection or to reach out for the idealistic. They are entirely utilitarian in their objective. They were prepared with a realistic consciousness of the very genuine difficulties involved in inducing our judges and our lawyers to change any of their working habits in the field of judicial procedure. Hence the recommendations of the seven committees are limited in number to those matters which are absolutely essential if the administration of justice in America is to be responsive to the needs of our times. The recommendations are confined to matters of fundamental importance—I might almost say of rudimentary importance. They are matters on which all who have taken the time to reflect are in substantial agreement. Some day—and, I hope, in the not too distant future—a more enlightened generation will look back on these reports and wonder that it should have been necessary to write them, necessary to agitate for the recommendations set forth in them, and necessary, perhaps, in some states to invoke the aid of enlightened and farseeing laymen to bring about their adoption. These reports, let me make it very clear, are not intended to be all inclusive in scope, nor definitive in objec-

tive. They are merely *ad interim* contributions to the solution of practical problems of paramount importance to litigants in this country.

Like the new Federal Rules recently promulgated by the United States Supreme Court, these reports and the recommendations set forth therein are an example of what the representatives of the three branches of the profession—the judge, the lawyer and the law school professor—can accomplish when they band themselves together and direct their training and their experience toward a common objective. The men on the seven committees, and on the associate and advisory committees cooperating with them, were carefully selected for their knowledge and skill in their respective fields, as well as for their wholehearted interest in promoting the administration of justice. There have always been those who have scoffed at the ability of lawyers to cooperate and to labor toward a common goal. The work of these seven committees, under the patient and untiring leadership of Judge John J. Parker as Chairman of the Section, is a complete refutation of such scoffers. Not only did each committee produce its preliminary report on time, but each of the chairmen joined with the members of the Council of the Section in a detailed criticism of the preliminary draft of all seven reports. The reports were then recommitted to the respective chairmen with instructions to prepare final reports embodying the recommendations evolved in conference, and in due season each committee produced a second report, which was then subjected to the same close scrutiny as the first before the final reports were submitted to the Board of Governors for presentation to the Association.

Our profession by and large has been peculiarly indifferent to the great problems of judicial administration. We have been so concerned with questions of substantive law that we have regarded procedure as a mere incident, forgetting that all too often questions of procedure may mean as much to litigants as questions of substantive law. We have all too often forgotten, moreover, that it is the delays in procedure, the technicalities of pleading, and the complexities of practice that have aroused the ire of our clients much more frequently than the actual decisions of the courts on the merits of the cases submitted to them. No one has ever seriously challenged the solemn declaration of Chief Justice Taft:

> "If one were asked in what respect we had fallen furthest short of ideal conditions in our government, I think we would be justified in answering, in spite of the glaring defects of our

system of municipal government, that it is our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts."

Although each state has borrowed freely from other states in every branch of the substantive law, in the field of adjective law we have been singularly insular and narrowly provincial. It is by no means uncommon to find adjoining states, each with some splendid points of practice of which the other seems to be totally oblivious, even though there may be many lawyers who are members of the bar of both states. Such a strange phenomenon could not exist in the realm of business, for competition would quickly eliminate such absurdities.

Judicial procedure in our State courts will soon be subjected to the active competition of the federal courts. The new Federal Rules, which will go into effect this Fall, represent the skillful selection by acknowledged experts of the best that each State in the Union has to offer in the field of procedure. If these new Rules are intelligently and liberally administered by the United States District Judges, with a view to promoting the administration of justice *in the interest of litigants,* there will indeed be a new dawn in the judicial history of this country. Then comparisons will indeed be odious, unless many states, through the joint activity of the bench and the bar, take active steps to bring their own procedure to a corresponding degree of simplicity and adaptability for serving the ends of justice.

But this is not the only type of competition that our State courts have to face. The most significant development of the Twentieth Century has been the growth of our administrative tribunals, both State and Federal, with extremely wide powers of adjudication. As Chief Justice Hughes has aptly put it, "A host of controversies as to private rights are no longer decided in courts". These administrative tribunals boast advantages which, it is claimed, our traditional courts lack, *e. g.,* dispatch, economy, technical skill and capacity to promote desirable lines of social improvement. To be sure, many of these tribunals have disadvantages which may not be overlooked. All too often the commissioners of our administrative tribunals have lacked the qualifications that we insist upon in our judges—independence of executive control, freedom from political influence, and security of tenure of office—or they have been selected for reasons other than their technical qualifications to fill the positions assigned to them. All too often, moreover, they work in secret and fail to assign reasons for their decisions. Finally, cases are not lacking in which their decisions are based on insufficient evidence or

evidence of dubious quality. But despite all of these objections, many of our administrative tribunals do seem to possess advantages which arouse the admiration of laymen. It is submitted, however, that there is scarcely any point in which our traditional courts, *if properly organized and properly manned by judges and lawyers*, could not meet in their field the advantages claimed for administrative tribunals without any of their attendant disadvantages.

The acceptance in every one of our States of the recommendations of the reports of these seven committees would go far towards solving the problem of the competition of the federal courts and of the administrative tribunals alike. Such acceptance would work wonders in promoting popular respect for the law, the courts and the bar. It would be a most substantial contribution toward the attainment of the primary objects of the American Bar Association "to advance the science of jurisprudence, to promote the administration of justice". The project is one to which each member of this Association who is concerned as to the security of our courts and the preservation of our democratic representative system of government in a world where standards seem to be shifting constantly, may well turn his thought with keen appreciation of the practical value of the reports submitted herewith.

. . . .

The challenge which all these matters present to the legal profession, and particularly to bar organizations, is obvious. In England a century or more ago, the bar for the most part was blind to the problems of judicial administration in the interest of litigants and of the public. It was laymen—editors, educators, and public-spirited citizens—aided by a few farseeing judges and barristers, who forced obviously needed improvements on a reluctant profession that was imbued with the curious notion that the courts were created for the benefit of judges and lawyers. Whether the task be accomplished by lawyers or by laymen—for it must be accomplished if our courts are to perform their work to best advantage to the public—is for the bench and bar to say in the first instance. If I do not mistake the temper of the profession after intimate contacts with the lawyers of many states—thus far I have travelled over 66,000 miles this year attending their meetings—they will accomplish the task in most jurisdictions themselves and do it gladly and thoroughly. In either event, these committees have charted the course which lawyers and laymen alike may safely follow in dealing with these fundamental problems of adapting the work of our courts to the business and social necessities of the times.

REPORT

OF THE

SECTION OF JUDICIAL ADMINISTRATION *

To the American Bar Association:

The Section of Judicial Administration has devoted its attention during the past year to a study of the procedure of our courts, with the view of suggesting needed reforms and of formulating standards which may serve as guides to all who are interested in improving the administration of justice. In view of the adoption by the Supreme Court of the new rules of practice for the federal courts, it seemed appropriate, while the mind of the profession was directed to the subject, to emphasize the importance of eliminating outworn technicalities in the practice of the state courts and reforming their procedure along the general lines followed by these federal rules. It was thought that there would probably never be a better time to undertake a comprehensive reform of the procedure of the courts, long regarded as one of the outstanding duties of the legal profession.

In order that the subject might be handled in such way as to command the confidence of the profession and the public generally, the Section adopted the plan of appointing seven committees to each of which was assigned, for study and report, a specific subject in the realm of procedure. Members of the committees were selected with great care from persons who were known to have special knowledge of and interest in the subject assigned; and in each case the person chosen as Chairman was one who through study and experience was qualified as an expert on the subject. To each committee was added a corps of advisory and consulting members, one from each state of the Union (and the District of Columbia) suggested for appointment by the state delegate from that state in the House of Delegates of the American Bar Association. The committees so appointed, with the Chairman of each, are as follows:

1. Judicial Administration—Judge Edward R. Finch, New York City, N. Y.

* At its meeting on July 25 and 26, the Section of Judicial Administration approved all recommendations contained in the Section report, with the exception of recommendation 14 of the Committee on Simplification and Improvement of Appellate Practice (page 511, *infra*), which was recommitted to that committee for further study and report. On July 28 the Section presented the following recommendations to the House of Delegates, all of which were adopted by the House:

"(1) That the recommendations of the Council as approved by the Section be approved by the House of Delegates.

"(2) That the advocacy of said recommendations in the various jurisdictions of the country be made a special program of the Association for the coming year.

"(3) That the Committees of the Association be constituted in the several jurisdictions to advocate the adoption of the recommendations."

2. Pretrial Procedure—Judge Joseph A. Moynihan, Detroit, Mich.
3. Trial Practice—Judge W. Calvin Chesnut, Baltimore, Md.
4. Trial by Jury including Selection of Jurors—Judge John P. Dempsey, Cleveland, Ohio.
5. Law of Evidence—Dean John H. Wigmore, Chicago, Ill.
6. Appellate Practice—Prof. Edson R. Sunderland, Ann Arbor, Mich.
7. Administrative Agencies and Tribunals—Ralph M. Hoyt, Esq., Milwaukee, Wis.

These committees have done outstanding work in cooperation with their consulting and advisory members and have submitted able reports, copies of which are hereto attached. It is believed that collectively these reports contain a comprehensive and practical program for the reform of the procedure of our courts. At a meeting of the Council of the Section held in New York City on April 1 and 2, 1938, these reports were reviewed and the following recommendations embodied therein were given the approval of the Council, viz.:

1. Judicial Administration

(1) *Regulation of Practice by Rules of Court.* That practice and procedure in the courts should be regulated by rules of court; and that to this end the courts should be given full rule-making power.

(2) *Unified Judicial System with Administrative Judge.* That provision should be made in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage.

(3) *Judicial Councils.* That Judicial Councils should be strengthened with representation accorded the Bar and the Judiciary Committees of the Legislative Department.

(4) *Quarterly Statistics.* That quarterly judicial statistics should be required.

2. Pretrial Procedure

(1) *Procedure Recommended.* That courts in the metropolitan areas should make provision for pretrial hearings, and other courts should give consideration to the procedure with a view of adopting it if justified by local conditions.

(2) *Time of Hearing to be Determined by Local Conditions.* That whether the pretrial hearing should follow closely the joinder of issue or should be postponed until shortly before actual trial, must be determined by the individual needs in each jurisdiction.

(3) *Should be had Before a Judge.* That the pretrial hearing should be had before a Judge.

(4) *Need not Involve Disclosure of Proof.* That a pretrial hearing need not involve a disclosure of the details of proof which counsel prefer not to disclose.

3. Trial Practice

(1) *Common Law Power of Judge Should be Restored.* That the common law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

(2) *Duty of Judge to Charge Jury.* That after the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury.

(3) *Duty of Judge to Control Trial.* That the trial judge should be at all

times the governor of the trial in the sense of actively, and firmly when necessary, requiring that the proceedings be conducted with dignity, decorum and the avoidance of waste of time.

(4) *Examination of Jurors on the Voir Dire.* That the examination of jurors on their *voir dire* should be in accordance with the procedure outlined in Rule 47 of the new federal rules of civil procedure, which is as follows: "The Court may permit parties or their attorneys to conduct the examination of prospective jurors or may of itself conduct the examination. In the latter event, the Court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

(5) *Alternate Jurors.* That, for prospective long trials, one or more jurors in addition to the regular panel should be selected and impaneled to sit as alternate jurors, in accordance with the practice authorized and regulated by Rule 47 of the new federal rules.

(6) *Scintilla Rule Should be Abolished.* That the scintilla rule as to the sufficiency of evidence should be abolished.

(7) *Submission of Specific Issues to Jury.* That the trial court should be authorized, in its discretion, to submit specific issues to the jury to be considered in connection with a general verdict, in accordance with the practice prescribed by Rule 49 of the new federal rules.

(8) *Partial New Trials.* That the trial judge should have power to grant a partial new trial where in his judgment the several issues are clearly and fairly separable.

(9) *Judgment Non Obstante Veredicto.* That the practice of granting judgment *non obstante veredicto* be uniformly adopted, and that it be extended to authorize judgment on motion, in accordance with the original motion for a directed verdict, after the jury has disagreed and upon discharge, as provided for in Rule 50 of the new federal rules.

(10) *Voluntary Non-Pros.* That after the trial of a law suit has begun, dismissal without prejudice by voluntary *non-pros* be permitted only in the legally reviewable discretion of the trial judge.

(11) *Reference to and Reports of Masters.* That in law cases involving complicated fact issues, there may well be reference to a special master or auditor in advance of a jury trial with the submission of his report for consideration by the jury (see *Ex parte* Peterson, 253 U.S. 300); that in equity and non-jury law cases the report should be accepted by the court as to the facts unless clearly erroneous, but nevertheless with power in the trial judge to adopt or *modify* or *reject* the report in whole or in part or, in his discretion, to receive further evidence with regard to the facts found, or to re-commit the report with instructions. In jury actions the findings of the referee, special master or auditor should be made admissible as evidence of the matters found and be read to the jury subject to the ruling of the court upon any objection in point of law which may be made to the report (see new federal rule No 53 (e) (2) (3)).

(12) *Preliminary Injunctions.* That the practice as to issuing preliminary injunctions should be in accordance with that outlined in the new federal rule 65 which in substance forbids the issuance of preliminary injunctions without a hearing, but permits a temporary restraining order when necessary to obviate irreparable injury.

(13) *Promptness of Judicial Decision.* That as aids in securing promptness of judicial decision, the "administrative judge" and requirement as to periodic statistical reports

should be provided for rather than rigid statutory requirements as to withholding of salaries or requiring affidavit from judicial officers.

(14) *The New Federal Rules.* That the provisions of the new federal rules of procedure with respect to the actual trial of cases should be uniformly adopted.

4. Selection of Jurors

(1) *Selection by Commissioners.* That jurors should be selected by commissioners appointed by the courts.

(2) *Cleveland System Recommended for Metropolitan Centers.* That in the metropolitan centers, some such system as that now in use in Cleveland, Ohio, should be adopted.

5. Law of Evidence

(1) *Effect of Error in Admission or Rejection of Evidence* That error in the admission or rejection of evidence should not be ground of itself for directing a new trial unless the appellate court after an examination of the entire record is of opinion that the error has resulted in a miscarriage of justice or has affected the substantial rights of the parties. (See Com. Rep. Part II, 3.)

(2) *Where Case Heard by Judge Without Jury.* That where case is heard by a judge without a jury a new trial should not be granted for error in the admission of testimony if there is substantial evidence to support the findings, unless it appears that the findings are based on testimony which should have been excluded. A new trial should not be granted for error in the exclusion of testimony unless it appears that the findings were affected by its exclusion. (Com. Part III, proposal 16.)

(3) *Exceptions Not Necessary.* That exceptions to the admission or rejection of testimony should not be required for the review of error on appeal; but for all purposes for which an exception has heretofore been necessary it should be sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor. New federal rule 46. (See Com. Rep. Part II, 4.)

(4) *Survivor's Testimony.* That the rule excluding testimony of an interested party as to transactions with deceased persons, should be abrogated by the adoption of a statute like that of Connecticut, which removes the disqualification of the party as a witness and permits the introduction of declarations of the decedent, on a finding by the trial judge that they were made in good faith and on decedent's personal knowledge (Com. Part III, proposal 1.)

(5) *Deceased Persons' Statements* That declarations of a deceased or insane person should be received in evidence if the trial judge shall find (1) that the person is dead or insane, (2) that the declaration was made and (3) that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

(*Note:* The council did not think wise to admit declarations of persons "otherwise unavailable" as allowed by the Massachusetts statute.) (Com Part III, proposal 5.)

(6) *Communications Between Physician and Patient.* That the rule of the North Carolina statute that the trial judge may require the disclosure by a physician of a privileged communication from a patient if in the opinion of the judge such disclosure is necessary for the proper administration of justice, is a salutary rule and should be adopted in the other states. (Com. Part III, proposal 12.) Privilege should not be extended to

accountants, social workers or journalists. (Com. Part III, proposal 18.)

(7) *Evidence of Business Records.* That the rule of the uniform business records as evidence act, drafted by the Uniform Laws Conference in 1936 and printed in the appendix to the report of the committee should be adopted in the several states (Com. Part III, proposal 2.)

(8) *Opinion Rule.* That ordinary witnesses should be allowed to state their conclusions with respect to ordinary matters subject to explanation, thus permitting a witness to state his observation in a natural and non-technical manner. (Com. Part III, proposal 3.)

(9) *Expert Testimony.* That the principles embodied in the uniform act of 1937 relating to expert testimony and set forth in the appendix to the report of the committee, should be adopted in the several states by appropriate legislation or rules of court. (Com. Part III, proposal 4.)

(10) *Certified Copies of Court Records.* That the provisions of new federal rule 44, permitting the introduction in evidence of certified copies of official records should be adopted in all of the states. (Com. Part III, proposal 6.)

(11) *Judicial Notice of Foreign Law.* That the uniform act drafted in 1936, requiring that judicial notice be taken of the common law and statutes of other states of this union and that the law of a foreign country be determined by the court, should be adopted in all of the states (Com. Part III, proposal 15.)

(12) *Administration of Oath.* That witnesses should be sworn separately, the oath being administered to each witness as he takes the stand to testify; and that the judge should see that it is administered in a dignified and understandable way, either by himself or by the clerk. (Com. Part III, proposal 7.)

(13) *Discovery.* That the provisions of the new federal rules 26 to 37 relating to discovery should be adopted in all of the states. (Part III, proposal 8.)

(14) *Cross-Examination to One's Own Case.* That the provisions of new federal rule 43 (b) should be adopted in the several states.

(15) *No Bona Fide Dispute of Facts.* That as recommended by the Committee of the Commonwealth Fund a decade ago, a general rule should be adopted in every jurisdiction substantially as follows: "Any rule of evidence need not be enforced if the trial judge, on inquiry made of counsel or otherwise, finds that there is no *bona fide* dispute between the parties as to the existence or non-existence of the facts which the offered evidence tends to prove, even though such fact may be in issue under the pleadings. No error can be assigned or predicated upon the violation of any rule of evidence, either at law or in equity, when it appears from statements of counsel or from other evidence in the case or is shown in any other lawful way, that there is no *bona fide* dispute between the parties as to the fact sought to be proved or disproved by the offered evidence, even though such fact may be in issue under the pleadings." (Com. Part III, proposal 11.)

Recommendations for Reference, Further Study, Etc.

(1) *Simplified Code of Evidence Rules for Jury Trials.* That the American Bar Association Committee on the Ross Bequest be asked to select, as the subject of a competitive award: The formulation of a simplified code of evidence rules for use in jury trials. (Com. II, proposal 6.)

(2) *Calendar Administration.* That state and city bar associations proceed to study the most improved methods of calendar administration, with a view to reducing inconvenience to witnesses, and urge the adoption

of such methods by their local courts. (Com. II, proposal 7.)

(3) *Abuse of Continuances.* That state and city bar associations make a study of the abuse of continuances in their communities, and demand of the courts that the abuse shall cease. (Com. II, proposal 8.)

(4) *Intimidation of Witnesses.* That state and city bar associations investigate the subject of intimidation of witnesses with a view of remedying the abuse wherever it exists. (Com. II, proposal 10.)

(5) *Legislative Change of Rules of Evidence and Procedure.* That legislatures should make no change in the rules of evidence or procedure without notice to state and local bar associations and giving them an opportunity to be heard with regard thereto. (Com. II, proposal 12.)

(6) *Privilege for Attorney and Client Communication.* That the Section on Criminal Law be requested to study and report on limitations on this privilege which should be prescribed in the public interest. (Com. III, proposal 11.)

(7) *Medical Testimony in Malpractice Suits.* That the American Medical Association be requested to examine its canon of ethics regarding the giving of testimony by one physician against another, in malpractice suits, with a view of removing the obstacle which the canon is frequently interpreted as interposing in this type of litigation. (Com. III, proposal 12B.)

(8) *Comment on Failure of Accused to Testify.* That the Section on Criminal Law be requested to arrange for a thorough study of the experience of those states where such comment is permitted. (Com. III, proposal 13.)

(9) *Burden of Proof.* That a committee be appointed to study the needs and possibilities of a simplified set of rules for defining burden of proof and presumptions. (Com. III, proposal 14.)

(10) *Hearsay Rule Codified.* That a committee be appointed to examine all the exceptions to the hearsay rule with a view to codifying or formulating them in a model statute and to general improvement in the application of the rule. (Com. III, proposal 20.)

6. Appellate Practice

(1) *Appeals from Inferior Courts and Trial De Novo in Higher Courts.* That appeals from inferior courts by way of full re-trial in a higher court should be avoided as far as possible, by improving the quality of the inferior courts, that, as a means of obtaining better inferior courts, the abolition of justice of the peace courts should be seriously considered, substituting therefor municipal courts or courts with wider territorial jurisdiction, properly organized and housed, having trained and salaried judges, competent clerks, office equipment sufficient for keeping proper records, and sitting, so far as practicable, at such times and places as the needs of the community indicate.

(2) *Pecuniary Limitations upon the Right of Appeal.* That a pecuniary limit should be fixed for all courts, above which an appeal may be taken as of right and below which an appeal may be had only by leave of the reviewing court, on a showing that an important question of law is involved.

(3) *Jurisdictional Requirements for Appeal.* That the filing of a simple notice of appeal, or of an application for leave to appeal, or some simple equivalent therefor, should be the sole step required to vest jurisdiction in the reviewing court, and that defects in the notice or application should not affect the jurisdiction. This notice should preferably be filed in the lower court, in order to serve the convenience of the appellant and to constitute a more easily effective notice to the appellee, and the clerk should be required to send a notice by mail to the appellee.

(4) *Supersedeas Bonds.* That supersedeas bonds should be fixed by the court at such an amount only as will adequately secure to the appellee the full benefit of his judgment, that the filing of such bond should be permitted at any time before satisfaction of the judgment; and that enforcement of the judgment appealed from should not be stayed until the bond is filed.

(5) *Assignments of Error.* That assignments of error should be required prior to making up the record on appeal only when the appellant proposes to omit some portions of the proceedings and record of the trial court, and that in other cases errors as well as cross-errors should be assigned only in the briefs and in the form of points relied upon for reversal. This is the method adopted by the new federal rules. Assignments of error made otherwise than in the briefs should not constitute limitations upon the scope of review except in so far as necessary to protect parties from actual prejudice.

(6) *Printed or Typewritten Records.* That the use of typewritten records, prepared in accordance with proper specifications, should be permissible in all cases, and that, if either party elects to print the record, the cost thereof should not be taxable as costs.

(7) *Sending Up Original Records to Appellate Courts.* That, so far as possible, all papers on file in the trial court which are to constitute a part of the appellate record should be sent to the appellate court in their original form and copies thereof should not be required for the use of the court.

(8) *Abstracts of the Record.* That abstracts of the record should not be required, but that such matters in the record as the parties desire to bring to the attention of the court should be set forth in appendices to the briefs, either by summarized statement or by quotation.

(9) *Form of Testimony in the Appellate Record.* That in preparing the record on appeal the appellant should be permitted to set forth all or any part of the testimony in question and answer form, and the appellee should be permitted to require testimony in question and answer form to be substituted for any condensed statement in narrative form prepared by the appellant.

(10) *Correcting the Record on Appeal.* That either the trial or the appellate court should have power at any time to make an order authorizing any amendment of the record on appeal which is necessary to present the case fully and correctly, upon such showing, in such manner and on such terms as may be just. This is substantially the new federal rule (R. 75-h).

(11) *Length of Briefs.* That the number of pages in any brief taxable as costs should be limited by rule of court.

(12) *The Oral Argument.* That a systematic effort should be made by the Bar and the appellate bench in each state and in each federal circuit, through joint committees of lawyers and appellate judges, to examine the causes which are operating to limit the effectiveness of the oral argument, and to adopt such measures as may seem proper to restore it to the position of importance which it ought to occupy in our system of jurisprudence.

(13) *"One-Man" Decisions on Appeal.* That the problem presented by "one-man" decisions on appeal be made the subject of cooperative studies by the appellate bench and Bar in the various jurisdictions.

*(14) *Enlarging the Capacity of Courts of Review—Divisional Organization Against Intermediate Appellate Courts.* That except in the federal system and in a few of the larger and more populous states, the

*This recommendation recommitted to the Committee (see footnote, p. 505 *supra*).

most satisfactory method of dealing with appeals from courts of general jurisdiction is a single appellate court with final jurisdiction in all cases, to be organized into as many divisions as may be necessary to deal with the cases brought before it.

(15) *Memorandum Opinions.* That where no new principle or novel application of law is involved, and the decision is fully and clearly controlled by certain statutes or cases, an effort should be made to limit the opinions to a brief summary of the facts followed by a reference to such statutes or cases.

(16) *Review of Non-Jury Cases.* That findings of fact should have the same effect on appeal in all cases tried by the court without a jury, whether they are cases at law or cases in equity.

(17) *Power of Appellate Courts.* That appellate courts should have power to enter or order the proper judgment without a new trial when the record of the proceedings shows as a matter of law what such judgment should be: and when error affects only a part of a case, the court should have power to remand for a new trial of that part only, if such remand will not prejudice the substantial rights of any litigant.

7. Administrative Agencies and Tribunals

(1) *Committee Continued.* That the present Committee on Administrative Agencies and Tribunals, which during the past year has collected much valuable information as to review of decisions of state commissions, be continued with direction to continue its studies along the lines indicated in its report and report again to the next meeting of the Section.

In order that the work of the committees may not have been in vain and that we may attain the object which all have in mind, the reform of the procedure of our courts in accordance with modern conditions, it is thought that committees of lawyers should be set up in the several states to study the reports herewith submitted and to take appropriate steps to secure the adoption of the recommendations which they embody. The advisory and consulting members of the seven committees which have submitted the reports would constitute in their several states ideal committees to undertake this work. To these could be added the members of the committees heretofore appointed by the Presidents of the state bar associations at the request of the President of the American Bar Association to carry on the work and such other persons as the President of the American Bar Association may think proper in setting up the committees. As the work will necessarily be one of considerable magnitude and importance, and as the Chairman of this Section will not have the time to give it the attenion which it should have, it is believed that it should be placed under the direct supervision of the President of the Association, who will be in an ideal position to bring it to the attention of the bars of the several states.

Respectfully submitted,

John J. Parker, *Chairman,*
Charles A. Goss,
Vice-Chairman,
Van Buren Perry,
Secretary,
Augustus N. Hand,
Marvin B. Rosenberry,
James W. McClendon,
George W. McClintic,
Ernest A. Inglis,
Henry T. Lummus,
Joseph A. Moynihan,
Merrill E. Otis,
Members of Council.

REPORT

OF THE

COMMITTEE ON JUDICIAL ADMINISTRATION

To the Section of Judicial Administration:

The Committee on Judicial Administration herewith submits its report.

Scope

The scope of this report is limited in the first place by the purpose of this Section of the American Bar Association to concern itself with the betterment of the procedural side of judicial administration.

Complaint and criticism of the courts concern not substantive law but legal procedure and the failure of the judicial machinery to meet adequately modern needs. Within the compass of that demand, the scope of this report is further limited by the title of the subject submitted for consideration, namely, Judicial Administration. Standing by itself, this title might be considered as wide as the whole field covered by the judicial department, but for the purposes of this report the title must be further limited by the titles of the other committees dealing with particular phases of the procedural side of judicial administration, namely, Committee on Pretrial Procedure, Committee on Trial by Jury Including Methods of Selection of Juries, Committee on Trial Practice, Committee to Suggest Improvements in the Law of Evidence, Committee on the Simplification and Improvement of Appellate Practice, and Committee on Administrative Agencies and Tribunals. In such a setting the undersigned committee has limited its consideration to concrete proposals which, operating generally, will, in the opinion of the committee, increase the efficiency of the judicial machinery and the combined operations of the courts of a state. For the purposes of this report the committee has selected only four fundamental proposals, endeavoring thereby to emphasize their importance.

Proposals

1. *Courts to be responsible for their own procedure. Where legal procedure is prescribed by a legislature, it should be restored to the courts and defined by rules of court.*

2. *A unified judicial system comprising all the courts within a state, with administrative power and responsibility for the system placed upon the courts themselves,* either through a single administrative judge for the whole state, with power to appoint a director and staff, or through administrative judges responsible for each homogeneous locality and all responsible to the single judge.

3. *Creation of Judicial Councils, where not now in existence, and strengthening those in existence in power and authority. Representation to be accorded not only to the Bench, but to the Bar, the Legislature, the Law Schools, and the laymen.*

4. *Judicial statistics to be required, sufficient in form and as often as needed, to reveal the work of the courts without being unnecessarily onerous.*

Bases for Proposals

1. *Courts to be Responsible for Their Own Procedure.* Regulation of

procedure by court rule is not an innovation, but a return to fundamental principles. Originally the courts, like every other judicial or quasi-judicial tribunal, had control over their own procedure. Then, starting with New York State in 1848, a movement spread to a vast majority of the states of the United States, whereby responsibility for judicial administration was divided between court and legislature, and the courts were strait-jacketed by an inflexible procedure prescribed by the legislature. Using the Field Code in New York as a model, these states became known as Code States. Power conferred is difficult to recapture and, although it was soon discovered that an error had been made and an obstacle created to the due administration of justice, most legislatures have until today successfully maintained control over the procedure of the courts, with the following results: (a) a responsibility for the administration of justice is divided between the courts and the legislature, and each of these departments, theoretically separate in our form of government, is able to shield its shortcomings at the expense of the other department; (b) the procedure of the courts is inflexible, and thereby often must be made an end in itself, for the courts must follow rigorously an act of the legislature even though it concerns procedure only; therefore, instead of procedure being merely a handmaiden in the administration of justice, it becomes often the master; (c) a mass of decisions has arisen dealing with procedure alone, which must be followed as precedents; (d) the practicing of law before a legislature by way of amendments to existing procedure, so as to affect favorably and unfavorably actions pending and to be brought; (e) continual legislative tinkering has developed an overparticularized, cumbersome and complicated machinery.

Nothing disgusts the layman more than a realization that his rights have been determined upon a point of procedure and that the Court did not reach the merits of his claim. As a result the layman welcomes any attempt to have his rights determined by means of trade associations, arbitration, and he even consents in fields like radio to a control by a department head without the guidance of any established rules and principles. In fact it is now seriously debated whether even elementary essentials of a judicial determination, such as due notice and a fair hearing, may not be sacrificed and an effective administrative board substituted, because present court procedure accompanying such essentials involves so much delay, waste and expense as to preclude determinations within a reasonable time, particularly by regulatory commissions and bodies created in the public interest.

A grant of rule-making power to the courts should contain a provision making rules of procedure supersede previous legislative acts or procedure, as was done in the Federal Act of 1934, and also very successfully exercised in Wisconsin.

It is submitted that the importance of centering the responsibility for the administration of justice in the courts is now universally recognized.

What court or courts in each state shall have this power, and what compromises made with the legislature, must be left to each state. In general this rule-making function should be vested in a court of last resort, with power in other courts to make supplemental rules essential to local needs. In exercising this power the court should be accorded every reasonable facility, such as the help of a judicial council, committees from the Bar, and such other expert advice and assistance as may be necessary.

An excellent example has been set by the Congress of the United States and the United States Supreme Court, with the aid of its Advisory Committee, in connection with the creation

of the Rules of Civil Procedure for the District Courts of the United States. This example not only comprises the necessary cooperation of a legislature and the place of the legislative veto, but also the cooperation of the Bar, the necessity of public hearings, and definite times for the holding of sessions to consider the subject of the rules, and the fixing annually of a stated time for the taking effect of amendments and new rules. Recent examples in states restoring court procedure to the courts include Wisconsin, Pennsylvania, West Virginia and New Mexico.

2. *A Unified Judicial System of the Courts Within a State With Provision for Administrative Power and Responsibility Within the System.* The Judicial Department of the government, to be efficient, must not only be responsible for a procedure adequate to the needs of modern times, but it must also have within itself a means of discharging the administrative work of the court as a whole. To have effective judicial machinery within the state, it is not sufficient that each judge shall discharge his functions efficiently in the trial of a case. Some judge or judges within the judicial system in the state must be charged with the responsibility of the efficiency of the system in the state as a whole. In some districts within the state, there is not sufficient work to keep the judge reasonably occupied, while in other districts the calendars are months or perhaps years behind. The tenure of a judge in a less crowded district must be held subject to be sent in his spare time to the overcrowded district. In the vast majority of cases, this service is performed voluntarily and willingly, but there must be power in the state system as a whole to compel, if indolence appears. The power to enforce other administrative measures for the benefit of the efficiency of the Judicial Department in a state as a whole, but not infringing upon the independence required for the necessary exercise of the judicial function, must be centered in some judge in a unified state system. This judge must have power to appoint a director and staff, subject to his continual supervision, or this administrative power must be centered in various judges in the state, each responsible for administration in a homogeneous locality, and all responsible to the one judge. Wherever such a system has been in operation, with the same judicial machinery, efficiency has been increased by at least one third.

There is pending in Congress a measure known as the Ashhurst Bill, designed to cover this need in the Federal Courts. This bill is approved in principle.

3. *Creation of Judicial Councils.* The advantages and benefits to the Judicial Department from the creation of a judicial council within a state seem no longer open to question. The only criticism to be found is that directed not to the Council but to its inaction. Its need is recognized. Anything tending to aid in the improvement of the Judicial Department is worth while, for herein lies the cornerstone of individual liberty. Bulwarks, gradually built up for the protection of individual liberty since the time of Magna Charta, are being swept away. The function of a judicial council is to have a body for research, the collection of data, the drafting of court rules and statutes, and similar tasks. Judges, and even those charged with responsibility for the duties of administration within the Judicial Department, have not sufficient time for research or the drafting of rules and statutes. Where a judicial council does not exist in a state, one should be created. Where it does exist, its power and authority must be adequate to its task. A judicial council most effectively organized is one composed of representatives of the Bench, the Bar, the Legislature, the Law Schools, and the laymen. Its membership

should not be so large as to be unwieldy. The representative of each branch cooperating approaches the subject from a different angle; the representative of the Bench, from the judicial viewpoint; the Bar, from its viewpoint; the members of the legislature, from the viewpoint of the legislative department; the Law School, often from the viewpoint of the symmetry of the law; and the laymen, from its practical effects. Judge McClendon of this committee reports that in Texas the Judicial Council includes two lay members, one of whom must be a journalist, and the Chairman of the Senate and House Judiciary Committees, and that these members have been most helpful, especially in two important respects, first, in publicizing the work of the Council, and, second, in handling recommendations in the Legislature. In New York both the majority and minority Chairmen of the Judiciary Committees in the Senate and Assembly are members of the Council, with excellent results. Obviously the fuller the cooperation that can be obtained from the Bench, the Bar, the Legislature, the Law Schools, the laymen and the press, the better will be the results in efficiency in the Judicial Department. Upon the Judicial Council should be laid the continuing obligation to suggest methods to increase the efficiency of the judicial machinery and necessary amendments to both the substantive and adjective law. To this body the judge or judges charged with administrative responsibility may turn for data and research. Likewise to this body the individual judge may submit for adequate remedy a remedy grown archaic, or a needed amendment revealed by a new combination of facts. New amendments and rules are constantly required because of the new problems constantly arising. A few years ago the courts were concerned with the new problem of workmen's compensation. Then came new problems arising out of the World War, and lately those arising out of the depression.

4. *Judicial Statistics to be Required.* The need for reasonable and adequate judicial statistics is no longer open to doubt. Discussion centers upon method and form. Any court functioning without reporting reasonable statistics showing its work lays itself open to serious criticism. Such judicial statistics as are required at stated times must be confined only to the data sufficient to reveal the daily work of the court for the period. The tendency heretofore has been to require too much. Judicial statistics, when confined to the actual work of the court for the period reported, enable the court to check the efficiency of its own work and keep informed the judge charged with administrative duties. Whether reports should be made quarterly, semi-annually or annually, depends upon the particular needs. Such judicial statistics should be filed with the judge responsible for administration, or according to his direction.

Obviously, carrying out and putting into effect in the various states the proposals herein submitted may require statutory and perhaps constitutional amendments.

Respectfully submitted,

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REPORT

OF THE

COMMITTEE ON PRETRIAL PROCEDURE

To the Section of Judicial Administration:

Recognition of the high duty of the Bench and the organized Bar to hear and heed the voice of public interest by eliminating delay and unwieldiness in certain aspects of the judicial process has in recent years led to many far-reaching procedural innovations. Perhaps none of the new developments has greater potentialities for serving the public good than has the plan of a pretrial hearing of each case by the Court An examination of the general purposes and the mechanics of this device is the object of this report.

The pretrial hearing can be succinctly described as a "preview" of the law suit. The Court examines the status and nature of pending litigation, with an immediate view of narrowing the issues, providing for stipulation of non-contested facts, and ascertaining the necessity of actual trial; and with the ultimate purpose of achieving swifter and cheaper justice by eliminating "deadwood," cases which would be voluntarily settled before or during trial, aiding in the negotiation of settlements in cases where settlements best serve the litigants' interest, and providing a stabilized trial docket composed exclusively of cases which are ready for immediate trial, which can be tried immediately upon assignment without the disrupting effect of last-minute continuances, and which can be tried in a much shorter time, with fewer witnesses, and less attendant expense than would have been occasioned had not the case been groomed and stripped to its essentials for effective disposition.

Until the introduction of the pretrial hearing, in the Circuit Court of Wayne County, Detroit, in 1932, the prevailing theory had been that it was the sole responsibility of counsel to look after pretrial preparation. Certain mechanics for providing discovery and for requesting admission of provable facts had been made available by Court rule, but the use thereof was left entirely to the initiative of counsel. The Bench and Bar has now come to recognize the important interest of the general public in the prompt and effective determination of litigation, and to recognize that such interest can best be served only if the Court itself sees that the advantages of pretrial procedure are availed of in each case.

National interest in the pretrial hearing as the focal point of all pretrial procedure has resulted from the inclusion in the new Federal District Court Rules, which will probably become effective in September, 1938, of a provision authorizing district judges to set up pretrial hearings in their respective courts. Every attorney in the land is now face to face with the prospect of actively participating in a pretrial hearing in the next few months. Current curiosity will soon be supplemented by a deeper interest, as the Bar learns the possibilities of this device. What is now generally regarded as an interesting experiment which has worked well in Detroit, Boston, and Los Angeles will become

an essential part of the judicial process in hundreds of trial courts. In the course of judicial leavening, this method of pretrial procedure will be exposed to the most critical of tests. The suggestions that result will undoubtedly avail to the improvement of the device.

Such suggestions will be directed chiefly to the mechanics to be employed in order that pretrial hearings may most effectively (1) narrow the issues; (2) shorten and speed trial hearings; (3) avoid trial in cases where it is not useful. A critical examination of the effectiveness of the pretrial hearing in attaining those ends will be the chief topic of this report. There will also be presented discussion concerning the (1) General Nature of the Hearing; (2) Examination of the System of Work in Courts Already Employing It; (3) Other Forms of Pretrial Procedure

Narrowing the Issues

Even though the general issue has been abolished in many states with the adoption of code pleading rules, requiring that allegations of the declaration be specifically answered and admitted or denied in the answer, yet every practicing attorney knows that many pleaders are unable to deny so many allegations (on the ground that the plaintiff's statement of a fact does not quite coincide with the defendant's version thereof) that answers sometimes amount to very little more than a general denial.

If the parties go to trial on the pleadings as drawn, the plaintiff (or the defendant, if he alleges new matter) must be ready to produce proof on many matters which can be and on the trial are so clearly and demonstratively established as to leave no possibility of raising a question of fact. Much of the Court's time may be taken up with proof of the width of a street, of the contents of a public record, of the amount of a doctor's bill, or of other matters which do not stand admitted on the pleadings but which, once proved, cannot be disproved.

When there is a pretrial hearing, all of these matters are determined before the case comes on for trial. When it is called, only such witnesses need be used as are necessary to furnish testimony on the points as to which the parties are in actual and honest disagreement. The trial is quicker. It is cheaper, both for the individual litigant and for the public, since the increased capacity of the court in disposing of cases often saves taxpayers the expense of additional judges and new court rooms.

The pretrial judge often need do no more than suggest to the attorneys that they stipulate as to some of the facts. The attorneys may work out the stipulation in their offices, and present it to the Court. In other cases, they may agree on certain facts during the oral discussion of the pleadings at the pretrial hearing, and then the pretrial judge will note in an official memorandum, which is a part of the court records, what facts have been agreed on.

As to some of the facts which are so eliminated from controversy, it would appear that the interposition of the Court should not be necessary to induce counsel to stipulate. In this category could be placed the following examples: (1) measurements showing width of street and possibly the situation of the motor vehicles in an automobile accident case; (2) certificate of the traffic bureau as to the operation of stoplights at a street intersection at the time of the accident; (3) the actual expense of medical care, or of automobile repairs; (4) weather conditions; (5) contents of any document which is a matter of public record; (6) the correctness, or the payment or non-payment, of certain items in a disputed bill for merchandise. But experience demonstrates it to be the fact that even as

to such matters, counsel are disinclined to execute an agreed statement unless they are prompted to do so by the Court.

Moreover, many other matters can often be stipulated and eliminated from issuable controversy, as a result of the advice and suggestion of an experienced judge, which would undoubtedly remain in issue if the pretrial hearing were conducted before a clerk or master. The advisability of having the pretrial hearing conducted before a judge, with full power (as limited by the rules) to dismiss a case, or enter judgment of default, cannot be disputed. It is only when the pretrial hearing is held before such a magistrate, for example, that the parties could be expected to reach an agreement as to the reasonableness of a doctor's bill, or of a garage bill, in a tort case. Similarly, unless a judge is in command it would be impossible for the parties to be required to make a binding election as to whether or not a physical examination of the person of an injured tort-complainant would be required. If such an examination is demanded, it is concluded before the case comes on for trial. Again, it is only when the pretrial hearing is held before a judge that the parties can sign a stipulation as to all the facts or agree on the facts orally and submit the agreed statement, for final determination, at the pretrial hearing. Other matters which may be eliminated from issue as the result of a pretrial hearing conducted by an experienced judge who possesses special capacity for this type of judicial work, include the following: delivery of goods, in cases of assumpsit for goods bargained and sold; amount of damages that should be awarded plaintiff if he is successful on the trial; agreement that liability exists, and the only question involved is the amount of damages; consent that certain documentary exhibits may be received in evidence without identification at the trial.

Sometimes, without formal stipulation of facts, an entire count (or several counts) of a declaration may be stricken by consent, after a discussion with the Court has convinced counsel that it would not be worthwhile to make an attempt to prove some of the allegations made in the declaration. When this is done, the defendant is spared the expense of preparation to meet whatever proofs might be presented in support of a somewhat specious claim. Similarly, a matter of affirmative defense may sometimes be eliminated from the pleadings.

There is another way in which changes in the pleadings may narrow the issue At each pretrial hearing, counsel is required to elect as to whether or not they desire to make any amendments to their pleadings. If they waive the right to make amendments, they are bound by such election (subject to special leave of the Court if new facts are discovered). Generally, leave to amend at the trial is denied. Konstantine *vs.* City of Dearborn, 280 Mich. 310. On the other hand, if counsel indicate at the pretrial hearing that they wish to make amendments, the case is held on the pretrial docket until all amendments are filed. If counsel have drafted their pleadings in a hurried and careless manner at the time suit was filed, they are given an opportunity to go over them and perfect them. Such amendments are frequently tendered. The effect of such amendments often is to clearly define the one important and controlling issue in the case. When this has been brought out, many less important issues can be disregarded.

Speeding the Trial Docket

No less important than the efficiency of a pretrial hearing in limiting and narrowing the issues, is its importance in achieving a stabilized trial docket. From the standpoint of judicial administration, indeed, this is perhaps

the most important single function of the pretrial hearing.

The trial docket is made up of cases which have been certified by Court and counsel, after a pretrial hearing, as ready for immediate trial on certain issues. They may be assigned on a one-day notice, followed by a 15-minute call to appear in a certain courtroom. There will be no last-minute requests for amendments; there will be no requests, after the calling of a case, for a continuance to enable a party to more fully prepare himself on some claim or evidence which "surprises" him. There will be no delays while doctors make a physical examination of a complainant.

Furthermore, the trial docket comprises exclusively "live" cases. The dead-wood—cases which would be settled when the parties were called into court, or after trial had proceeded in a part of the way—has been effectively culled out at the pretrial hearing.

At the time of the pretrial hearing, after careful discussion of the controversial issues, Court and counsel have reached an estimate as to the amount of time it will take to try the case. This notation, which is usually quite accurate, is noted in the files of the case by the pretrial judge. The cases which can be disposed of in a few hours can be specially noted by the assignment clerk, and used to fill in what otherwise would be vacant spaces in the time of the trial judges. When a judge convenes court each morning, he has an accurate idea as to whether or not counsel in a succeeding case should be notified to be in court ready for trial before the end of the day. The trial judge is able to spend all of his court hours listening to testimony.

The somewhat laborious method of developing facts by examination and cross-examination of witnesses can sometimes (with the consent of both parties) be avoided in favor of an informal hearing. The pretrial judge in one Detroit case, for example, when he learned that a claim of $750,000 based on the alleged faulty construction of a sewer depended in large part on finding of engineers, suggested that each side appoint one engineer, to serve virtually as a friend of the Court in reporting to the judge his opinion on the questions of engineering science which were in issue The proposal was satisfactory to counsel. The engineers and counsel made up a record in the chambers after regular court hours, and a case which probably would have taken two or three weeks to try in the ordinary fashion was disposed of in three after-hour conferences.

Still another way in which the trial docket is speeded is by the elimination therefrom of cases which can more properly be disposed of by settlement than by trial.

Avoidance of Trial in Cases Where It Would Not Be Useful

The pretrial hearing is not an arbitration, and ordinarily the judge does not take the lead in seeking to settle cases. In every case, however, he asks the attorneys whether there is any possibility of a settlement. If one of them says there is not, there is usually no further suggestion of the subject—unless the judge divines that the apparent reluctance of counsel to settle is merely a mask assumed lest an admission of a readiness to settle be taken as an admission of a weak case. In such circumstances, the Court suggests to attorneys that the case might be a proper one for settlement. This suggestion is usually assented to by both sides, and the matter is then held up while the parties seek to bridge the gap between their respective ideas as to the proper amount to be paid in settlement.

In some cases, parties wish to settle but, despite negotiations, cannot come to complete agreement on the terms of the settlement. Counsel

may at their own suggestion, or at the suggestion of the Court, bring the litigants into the judge's chambers for an informal conference.

The advice and suggestions of the judge are frequently effective in bringing the parties to an agreement. They may talk freely with the pretrial judge as to their chances for prevailing on the trial, since he will not (ordinarily) be the judge who hears the case. The parties are always influenced by the suggestion of the Court as to what sum is a proper settlement. They are impressed when he points out the difficulty of proving freedom from contributory negligence in a particular case, or when he suggests that certain documents on which a party relies may not be admissible in evidence. They realize that the judge's familiarity with the nature of the judicial process enables him to predict with some degree of accuracy what may happen to the case in court.

Most of the cases disposed of by settlement at the pretrial stage are cases involving individual litigants with not over $2000 at stake. But occasionally settlements are made involving sums as high as $20,000. Recently in a Detroit case involving a claim of $15,000, the parties were brought into the chambers of the pretrial judge and, after a two-hour conference, agreed on a settlement which involved payment of $5,500. The judges estimate the case would have taken two weeks to try. In another case, which was three-cornered, the pretrial judge saw that each of the three litigants had suffered loss in an unsuccessful joint venture, and that the most that any of the parties could get, after several days in court, would be an empty moral victory. At his suggestion, the case was dismissed voluntarily.

Where cases are brought for their nuisance value, settlement may not be encouraged by the pretrial judge. Personal injury cases bulk large in this category. If the plaintiff has undoubtedly been injured, and has incurred a readily-ascertainable expense for medical care, and has suffered a definite amount through loss of wages —in such a case, the judge may be inclined to work toward a settlement in a sum which would not be greater than it would cost the defendant to litigate the case. Payment of $100 or $200 to an injured complainant, under such circumstances, may accomplish greater social good than payment of an equal amount in court expenses. On the other hand, where there is something in the facts which suggests a strike suit--as in a recent Detroit case, where a $10,000 damage suit was brought against a large department store for personal injuries suffered by a woman shopper who slipped on a piece of gum while walking down an aisle, and where the plaintiff, at the pretrial hearing, voluntarily offered to settle for $75, and where there was no showing of actual injury to the plaintiff—then, of course, the pretrial judge may well prefer to see the case go down under a jury verdict of no cause for action Only in such way can the bringing of nuisance value suits be discouraged. Indeed, the penetrating inquiries addressed by the pretrial judge to plaintiff's counsel may go far in assisting defendant's counsel to determine that plaintiff's case has no "settlement value" in it. Sometimes, after frank discussion at the pretrial hearing a non-meritorious suit is voluntarily dismissed.

An agreement of settlement reached at the pretrial stage is a final disposition of the case. The pretrial judge enters a consent judgment, after assuring himself that the settlement is fair to both parties, and it is a very difficult matter to get this consent judgment set aside. Of course, there can be no appeal from a judgment thus entered by consent.

Sometimes, the effect of the pretrial hearing is only to initiate the settlement of a case. Counsel may

insist, before the pretrial judge, that the case cannot be settled, and that it be put on the trial list. It will be put on the trial list. But after viewing what remains of the case after the pretrial hearing has trimmed it down to its essentials, there may be—and quite often is—a change of heart. The case is then removed from the trial list and sent back to the pretrial judge for settlement.

In some cases, it is apparent at the pretrial stage that the defendant's case is hopeless, legally, and that he is fighting the action only in order to gain time. If the defendant's desire for time is justifiable, as in the case of a small business man who would be put out of business by the levy of execution, the pretrial judge may suggest that a consent judgment be entered upon an agreement that it shall be satisfied through periodic payments into court by the defendant. The case is then retained on the pretrial docket pending the completion of such payments. This practice is more elastic than that provided by statutes authorizing payment of money judgments by installments, because statutory installments must be paid in precisely stated amounts at unfailingly regular intervals, on pain of immediate issuance of execution. Under the moratorium device worked out by the pretrial judges, the Court may grant a short adjournment, if the debtor is unable to pay the full amount of the installment on the due day.

The extent to which a pretrial hearing is used as a conciliation docket depends largely on the particular temperament and attitude of the pretrial judges. In Detroit, for example, where the judges rotate in conducting the pretrial call of law cases (each judge handling it for a year or two) those members of the Bench who have particular aptitude for conciliation may in this way dispose of four or five cases each day at the pretrial hearing. Other judges leave the question of settlement more to the parties, and concern themselves chiefly with trimming down contested cases, and cutting out deadwood, to the end of creating a stabilized trial list of active and ready-for-trial cases.

In all courts where the device of the pretrial hearing has been employed, a surprising number of settlements have resulted. The settlement is made before, and not on the eve of, or in the midst of, the trial. Thus is the trial docket speeded.

General Nature of the Pretrial Hearing

As has been indicated by the foregoing discussion, the pretrial hearing is an informal conference between the Court and counsel. In many cases, in large cities, opposing attorneys may be personally unacquainted until the case is called and they step up before the pretrial judge. The judge initiates the discussion by asking them what the case is about, whether they are satisfied with the pleadings, how many of the material facts of the case can be agreed on, and whether either of them thinks there may be an opportunity to settle the case. There follows a free discussion.

No stenographic record is taken. The Court and the attorneys can usually learn just how the case stands, and the pretrial hearing need not usually last over 10 or 15 minutes. At the conclusion of the hearing, the judge makes out a report which becomes part of the record of the case, as above described.

Experience has shown that attorneys cooperate willingly in appearing at the pretrial hearing. Of course, there should be this sanction—dismissal of the trial praecipe (which has the effect of removing the case from the trial docket) or dismissal of the case, in event of the non-appearance of plaintiff's attorney; or entry of default in case of the non-appearance

of the defendant's attorney. Even though such penalties are not frequently invoked in practice, the mere existence of the possibility of the Court's disposing summarily of the case is sufficient to insure prompt and regular attendance of counsel. It is obviously important that the pretrial hearing be attended by senior counsel, rather than a junior law clerk who does not know enough about the case to aid the Court. If a busy barrister sends his clerk over, the Court will send the clerk back with the message that the pretrial hearing will be held the next day, and that the case will be summarily disposed of unless Mr. Busy Barrister is present.

In many cases, several pretrial hearings are had. If the parties wish for time to discuss a settlement, adjournment of the pretrial hearing is granted as of course. If, at the first hearing, counsel ask leave to amend their pleadings, the case may be adjourned for further pretrial hearing after amendments are filed. In other cases, the adjournments are usually agreeable to counsel and are rarely refused by the Court, unless it appears that counsel are seeking unduly to delay the assignment of a cause for trial.

Pretrial hearings may be instituted without the aid of statute by virtue of the inherent rule-making power of the Court. The Court may adopt any rule which is peculiarly fitted to local conditions. Merely as suggestive, we cite the rules adopted in the Wayne Circuit Court, Detroit; and in the new proposed uniform Federal District Court rules.

The Wayne Circuit Court rules provide:

> "Chancery, Pretrial, and Reference Division. The pretrial and Reference Docket is called daily before the presiding Judge at 10:00 A. M. Chancery cases will be called on this docket sometime before they are regularly reached for trial; for the purpose of settlement; disposition of preliminary motions, framing the issues, and trial. Such chancery cases as in the discretion of the presiding judge require early or special attention will be called on this docket. . . . . The Pretrial docket is an official docket. The judge presiding over this docket has jurisdiction under the rules to enter a decree to dismiss the cause, or to dismiss the trial praecipe, as the case may be, on the failure of either party to answer.
>
> "Law Pretrial and Conciliation Division. Law cases will be called on this docket sometime before they are regularly reached for trial, for the purpose of settlement, disposition of preliminary motions, framing the issues, and trial. Attorneys should be in court promptly, that the call may be conducted without interference with their other court assignment. The Pretrial Docket is an official docket. The Judge presiding over this docket has jurisdiction under the rules to enter a judgment of nonsuit, or to dismiss the trial praecipe, as the case may be, on the failure of either party to answer."

The new Federal Court rules do provide:

> "In any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
> (2) The necessity or desirability of amendments to the pleadings;
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
> (4) The limitation of the number of expert witnesses;
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
> (6) Such other matters as may aid in the disposition of the action.
>
> "The Court shall make an order which recites the action taken at

the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The Court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

The following rules, which were drafted by Herbert Harley, Esq., of the American Judicature Society, with the participation of Prof. Edson R. Sunderland, of the University of Michigan Law School, go much further than any existing scheme of pretrial hearings, inasmuch as they contemplate the virtual elimination of pleadings, substituting a pretrial conference as a means of determining the issue involved in the case. They are of interest as indicating what may be a final goal for pretrial procedure.

SEC. 1. In all actions for the recovery of money damages, either liquidated or unliquidated, for foreclosures, specific performance, cancellation or reformation, to quiet title and for the recovery of land or chattels, the plaintiff shall endorse on the summons a concise statement of the nature of his demand.

SEC. 2. On the return day named in the summons in all actions above mentioned, the parties, in person or by counsel, shall appear in court and the Court shall thereupon determine the issues involved and reduce the same to writing, without requiring written pleadings.

SEC. 3. In determining the issues involved, the Court shall ascertain and make a record of any agreement by the parties as to facts and modes of proof. The Court shall make such orders respecting discovery and disclosure as may be deemed advisable, and shall specify the steps to be taken in preparing the case for trial, to the end that all justifiable issues between the parties may be tried and determined in the most direct, economical and prompt manner.

SEC. 4. The Court may, with consent of the parties, enter final judgment at any stage; and the Court shall enter judgment when it shall be made to appear that there are no genuine and substantial issues to be tried.

SEC. 5. When all needed steps preparatory to a trial on the merits have been taken, the Court shall set the action for trial on a day certain, or on a calendar of trial cases. The Court shall at all times prior to the entry of final judgment have full power of control over the proceedings and may vacate or amend any order or proceeding, or correct any error, or make such further orders as may be proper.

SEC. 6. On review of the final judgment no error committed by the Court in such a proceeding shall be deemed reversible unless the party assigning the same shall affirmatively show that he has been substantially prejudiced thereby.

EXAMINATION OF SYSTEM AT WORK IN VARIOUS COURTS

1. Detroit. Necessity mothered the invention of the pretrial call in Detroit, where the pretrial plan was first used. In 1929, the law calendar was about 45 months behind, and the chancery calendar about 24 months behind. Finding that more than half of the cases coming on for trial were, after being called for trial, nevertheless disposed of by settlement rather than by entry of judgment, the question suggested itself why such cases could not be settled earlier. A special conciliation docket was set up for law cases; and chancery cases were called for discussion concerning the settlement of issues on a docket which had been previously reserved solely for mechanics lien cases. This chancery docket soon developed into

the pretrial docket as it now exists, and a similar docket was set up for all law cases by enlarging the ascope of the conciliation docket.

The system has worked so well that law cases are now tried about 10 months after reaching issue. Chancery cases are called, on the whole, even more speedily; because of special provisions for advancement of chancery cases. Any case, either law or chancery, may be advanced by special motion for a hearing within two weeks after issue is reached.

On an average, over 12 per cent of all cases started are finally disposed of at the pretrial stage.

Jury trial is waived in about 65 per cent of all cases. In many instances, this waiver comes after the narrowing of the issues at the pretrial hearing.

The plan is popular with members of the Bar. At a hearing held in 1934 by a state legislative committee, the assistant general counsel of a large Detroit insurance company testified that not more than 10 to 15 per cent of his cases reaching the pretrial docket were ultimately tried. He thought that the amounts paid in individual cases were a little larger than before the system was begun, and this seemed to be largely due to the elimination of calendar delay and the consequently greater likelihood of plaintiff's witnesses being available, and the like. Before 1929 there was very little incentive for insurance companies to settle a case early in its career, for time was apt to work in defendant's favor. Now, when prompt trial can be had, there is less reason for withholding early settlement at a fair figure.

The system is beneficial both to plaintiffs and to defendants. Out of a group of 18 large casualty insurance companies, the Detroit company was the one that had the smallest number of pending suits per $100,000 of earned premium. The percentage of pending suits per $100,000 earned premium was 13.1 per cent for all 18 companies, but was only 6 per cent for the Detroit company. As a result, the reserves for pending litigation which the Detroit company had to carry, were, in proportion to the number of suits brought, less than half the amount set aside for this purpose by the other companies.

2. Boston By order of the Justices of the Superior Court of Massachusetts a pretrial plan, modeled on that of Detroit, applicable to law actions in Suffolk County, became effective on September 1, 1935. Suffolk County was chosen because it includes the City of Boston and has from six to ten jury sessions a day.

Viewed at first with some misgivings on the part of the trial bar, pretrial soon became popular, and today, after an experience of two and one-half years, it seems thoroughly established as a permanent part of the judicial system. In fact, it is being gradually extended to sittings of the Superior Court in other counties, at the request of the local bars.

Report of Work in Pretrial Session in Suffolk County for Calendar Years 1936 and 1937

From records kept under the direction of the pretrial judge

	1936	1937	Totals
Settled at pretrial call	1,132	1,631	2,763
Nonsuited and Defaulted	537	597	1,134
Jury Waived	495	421	916
Continued	318	464	782
Jury List	2,197	2,921	5,118
Auditor	....	50	50
	4,679	6,084	10,763

The above table of the disposition of cases on the jury list indicates the progress being made. While only cases on the jury list have been pre-

tried there seems to be no good reason why the same method should not work equally well with jury-waived law cases and equity cases.

In Suffolk County, it is reported by the pretrial judge, that agreements of counsel are usually obtained as to the following matters.

1. Motor Vehicle Tort Cases.
   (a) Legality of registration of motor vehicle involved.
   (b) Agency where the operator is other than the owner.
   (c) The admission at the trial of photographs of the locus and of the vehicle involved without the necessity of producing the photographer.
   (d) Agreement that a copy of a hospital report may be introduced without producing the custodian of the records.
2. Suits against Municipalities on Account of Defects in Highway.
   (a) Agreement that the highway in question is a public way.
   (b) Date of receipt of notices by the defendant required by statute.
3. Public Liability Cases.
   (a) Ownership or control of the premises in which plaintiff claims the accident occurred.
   (b) If a snow and ice case, on sidewalk, acknowledgment of receipt of notice thereof as required by statute and the sufficiency thereof.
   (c) In landlord and tenant cases, the status of the plaintiff, either as a tenant-at-will or lessee, and if not a tenant, whether business visitor, guest of a tenant, trespasser or licensee.
   (d) Whether accident on a common stairway or passageway or area.
   (e) A statement of the specific defect in the premises upon which plaintiff relies.
4. Note Cases.
   (a) Genuineness of signature of maker or endorser.
   (b) Execution of note and delivery.
   (c) Payments, if any, on account of principal or interest.
5. Insurance Cases.
   (a) Question whether or not policy executed and in force.
   (b) Premiums, paid or unpaid.
   (c) Policy properly reinstated after lapse.
   (d) Double indemnity, resulting through accident—agreement on facts in order to determine whether within the meaning of the terms of the policy.
6. Contract
   (a) Nature of obligation—oral, written or implied.
   (b) Payments, if any.
   (c) Agreement on facts in order to determine whether Statute of Frauds applies.
   (d) Execution of written contract—whether party signing for a corporation had authority.
   (e) The production of instruments, documents, correspondence, without requiring notice under the statute or summons.

Both Court and Bar in Massachusetts have suddenly learned that when opposing attorneys come face to face, in the presence of an impartial third person, with the cards laid face up on the table, suspicion will drop away, and that the result—almost inevitable for psychological reasons—is either an amicable settlement or a clarification and narrowing of the real issues in dispute.

It should be noted that in Suffolk County, the Court adopted as a temporary measure in order to relieve the congestion in the civil trial docket, the expedient of referring motor vehicle tort actions to auditors. On motion of any party this type of action is referred to an auditor appointed by the Court. The auditor hears the evidence, makes findings of fact and finds for either plaintiff or defendant, makes a report in writing to the Court, and this report is *prima facie* evidence, if any party seeks a jury trial thereafter. The policy has

been effective in speeding the trial docket and a very large percentage of the actions thus referred to auditors are disposed of without trial or hearing. Of the cases in which a report is filed by the auditor only a very small percentage go to a trial by jury.

3. Los Angeles. The Pretrial system was introduced in Los Angeles in March, 1937.

During October (beginning October 13), 16 cases, estimated to take 10½ days for trial, were disposed of at the pretrial hearings. In November, 29 cases, estimated to take 17½ trial days, were likewise disposed of. In December, the number of cases so disposed of was increased to 31, estimated to take 19½ days for trial.

In addition to this splendid record, other cases, not ready for trial, although set on the calendar, were taken from the active list and there were voluntary dismissals of other pending cases.

These gratifying results were the direct rewards of the interest and efforts of these judges. They did not hesitate to take an active personal part in the pretrial hearings; to ask searching questions and to press into the circumstances of the cases before them to get to the vital questions and issues. They really found out what Professor Sunderland terms "the fact and fancy" in the cases.

At present, however, cases set for trial are waiting a period of four to five months to be assigned to trial departments. Primary consideration is now being given to bringing the calendar up to date and this result is assured as pretrial hearings clear and stabilize the entire calendar administration.

4. In One-Judge Courts. The three cities discussed above are all metropolitan centers, with trial benches composed of a comparatively large number of judges. In the opinion of the committee, however, the plan of the pretrial hearing is effective and useful in a court where one judge handles all the judicial business. Confirmation of this opinion comes from the experiment tried last year in Essex County, Massachusetts, where a seven-weeks term of court was recently conducted by one judge. The Court, at the beginning of a seven-week term, devoted one week to a pretrial call. Of 399 cases listed for hearing, 245 were passed to the trial list, involving, however, only 147 trials because several groups of cases were tried together. Ninety-three cases were disposed of at the pretrial call, not including six which were transferred to auditors for hearing.

It would seem that in a one-judge court, the judge would gain at the pretrial hearing a familiarity with the legal issues involved in a case that would be helpful to him upon the actual trial.

5. In England In England, the only pretrial system which corresponds to the pretrial hearing is the so-called summons for directions, which involves a hearing before a Master who has certain powers in passing on matters of pretrial procedure.

A summons for directions may be issued *ex-parte* at the request of either party. It directs the other party to attend a hearing before a King's Bench Master at a certain hour on a certain day, to show cause why an order for directions should not be made with reference to pleadings, discovery, place of trial, and mode of trial. These summons are available in practically all of the common law actions. Each Master, in addition to his other duties, hears each day four calls of these summons for directions. About 15 cases are listed on each call.

The hearing on a summons for directions is usually very short and quite formal. Because it is held before issue has been joined, there is no questioning to determine the matters really in dispute, and no efforts

to induce settlement. The Master makes his order by filling in blanks on a printed form, directing the number of pleadings to be filed, fixing the time for filing them, imposing requirements as to bills of particulars, providing for discovery as to documents, setting the time and mode of trial. There are no technical and intricate orders issued.

The object of those who devised the summons for directions was to cheapen and expedite litigation. It has recently been described by the English Law Society, however, as being quite useless in practice. Members of the Bar rarely attend the hearings, but are represented by their managing clerks. It is known in advance what the directions will be. Recently suggestions have been made that summons for directions should be postponed until after the proceedings are closed, so that the dispute may be narrowed and the evidence thereby shortened, and that it should be decided at the hearing what the discovery order should be, how many documents should be copied for the use of the Court, whether evidence should be admitted by affidavit, and what directions as to expert and other witnesses should be made. If these reforms are made, it would enable the Court to direct the course of procedure in every case, to the determination of issues in a simple and effective manner. Until such reforms are made, however, it would appear that the practice is less effective than the pretrial hearings held in Detroit, Boston and Los Angeles.

Such reforms may result from a new English Court rule, adopted December 17, 1937, to take effect January 11, 1938. This rule changes the practice on summons for directions, to give the master power, on the hearing for directions, to make such order as may be just with respect to pleadings, particulars, discovery and inspection of documents, interrogatories, inspection of real or personal property, admissions of facts or documents, and place or mode of trial, and to order that any particular fact or facts may be proved by affidavit, or that any witness may be examined before a commissioner, or that any fact or facts may be proved by oath on information and belief or by production of documents or entries in books or by copies of documents or entries, or that no more than a specified number of expert witnesses may be called, or that an expert may be appointed by the court to inquire and report upon any matter of fact, or that the consent of the parties to waive or limit their right of appeal be recorded.

This rule gives to the masters the power which had been conferred on judges, in certain types of cases, under the so-called "New Procedure," which was abolished at about the time of the promulgation of the new Rule above described.

Many of the objectives sought at the pretrial hearing under the American procedure are attained in some measure at least by separate proceedings in England. Whether or not these interlocutory proceedings are had in a particular case depends upon the initiative of counsel.

Thus, for example, application may be made to a Master to settle the issues when they are not sufficiently defined by the pleadings and he may direct that an account be taken, or some other form of preliminary inquiry made. In practice, however, this procedure of settling issues is rare.

Again, when points of law are raised by the pleadings, either party may apply to set them down for hearing and disposition before trial. The proceedings are in the nature of a hearing on demurrer. While the potential value of this form of preliminary hearing needs no comment, it is unfortunately not much used in practice.

A third type of interlocutory hearing is described under the English

rules as a special case. In this particular type of proceeding the Court may take the initiative. Such a hearing is had when the parties are agreed on the facts. They may go to trial without pleadings and make an agreement between themselves as to the amount of damages which should be paid according to the decision of the Court on an agreed statement of facts accompanied by all relevant documents. In practice, this procedure is not much used.

The English rules make extensive provisions for pretrial discovery In the King's Bench Court, a discovery may be divided into interrogatories, disclosure of documents and particulars. The purposes of interrogatories are to learn what case has to be met, to see if the other party will pledge his oath to the truthfulness of his case, and to impeach or destroy the other party's case. They are particularly useful in cases where answers both deny an allegation and at the same time admit and avoid the same. They are frequently used by defendants as a means of showing mitigation of damages and to induce settlements. The practice is rather strict. If the answers of one person interrogated are insufficient, he may be required to answer further. A corporate officer is not permitted to answer that he does not know, but is required to make inquiry within the corporation until he ascertains the required information.

Disclosure of documents is usually obtained under an omnibus demand on the other party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter or question involved. The affidavit is divided into three schedules. One contains the documents the party possesses and is willing to produce, which must be set out in detail. The second contains the documents he possesses but claims to be privileged. These, as a rule, are not set out item by item. The third schedule describes the documents which the deponent no longer possesses. A criticism of the rule is that under practice a party upon whom discovery is made is required to set forth and furnish a number of copies of every letter exchanged between party and his counsel and every other scrap of paper in any way relating to the dispute. Parties are put to inconvenience and expense in producing many copies of inconsequential papers.

If either of the parties is not satisfied with the particularity of his opponent's pleadings, his counsel writes a letter to opposing counsel, asking for a more particular statement as to certain items. If this request is refused, an application is made to a Master, who decides whether or not further particulars will be required

As a device for settling cases, the English rules permit a defendant to pay into court a certain amount as an offer of settlement, at the same time denying liability. If the plaintiff accepts the sum in satisfaction, he withdraws it from court and cannot further prosecute his action. If, however, he wishes to further prosecute his action, the money is left in court and a hearing is had on the sole issue as to whether the sum paid in by the defendant is sufficient, except that if the action is for unliquidated damages, a question may still remain as to whether the defendant is under any liability. A similar rule provides that if a defendant takes the position that suit is brought unnecessarily, he may file a plea of tender and pay into the court the entire amount claimed. Unless plaintiff can prove to the court he was justified in starting the suit, plaintiff must pay the costs of court proceedings. This is thought to be of some effect in inducing creditors to make a diligent attempt to collect an uncontested bill before starting suit.

OTHER FORMS OF PRETRIAL PROCEDURE

Of course, the pretrial hearing is not intended completely to supplant other well-established devices designed to assist counsel in preparing for the trial of the case or for its early disposition, including such matters as discovery, examination of documents, requests for admission of facts, and motions for summary judgment.

This committee, however, does not feel warranted in the course of this report in undertaking any exhaustive discussion of these various modes of procedure. It will make only a few specific suggestions.

1. Motions for Summary Judgment

In the opinion of the committee, the chief defect of the provisions for summary judgment found in the statutes of most states is that they are not sufficiently broad and elastic to permit the court to make the most effective possible summary disposition of a case.

We suggest the adoption in other states of statutes or rules similar to Rule 113 of the New York Rules of Civil Practice, which were originally adopted by a convention representing the judiciary and Bar, held in 1920. These rules are binding on all the courts in the state, except the court for the trial of impeachments and the Court of Appeals. The rule provides:

When an answer is served in an action,

(1) To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

(2) To recover a debt or liquidated demand arising on a judgment for a stated sum; or

(3) On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

(4) To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

(5) To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

(6) To enforce or foreclose a lien or mortgage; or

(7) For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or

(8) For an accounting arising on a written contract, sealed or not sealed;

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in subdivisions 3, 4 or 5 hereunder shall fail to show such facts as may be deemed by the judge hearing the motion to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a

referee, by the Court alone, or by the Court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the Court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The Court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions (as amended March 14, 1932, and May 11, 1933; in effect June 15, 1933).

The English procedure on this point is even broader and has proved effective. It differs from the summary judgment procedure in force in many of our states, where if the Court feels that there is a triable issue, the motion must be denied. The English procedure is more elastic, the Court being empowered to impose conditions upon the defendant's right to defend.

Under the English rules, an application for a summary judgment may be had,

(a) On a claim for the recovery of possession of a specific chattel with or without a claim for hire or damages;

(b) When a landlord seeks to recover possession of land with or without a claim for rent against a tenant whose term has expired, or who has become liable to forfeiture for nonpayment of rent;

(c) For the recovery of a debt or liquidated demand arising on:

(1) A contract, express or implied;
(2) A bond or contract under seal for the payment of a liquidated amount;
(3) A statute when the sum sought to be recovered is fixed and something other than a penalty;
(4) A guaranty;
(5) A trust.

If the defendant wishes to defend the action, he must file an affidavit setting out his defense in detail, showing that there is a triable issue. At the hearing, the Court may give judgment for the plaintiff or give the defendant leave to defend, or make an order which gives something to each party.

If the defendant's affidavit discloses a defense on the merits, he is entitled to unconditional leave to defend. If there are several defendants, judgments may be entered against some of them and others permitted to defend the case. Judgment may be given to the plaintiff for part of the claim either unconditionally or on terms. Similarly, terms may be imposed on the defendant in giving him leave to amend. With the consent of the parties, the Master may hear a case as a referee upon a motion for summary judgment. Some of the forms of conditional orders are:

(1) An order permitting the defense, conditioned on payment of the whole claim into court, with judgment for plaintiff in default of such payment.

(2) Leave to defend as to the

whole claim on payment into court of part of the claim. If default is made in such payment, judgment for the plaintiff for that part and leave to defend as to the residue.

(3) Payment to plaintiff's solicitors of a part of the claim. Judgment for plaintiff for that part, if not paid. Leave to defend as to the residue.

(4) Judgment for the plaintiff, with a stay pending the disposal of a counterclaim.

2. Motions for Discovery. While the pretrial hearing may serve many of the purposes of the traditional motion for discovery, the committee believes that the courts should retain and broaden existing rules for discovery.

The whole question of discovery before trial is so well discussed in Ragland, "Discovery Before Trial" (1932), that it is deemed unwise to burden this report with any lengthy statement concerning the technique of discovery.

Either party should have full privilege to compel the opposite party to submit to oral examination, on oath, concerning all the issues in the case. Each party is entitled to know the other's case. Such discovery should be available before pleading, as a means of enabling the party to declare or answer; as well as after joinder of issue, to enable the party to prepare for trial. Courts should adopt a liberal policy in permitting use at the trial of the record made in discovery proceedings; and such records should in certain instances be available for use as depositions.

3. Inspection of Documents. Court rules should provide that where documents relating to the action are in the possession of one of the parties, his adversary shall have a right to inspect them before trial. There are two ways in which he should be able to make inspection: (1) by requiring their production during an oral examination for discovery, and inspect them during the course of such examination; (2) require their production at any time before trial, regardless of other discovery proceedings, for his examination.

4. Notice to Admit Facts. As an additional inducement toward a full and fair pretrial disclosure of all the relevant facts of an action, court rules should provide that one party, by written notice, may call on the other to admit (for purposes of the trial only) the existence of certain facts; and that if the party on whom such demand is made refuses to admit the facts, then the party who made the demand shall be entitled, on proving such facts, to tax full costs for all the expense to which he was put in proving such facts.

The notice to admit facts is employed in England, Massachusetts, Michigan, New York, New Jersey, and Wisconsin. In the opinion of this committee, the device should be extended.

RECOMMENDATIONS

1. The establishment of pretrial hearings is urgently recommended for all metropolitan courts.

2. It is believed that pretrial hearings can also be effective in one-judge courts. In such courts, perhaps it would be proper to have an itinerant pretrial judge to conduct these hearings in several judicial circuits, in order to avoid any reticence that counsel might feel if they believed that disclosures and offers of settlement made at the pretrial stage might affect the Court's attitude at the trial.

3. Whether the pretrial hearing should follow closely the joinder of issue, or should be postponed until a few weeks before the actual trial, is probably a matter which must be determined according to the individual needs of each jurisdiction. A majority of the committee believes that, on the whole, it is better to have the pretrial hearing not more than three weeks before the trial.

4. The pretrial hearing should be held before a judge, not a referee.

5. There is no need to compel counsel to disclose the details of their proof in any case in which they prefer not to make such disclosure before trial.

Conclusion

While not intended to exclude other well established pretrial plans or systems, nevertheless the plan of calling each case on a pretrial docket, to give court and counsel a preview of the suit, produces results which cannot be obtained in any other way. This circumstance is due principally to the fact that the diligence of the court will go further in narrowing the issues, disposing of cases that do not need trial, and providing a stabilized trial docket, than will attorneys on their own initiative. The prediction is that the use of this device in federal district courts, under the new rules, will lead to its adoption in the courts of many states. Such adoption will be a monument to the zealousness of the Bench and Bar in serving the public good by providing a speedier and less costly justice.

Respectfully submitted,

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REPORT

OF THE

COMMITTEE ON TRIAL PRACTICE

To the Section of Judicial Administration:

Your Committee on Trial Practice herewith submits its report and recommendations.

This committee has approached the subject from the standpoint, which is common to the several committees of the Section of Judicial Administration, of making only such recommendations as will (1) tend to promote the efficiency of judicial administration and (2) be susceptible of uniform adoption in the several states. We understand that it is the central thought affecting all the committees that, if approved by the American Bar Association, uniform standards should be recommended for judicial administration throughout the states. The present program is an effort to achieve in the field of procedural law some measure of progress comparable to what has been done for the substantive law by the American Law Institute and the State Commissioners for Uniform Laws. We have had the benefit of the views of the members of the associate and advisory members of the sub-committee from most of the 48 states, and the recommendations herein made are in accord with the great majority of the views so expressed.

The scope of the work of this committee begins at the time the judge takes his place upon the bench and calls a case for trial, and ends with the final judgment or decree in the particular case. There has thus been excluded from our consideration such matters as the selection and organization of the general panel of jurors for the trial of jury cases, all matters affecting pleading and pre-trial practice, and all appellate procedure.

In every jury trial the most important feature is the *proper function and authority of the trial judge*. The nature and efficiency of the trial is determined by the extent of the authority of the judge, whether his relative position with respect to the jury and counsel is in accordance with the common law conception of his office and function, or whether he is in effect merely an umpire of the proceeding. Probably the constitutions of all the states, as well as the Federal Constitution, guarantee the right of a jury trial in criminal and certain other classes of cases. Under the decisions of the Supreme Court of the United States interpreting the Federal Constitution, the function and authority of the judge has always been in accordance with the common law conceptions, that is, he is a governor of and not a mere moderator at the trial. But in the majority of the several states by written enactment or in customary practice, the common law scope of the judge's authority has been greatly restricted, to the extent in many states that the judge is not permitted to instruct the jury orally as to the law of the case, or analyze, summarize or comment on the evidence; and in some states he is powerless to advise or instruct the jury either as to the law or facts of the case except to the extent of granting or rejecting more or less abstract

written propositions of law prepared and submitted to him by counsel in the case.

Trial by jury in certain classes of cases is still a vitally important feature of our judicial administration; but it in recent years has become the target of serious criticism. The charge is that it often results in a miscarriage of justice, principally in the field of criminal cases. To preserve the jury as an important institution and to obviate any just criticism of its function, it is obvious that the efficiency of the system should be strengthened as fully as possible. It is believed that the criticism, to the extent well founded, is much more prevalent in those jurisdictions where the authority and function of the trial judge are most restricted. The jury by its very nature and position is ununiformed as to the law and unaccustomed to weighing the probative force of testimony. It is the proper function of lawyers in the case to be advocates for the respective parties to the litigation. The only experienced lawyer in the trial who is personally disinterested in the outcome of the case is the judge. He is required to know the law and is accustomed to weighing evidence. In equity, admiralty, bankruptcy and other classes of cases, he is the sole judge both of the law and of the facts. He is the only participant in the jury trial who is qualified by knowledge, experience and lack of interest, to instruct the jury as to the law and to advise them, based on his experience, as to the probative force and the relative significance of the parts of the testimony as bearing on the particular issues made by the pleadings, and submitted to the jury for its decision. If the verdict of the jury is opposed to the evidence, the trial judge, probably in every jurisdiction, has the power to set aside their verdict by granting a new trial. It seems highly illogical in any efficient system of judicial administration to grant to the trial judge this ultimate power to set aside the jury's verdict, but to withhold from him the power to advise them from his experience, prior to their verdict, by an analysis, summary and comment on the evidence; especially when, as is always absolutely requisite, except in the case of directed verdicts, he makes clear to them that his comments are merely advisory, and theirs is the power to decide in their uncontrolled discretion.

The tendency in some jurisdictions to unwisely restrict the authority of the trial judge in this respect springs from conditions in the early history of the development of our American law which no longer now obtain. The departure in some states from the common law conception of the functions of the trial judge was rooted in the distrust of arbitrary and absolute power as supposed to be exemplified in some Colonial judges who received their appointment, not from the duly constituted representatives of the people, but from an absolute monarch. These conditions have long ceased to prevail, and there is no longer reason to sacrifice efficiency in the administration of justice to a popular feeling which traces its origin to very different political conditions. In our judicial system public dissatisfaction has largely shifted from the judge to the jury. To restore public confidence in the jury system we must make it more efficient. The remedy where needed is ready to hand—restore the common law functions of the trial judge.

Criticism of juries in federal courts is comparatively rare. There the common law function of the trial judge is firmly established, as is clearly pointed out in recent decisions of the Supreme Court of the United States. In Herron vs. Southern Pacific R. Co., 283 U.S. 91, 95, Chief Justice Hughes, speaking for a unanimous court, said:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of de-

termining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides."

In Capital Traction Co. *vs.* Huff, 174 U.S. 1, 13, 14, the Court said:

"Trial by jury . . . . is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."

Similar recognition of the authority and duty of federal district judges in jury cases may be found in other recent cases in the Supreme Court, as, for instance, Baltimore and C. Line *vs.* Redman, 295 U.S. 654, 657; Gasoline Products Co. *vs.* Champlin Ref. Co., 283 U.S. 494, 497-499; Dimick *vs.* Schiedt, 293 U.S. 474, 486

In the Journal of the American Judicature Society for February 1938, there is quoted the following opinion advanced by Professor Edson R. Sunderland of the University of Michigan Law School:

"Many are the complaints against modern procedure, and many are the remedies proposed, but the writer believes that no single reform would have so wide reaching and wholesome effect in promoting the efficiency of the courts and improving the quality of justice obtainable there, as a return to the sensible and effective rule of the common law permitting, and in its spirit requiring that the judges should generously aid juries in reaching just conclusions on (matters) of fact."

Nor need there be any fear that a litigant is without redress where, as very rarely happens, the trial judge unduly or unfairly presses his advice upon the jury, because, as the Supreme Court by Chief Justice Hughes said in Quercia *vs.* United States, 289 U.S. 466, 469-471:

"This privilege of the judge to comment on facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing judicial office. In commenting upon testimony he may not assume the rôle of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of commenting in order to give appropriate assistance to the jury is too important to be left without safeguard against abuses."

On this important feature of trial practice the committee therefore recommends:

1. That the common law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

2. That after the evidence is closed and counsel have concluded their arguments to the jury, the trial judge shall instruct the jury orally as to the law of the case, and he may advise the jury as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury.

3. That the trial judge be expected at all times to be the governor of the trial in the sense of actively, and firmly when necessary, requiring that the proceedings be conducted with dignity, decorum and the avoidance of waste of time in the trial.

Selection of the Particular Jury Panel. In every jury case the first step in the trial is the selection of the particular jury panel. We are not concerned here with the method of selection or qualifications of the general jury panel in attendance on the court; and it is assumed that a duly qualified and properly selected whole panel of jurors is present. Probably in all jurisdictions there are allowable a certain number of peremptory challenges and an unlimited number of challenges "for cause." The precise method of exercising

peremptory challenges varies in the different courts. The typical procedure consists either in presenting to counsel a printed list of the available jurors from which certain names are struck, or by placing a jury of 12 in the jury box and orally eliminating those peremptorily challenged Doubtless there are other variations in practice, but this purely mechanical procedure in exercising peremptory challenges is only a matter of local custom and convenience and involves no principle with respect to efficiency of judicial administration. The committee, therefore, finds no occasion to suggest uniform standards in this respect.

But the examination of jurors on their *voir dire* as a basis for the exercise of challenges either "for cause" or peremptorily presents a very different problem. In some states, in cases of large public interest, it not infrequently happens that several days or even a week or more of judicial time is required to select the particular panel. This is due to the too extensive latitude allowed to counsel for the parties in the questioning of individual jurors, and the trial is thus unduly protracted. It can be obviated by placing the initial questioning of jurors on their *voir dire* in the hands of the judge, who puts to the jurors singly, or preferably in groups of convenient size, general questions to elicit answers directly relating to the ultimate question to be decided, whether the juror is free from bias in the particular case, and after the judge has asked all pertinent questions which occur to him as having a probable bearing on the matter, opportunity is then afforded, within measurably restricted limits, to counsel to supplement the examination by directly relevant questions. The judge should actively intervene if necessary to eliminate immaterial and unimportant interrogation of prospective jurors. When this course is pursued, examination of jurors on their *voir dire*, even in such unusual cases, can generally be completed in an hour or two and much time otherwise really wasted can be saved. This is the method of examination of prospective jurors which is now commonly practiced in the federal trial courts, and the procedure is provided for in Rule 47 in the new Federal Rules of Civil Procedure, as follows:

> "The court may permit parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper"

The committee recommends the general adoption of the procedure outlined in the above rule for the examination of prospective jurors on their *voir dire*.

Alternate Jurors. A lengthy trial sometimes terminates in a mistrial owing to the protracted illness, death or other incapacity of one or more jurors of the particular panel, when the parties are unwilling to stipulate or particular legal procedure makes it impossible for them to stipulate to continue the trial with the remaining jurors. To obviate mistrials for such causes, with consequent waste of judicial time, it is now provided by statute in a number of states, as well as by federal law, that in a prospective long trial one or more jurors in addition to the particular panel may be selected and impaneled to sit as alternate jurors and to serve as members of the panel, in the order in which they have been selected, in replacement of a juror or jurors who have become incapacitated. This practice is authorized and regulated by Rule 47 of the new Federal Rules of Civil Procedure.

The committee recommends this

practice for uniform adoption in the several states.

The introduction of evidence is a subject of fundamental importance in the trial; but this committee deems it unnecessary to submit recommendations as to uniform standards with respect to the subject as the substantive rules with respect to the admissibility of evidence are within the scope of the work of a different committee. From the narrower standpoint of the efficiency of trial work and the conclusion of the trial within reasonable limits of time, this committee submits the comment that the modern tendency to limit lengthy discussion of points of evidence by counsel is desirable, as is also the growing attitude of greater liberality in the admissibility of evidence. In this connection we also note that in appellate courts reversal with a new trial is becoming less frequent with respect to the errors in the admission or rejection of evidence under the doctrine of harmless error. When the trial judge is allowed a reasonable latitude of comment on the evidence, he can be more liberal in permitting the introduction of evidence which, when offered, seems to possibly have some bearing on the case, but which upon the conclusion of the whole evidence turns out to be of slight importance and of doubtful admissibility.

And in this connection the committee has noted that the *scintilla* rule of evidence still, at least nominally, prevails in some jurisdictions, but not in the federal courts. It is the view of the committee that this rule, which requires a submission of the particular issue to the jury, should be uniformly abandoned.

Formulation of specific issues for the jury in connection with the general verdict. This practice should be distinguished from a so-called "special verdict" of the jury. The submission of "special issues" for the jury to answer is not intended as a substitute for the general verdict but is in addition thereto. The practice now prevails in a number of the states, and is authorized by Rule 49 of the new Federal Rules of Civil Procedure. The answers of the jury to the special issues so submitted may serve as a desirable check upon the correctness of the general verdict. When the general verdict and all the answers on the special issues are harmonious, the finality and correctness of the appropriate judgment on the verdict is thus fortified. But where the answers to the issue, or to one or more of them, is inconsistent with the general verdict, the court is authorized to direct the entry of judgment in accordance with the answers notwithstanding the general verdict; or may return the jury for further consideration of its answers and verdict, or may order a new trial.

It is not the view of the committee that this practice with regard to special issues should be generally adopted for all cases, as in most a general verdict will be quite sufficient; but the committee does recommend that in complex cases the trial judge should be authorized, in his discretion, to formulate and submit such special issues to the jury for answer by them, and be empowered thereafter to direct the entry of judgment in accordance with the tenor of the jury's answer to the special issues, or order a new trial, substantially as provided for in Rule 49 of the new Federal Rules of Civil Procedure.

Partial or Complete New Trials. In a few, but probably not many, jurisdictions, it is now permissible for the Court, in ruling on a motion for a new trial, to grant it, limited to only one or more of several issues in the case; as, for instance, where there has been a general verdict for the plaintiff in a negligence case, a new trial may be granted limited to the amount of damages only. It is the view of the committee that the power of the trial judge to grant a

partial new trial should exist, but that it should be sparingly exercised in actual practice, and then only where the several issues are clearly and fairly separable. The subject is regulated by Rule 59 of the new Federal Rules of Civil Procedure.

Judgment Non Obstante Veredicto. This practice now prevails in many states. In some cases it is very useful in saving the time of an otherwise necessary new trial. It finds application in a situation where at the close of the trial a party moves for a directed verdict which is not granted by the court, and in consequence of which the case is submitted to the jury and a verdict returned by it, and thereafter within a limited time, say ten days, the party so moving for a directed verdict renews the application and the trial judge thereupon concludes that the verdict should have been so directed. In such case the practice of entering a judgment *non obstante veredicto* authorizes the trial judge to enter judgment despite the verdict (or any judgment entered thereon) in accordance with the motion for a directed verdict; and where the practice does prevail the final judgment in accordance with the considered legal opinion of the trial judge may be entered without the formality of a new trial; and the case is then at once in position for an immediate appeal if desired. A similar practice is authorized and regulated by Rule 50 of the new Federal Rules of Civil Procedure.

The committee recommends that the practice of judgment *non obstante veredicto* be uniformly adopted, and that it be extended to authorize judgment on motion, in accordance with the original motion for a directed verdict, after a jury has disagreed and been discharged, as provided for in Rule 50 of the new Federal Rules.

Dismissal Without Prejudice by Voluntary Non-Pros. This practice now widely prevails. It is, we believe, the very general opinion of the Bar that the practice constitutes an abuse of legal procedure in the great majority of cases and is unduly wasteful of judicial time and oppressive to defendants. In some states the power of the plaintiff to effect a dismissal of his case without prejudice by submitting to a voluntary judgment of non-pros is limited by statute; as for instance in Maryland (see Ann. Code, Art. 75, s. 183) where the right does not exist after conclusion of the testimony and *beginning of argument on the facts*. But where the practice prevails without restriction, it is possible for the plaintiff to nullify an anticipated adverse result after a very long trial by simply stating to the court that the plaintiff submits to a voluntary non-pros; with the result that the case is dismissed without verdict or final judgment, leaving the plaintiff at full liberty to reinstate suit upon the same cause of action and without opportunity to the defendant to plead *res adjudicata*. Of course there will be from time to time particular cases where the plaintiff's case seems likely to fail by reason of lack of proof on some particular point which might be later supplied, and in such cases the plaintiff should be permitted in the discretion of the trial judge to dismiss his action *without prejudice*. But more often the power to take a voluntary non-pros is exercised by the plaintiff after adverse rulings on fundamental points of law and he is thus enabled to reinstitute the case in some other court of appropriate jurisdiction before some other judge, with the hope of obtaining a different ruling on the law. Where the non-pros is apparently taken for the latter reason it ought to be permitted, if at all, *only in the discretion of the trial judge*. The subject is regulated by Rule 41(2) of the new Federal Rules of Civil Procedure.

The committee therefore recommends for uniform adoption that dismissal of the suit by the plaintiff

in a law case after the trial has begun, without prejudice to its reinstitution, should be allowed only in the legally reviewable discretion of the trial judge.

Reports of Referees and Masters and Auditors. Reference of special matters to referees or special masters or auditors has long been common practice in equity cases but is not generally customary in law cases, especially those that stand for trial on the jury docket. In the opinion of the committee juries could well be aided in many cases involving elaborate accounting or other highly complicated fact issues by a reference of special issues to a referee, master or auditor, in advance of the jury trial, with the submission of his report for consideration by the jury (see *Ex parte* Peterson, 253 U S 300)

There is now some uncertainty or diversity of view as to the status in court of the report of a referee or master with respect to its finality. It is desirable there should be uniformity in this respect

The committee therefore recommends as a standard for uniform practice that the reports of referees, masters and auditors in equity and non-jury law cases shall be accepted by the Court as to the facts unless clearly erroneous; but that the trial judge may adopt or modify or reject the report in whole or in part, or may in his discretion receive further evidence with regard to the facts found by the referee or master or auditor, or may recommit the report with instructions. And in jury actions such findings should be made admissible as evidence of the matters found, and be read to the jury, subject to the ruling of the court upon any objection in point of law which may be made to the report (see new Federal Rule 53(e)(2)(3)).

Preliminary Injunctions. In some jurisdictions, preliminary injunctions are now freely granted *ex parte* and without notice to adverse parties. The present federal equity practice requires notice, but permits in cases of otherwise irreparable injury a restraining order of limited duration. For the future the federal practice in this matter is proposed to be governed by the new Rule 65, which is substantially the same in effect as at the present time.

The committee recommends this federal practice for uniform adoption.

Promptness of Judicial Decision. Where equity or non-jury law cases or particular matters arising therein, and motions for new trial in jury cases are taken under advisement by the judge, it is obviously important in efficient judicial administration that decision should be rendered with all reasonable despatch. But the great variety and diversity, and sometimes complexity, of the questions which are thus presented to the trial judge, and the particular situation of the judge with respect to available time for study of the question, is such that it is not practicable to formulate uniform standards as to the time for rendering decisions. Several of the states have attempted to regulate the matter to some extent by law but in general the information of the committee is to the effect that such statutes are not really effective. More efficient aids to securing prompt decisions will be found in the office of "administrative judge" and the requirement as to periodic statistical reports, recommended by another committee of the judicial section.

The new Federal Rules of Civil Procedure. These new rules of civil procedure have now been adopted by the Supreme Court of the United States pursuant to the Act of Congress of June 19, 1934, ch. 651, and have been reported to the present Congress by the Attorney-General and, subject to its veto power, will take effect on or about September 1, 1938. It is generally well known to the Bar that the rules now so adopted by the Supreme Court have resulted

from two years of most thorough study and consideration by a highly competent committee of lawyers appointed by the court, during which time preliminary and tentative drafts of the rules have been widely distributed to the Bench and Bar, and have been constructively criticized by judicial conferences and many bar associations. The new federal rules thus now adopted by the Supreme Court represent our greatest national professional effort to modernize legal procedure in order to promote efficiency of judicial administration. For many years past the American Bar Association has cordially approved and supported the movement for the adoption of these new rules, which are to be of uniform application in all law and equity cases in all of the district courts of the United States, including the District of Columbia. While these rules are obviously of themselves not effective in any of the state courts, the thought was expressed in the support given to the subject by the American Bar Association that the advanced standards of legal procedure therein formulated after such thorough consideration by the Bar of the United States may well serve as standards for judicial administration in the courts of the several states, subject, of course, to their respective pleasure. Insofar as the rules relate to the legal procedure directly involved in trial practice, and thus within the scope of the subject matter entrusted to this committee as herein discussed, we beg to submit our considered judgment that the standards for legal procedure therein expressed should be supported for uniform adoption throughout the country, subject only to such variations as may be required by particular local conditions.

And finally, the committee begs to say that it has not conceived it to be its function to formulate particular rules to put into effect the standards of legal procedure in the trial of cases herein recommended. The duty of the committee has been only to recommend standards for consideration by the American Bar Association and, to the extent that they are approved and recommended by the Association to the bars of the several states, the method of putting them into effect in the states where approved is left entirely to the bar of the respective states. Obviously in some states necessary changes, to the extent approved by the political or judicial authority of the state, may have to be made by statute or possibly by constitutional amendment, but probably in many cases the changes approved can be made effective by rule of court.

Respectfully submitted,

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	E R. McNeill, Pawnee, Okla.

REPORT

OF THE

COMMITTEE ON TRIAL BY JURY INCLUDING METHODS OF SELECTION OF JURORS

To the Section of Judicial Administration:

Criticisms of Jury System

Lawyers and judges must face the fact that the *system* of jury trials is undergoing criticism in many jurisdictions. These criticisms are varied in nature but most of them could be eliminated by proper selection of jurors in the first instance, by courageous refusal on the part of the Bench to accept inadequate excuses for not serving as jurors, and, by proper conduct of jury trials by the Bar and Bench, together with proper quartering, protection and instructions to jurors. Jury service today is the chief remaining governmental function in which lay citizens take a direct and active part, and trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community. It is highly important that everything be done which can be done to insure the most efficient methods of jury selection and trial procedure.

What May be Done to Improve Existing Evils?

The right of trial by jury is guaranteed by the Bill of Rights of the Federal Constitution and the constitutions of the various states. This means, of course, the right as it existed at common law.

The constitutional guaranty of the right to trial by jury does not mean that cases in which such right exists *must* so be tried. Generally, a jury may be waived both in civil and in criminal cases, and in civil cases where several causes of action are combined and the matter is too complicated to permit intelligent consideration by a jury the modern tendency is to hold that such actions are equitable in nature and should be tried by the Court as to the issues of law and fact. In this connection attention is called to the case of *Ex parte* Peterson, 253 U.S. 300, which establishes a practice in the federal courts for the simplification of complicated actions at law. This case authorizes the appointment of auditors and referees in complicated cases in order to simplify the issues and the reports of such auditors and referees are *prima facie* evidence as to the facts in issue.

In other words the Court held in that case that the auditor appointed by the Court to examine books and papers and make computations could express an opinion as to these matters, leaving the parties free to call, examine and cross-examine witnesses to the same extent as if the report had not been made. Power is reserved in the Court to reject such a report.

The maintenance of jurors is an expensive element in the administration of justice, especially in the large centers of population. Despite efforts to minimize the cost there is a tremendous waste for the reason that a large percentage of jurors who are called are kept idle because of challenges and the uncertainty as to the

rapidity with which cases are disposed of in the court rooms, and the further uncertainty as to whether or not a jury will be waived after a civil case is called for trial or will be settled or a plea be entered in a criminal case.

In order to combat this evil some of the states have enacted laws which permit courts to adopt rules requiring a jury to be demanded in writing within a reasonable time after the joining of the issues in civil cases and prior to trial in misdemeanor cases. Failure to make such a demand operates as a waiver. Such legislation has been upheld on the ground that this is no denial of the right to a jury trial but provides a method of waiving such right.

Under this procedure the Court is enabled to determine more intelligently how many jurors must be summoned for duty from time to time and by careful executive supervision the expense can be reduced considerably. In some jurisdictions, laws have been enacted to the effect that a demand for a jury in civil cases shall be construed as a demand for a jury of six, or eight, or such number as the law may designate, unless the demand expressly calls for a full jury of 12, and such laws have been upheld as not being a denial of the right to trial by jury.

In other words a jury of 12 is not necessary in civil cases if the parties expressly agree or, in conformity with a rule, impliedly agree to a lesser number.

The efficiency of jury trials depends upon a number of contributing factors:

First. The caliber of the jurors. This in turn hinges largely upon the method of selection, with which we will deal later.

Second. Acquainting jurors who have been summoned, before they are permitted to sit in cases, with the general nature of their duties and the importance of rendering a verdict in each case based upon the law and evidence only. This can be accomplished by oral instructions by the presiding judge or some judge designated by him, a method which may be supplemented, if desired, by printed pamphlets.

Third. The proper quartering of jurors while awaiting call to a court room and proper protection during trial and during their deliberations. In important cases in which danger of attempted influence is apparent they should not be permitted to separate before a verdict. This practice should not be limited to first degree murder trials. Its value has been demonstrated by courageous judges in many cases involving public interest.

During the recess periods the jurors should not be permitted to loiter about the court room or corridors. Both upon recess and adjournment they should be escorted by a court officer from the court room to their quarters.

Fourth. The trial Court should impress the jurors while they are being impanelled with the serious nature of the business in which they are engaged and the importance of the oath administered to those who are accepted. The jury should be impanelled by the judge, subject to the right of the attorneys, in the discretion of the Court, to supplement questions of the Court within reasonable limitations. If the jurors are permitted to separate before a verdict the court should caution them forcefully and not in a perfunctory or stereotyped manner.

Fifth. The trial Court should give his final instruction orally after argument, in language which the jurors will understand and appreciate, and not with a view of dictating a legal masterpiece which will read well in print to lawyers, but is incomprehensible to a jury of lay people or even, in some instances, to an audience of lawyers not familiar with the issues of law involved.

SELECTION OF JURORS

The first important factor is the method of selection of jurors. The necessity for removing the selection of juries as far as possible from political influence and placing this power in the hands of competent and independent commissioners who will weed out those least qualified will be generally accepted. The jurors, of course, should represent a cross-section of the community. For example, it would not do to have juries composed entirely of working men or entirely of business or professional men or to come wholly from one community in a large county.

We agree with the special committee of the Boston Bar Association on Methods of Selecting Jurors (Supplement to Bar Bulletin of the Boston Bar Association, January, 1935), from the report of which the following quotation is taken:

> "Having assumed the continuation of the present system, the next question is, what kind of a jury do we want? Should it be strictly a cross-section of the community, or should it be selected solely on the basis of ability to understand and decide cases? This is a large and important subject. The advantages of intelligence and ability to decide cases are obvious. Without them verdicts will be matters of emotion, prejudice and the like. On the other hand, if ability to decide cases is all that is sought it would probably be best to leave the matter to the judges who after all are experts. The jury is more than the mere decider of cases. It is a balance wheel in the administration of justice, it has been the protector of the people against tyranny, and it might be so again as against a militant bureaucracy. It serves to give laymen an insight into the functioning of the judicial machine and in this sense is an educational institution. It is a buffer for our courts, protecting them from the full effect of the blasts of popular emotion. In a heterogeneous nation such as ours the jury is 'called upon to pass upon matters involving every class in the community, on disputes between rich and poor, between employers and employees, between corporations and individuals, between property owners and wage earners, between those of different races and creeds.' In such disputes a jury fairly representative of all classes and creeds will be more intelligent. The problem is to find honest jurors with sufficient intelligence to understand the issues presented and yet representative of the community."

The matter of selection of jurors was approached in Cleveland in a scientific and thorough manner after investigation of systems in other jurisdictions throughout the country and the American Judicature Society has given the Cleveland system official commendation. Under the General Code of Ohio (Sections 11419-1 *et seq.*) the judges appoint two commissioners of jurors, neither of whom is an attorney, and both must be members of different political parties. The commissioners are officers of the court. Any commissioner may be removed at any time for good cause by vote of a majority of the judges. Vacancies are filled by appointment by the judges. Compensation is fixed by the judges and full provision is made in the law for assistants, quarters, supplies, etc. The appropriation for petit jurors for this year amounts to $89,701, and for grand jurors to $4667.

All progressive measures in government have been the result of unselfish interest on the part of individuals. Committees, headed by Chief Justice Powell and the late R. B. Newcomb, were responsible for the statutory enactments which made the modern system possible.

The problems of rural communities of course are different from those of the large cities. In Ohio, however, the fundamental principles obtain both in rural communities and large centers of population. In the rural counties

the office of Jury Commissioner necessarily is a part-time office, but jurors must be selected from the polling list and from subdivisions in proportion to population as nearly as possible and the key-number system is required unless otherwise ordered by the Court. Of course, the rural communities are not required to maintain the elaborate system that obtains in large cities and considerable discretion is vested in the Court with reference to the details of operation. The answer to the whole problem is that "pensioned jurors" must be eliminated so that jury service must be regarded as a civic duty, and that judges must not be so timid as to excuse from that service freely or for insufficient reason. No Court will *exact* such service too often over the objections of a person summoned.

No system can be successful unless it is efficiently administered. The Cleveland system has been administered properly since its adoption by Messrs. A. J. Kennel and V. A. E Dustin, and we attach hereto by way of appendix a detailed explanation of the Cleveland system

The Recorders' Court of Detroit also uses the key-number system and has made wonderful strides in the method of selection of jurors as evidenced by an article appearing in the April issue of the Judicature Society report, a copy of which is also appended hereto.

In 1935 the presiding judge of the Superior Court in Los Angeles County appointed a committee of judges to investigate and report on methods of jury selection. This committee, after a study of methods used in all parts of the country, recommended the key-number system as used in Cleveland and Detroit. It was adopted in Los Angeles with an added refinement, a test to determine the mental capacity of the applicant. A report concerning its operation is included in the appendix to this report.

Selection of jurors in a scientific and representative manner is the best guaranty of efficient jurors. When proper selection has been followed, as previously indicated in this report, by appropriate general instructions to jurors before actual service (which of course must not include anything which might be construed as an attempt to influence a verdict in any particular case), proper quartering, seclusion, proper impanelling in each case, timely admonitions and proper instructions by the trial court, it would seem that the system of jury trials as it existed at common law can be safeguarded as effectively as is possible when we consider the fact that juries are comprised of lay people. If there were added to these measures legislation permitting courts to adopt reasonable rules with reference to demanding juries within reasonable time before trial in civil and misdemeanor cases, proper supervision by a Chief Justice, or presiding Judge and cooperation by the bar, the economic features can be solved. Of course there is bound to be some incidental waste, as cases cannot be ground out with the precision and accuracy that characterize the operation of a factory, and sufficient time should be taken in every case for proper presentation and intelligent decision Unselfish cooperation by the Bench and Bar would eliminate much lost motion.

The privilege of challenge is abused in many jurisdictions. As Judge Lummus, author of "The Trial Judge," has pointed out, a litigant is not entitled to a satisfactory jury but is entitled to an impartial one. Other abuses in some jurisdictions are an undue number of demands at the last minute that the Court reduce his charge to writing and the presentation of a number of special requests to charge before argument, the giving of which or refusal is later urged as technical error, despite the fact that the general charge correctly states the law. The employment of undue technicalities

as against the merits usually is frowned upon by jurors.

Trial by jury can never be an effective means for administering justice as long as it is characterized by appeals by able advocates to the emotions of untrained men and women with the judge muzzled and relegated to the side lines and not allowed any substantial part in the trial except to say "yes" or "no" to propositions of law drafted by counsel and used by them for partisan effect.

As said by Justice Braley (Whitney *vs.* Wellesley & Boston Street Railway, 197 Mass. 495, 502), "The judge who discharges the functions of his office is . . . . the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings."

The committee recommends:

1. That jury commissioners should be appointed by the Court.

2. That the key-number system of jury selection with elimination of the unfit by a personal examination impartially conducted be adopted where present methods of jury selection are unsatisfactory.

3. That committees be appointed in each state by the state bar association to consider the conditions obtaining in their various jurisdictions with reference to jury selection and conditions surrounding the functioning of juries and to make recommendations for improvement.

Respectfully submitted,

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	Morison R. Waite, Cincinnati, Ohio
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APPENDIX

The Cleveland System

The Board of Elections is required to furnish biennially on or before the last day of December a certified list of the names and addresses of the electors of the county as shown on the poll books for the next preceding general election. The number of jurors required per year is estimated by the court to which is added a number equal to those which past experience has shown probably will be eliminated by examination. The result is used as a divisor and is divided into the entire list of voters; the quotient is used as a key number.

For instance if this quotient should be 25, then every 25th name on the polling list is checked for jury service and each name is given a consecutive number. The names so selected are taken from the various subdivisions of the county in proportion to population as nearly as possible. Persons so selected are notified to appear for examination. This examination is the heart of the plan as it gives the opportunity for a large number and selecting only those who are found to be eligible.

One of the annual reports of the Jury Commission contains the following statement which illustrates its purpose:

"The Commission believes that if juries are to function impartially, and render justice to all classes, they should not be composed of a predominating number of any particular group. All classes ought to be represented, and our effort is to give every class representation insofar as suitable representatives can be obtained.

"To this end, therefore, the Commissioners have tried to select jurors physically and mentally healthy, possessing good reputation for honesty and morality; at least enough education to be able to read, write and understand English; and finally, persons of sufficient intelligence and experience in life to be able to understand the various problems presented in both civil and criminal litigation.

"In order that the Commission may obtain as much information regarding these qualifications as is possible, it has designed a card in-

dex system. Under this system, each citizen called signs a card in his or her own handwriting, giving the name, address, occupation and age. The Commission then obtains and records on each card responses of each individual to the following questions.

Length of residence in the county
Occupation for the past five years
Occupation of the husband, if the person under examination is a married woman
By whom employed
Nature of duties
Business address
Citizenship
Ability to read, write and understand English
Extent of education
Whether married
How many children living at home
Physical or mental defects
Whether ever indicted or convicted of a crime
Views on capital punishment
Whether any views opposed to organized government

In addition to the above, other questions that suggest themselves may be asked to determine suitability for jury service."

Each prospective juror is required to appear and is personally examined. Such matters as his hearing, ability to understand English and general intelligence are decided by the examiner. People who are disqualified by reason of illiteracy, mental or physical incapacity, conviction of crime or other good and valid reason are eliminated. Those whose names have been selected according to key number are summoned to appear until the required number of prospective jurors for the ensuing year have been chosen. The names of those selected are typewritten on cards and all of these cards are placed in a large wheel located in a conspicuous part of the court house. Jurors are not permitted to serve more than two weeks except in cases which have not been completed at the expiration of the two-week period. Each week a sufficient number of names are drawn for service for two weeks, which results in approximately half the jurors having had one week's experience and the other half being new jurors. This is regulated by elimination at the end of the first week of the jury year. Every Monday morning the new jurors are instructed generally by the Chief Justice with reference to their duties and the important rôle they play in the administration of justice.

The names so drawn from the large wheel in turn are placed in a smaller wheel in the assignment room, from which room cases are assigned for trial. As jury cases are sent to trial rooms the names are drawn from this smaller wheel. When the jurors are discharged from the trial room their names are returned to the smaller wheel unless their two-week term has expired. Adequate records, including a card index system, are maintained in the office of the jury commission. The Federal Court of the Cleveland District and the Municipal Court of the city have requested that lists of jurors who have been examined and approved by the Commission be furnished to these courts so that the names of prospective jurors may be drawn from such lists. At the expiration of the jury year the names in the "big" wheel are discarded and new cards are made out for the ensuing year as required by law and placed in the wheel.

All persons summoned for service after their names have been drawn from the wheel are required to serve at the time designated unless for good cause the time of service is postponed by the presiding judge until a period later in the jury year.

The judges fix the compensation of jurors, the maximum provided by law being $5 per day.

Grand jurors are drawn in the same manner as petit jurors. There are many other provisions as to details, too numerous to cover in a general report of this nature.

The report of the jury commission for 1937 shows that letters were mailed to 13,063 persons whose names were taken from the poll books under the key-number system, 1726 persons were exempt by law or had removed from the county, and 71 names were reserved to be called at a later date. This left 11,266 who were examined. Of this number 7166 were approved

for immediate service and 493 were temporarily exempted, making the total number 7659. In other words approximately 68 per cent of those examined were approved.

Out of the total number approved 3643 were men, who were graded according to intelligence, experience and training into four groups A, B, C, and D; 7.05 per cent qualified in A group, 17.60 per cent in the B group, and 75.35 per cent in C and none in D; 76.36 per cent were married and 19.46 per cent were single; 71 were widowers, 69 were divorced and 12 were separated; 336 had college educations, 1378 high school, 1649 seventh and eighth grade, and 280 sixth grade or less. As to capital punishment 127 were neutral, 2490 were for and 1026 against.

Of the women 3523 were approved, 5.31 per cent came within Group A, 23.25 per cent in Group B, 71.44 per cent in Group C; 92.28 per cent were native born; 7.72 per cent were naturalized; 68.69 per cent were married, and 20.10 per cent were single; 241 were widows, 108 were divorced and 46 were separated; 255 had college educations, 1581 high school, 1531 seventh and eighth grade, and 156 sixth grade or less; 128 were neutral as to capital punishment, 2544 were for and 851 against.

The intelligence ratings are for statistical purposes only, unqualified persons having been eliminated upon examination.

Five Years' Use of Key-Number Jury System in Detroit

The Recorder's Court in Detroit is the only court in the country having unified, or complete, criminal jurisdiction. It has to its credit many innovations, including the key-number system of jury selection. This was borrowed from Cleveland six years ago, after scandals were revealed in jury selection and service.

At the end of five years the commissioners made a tabulated report which contains interesting data. It appears that in five years 8824 jurors were sworn for service and put in the jury box. This number represents 22 per cent of the 40,050 citizens whose names were selected from the voters' registration lists by applying a key number. This number is found by dividing the total number of voters by the number of jurors required (to which number first there is added enough to permit of eliminating the unfit). Naturally, the divisor is made amply large; by calling a large number—nearly five times as many as were used—it is possible to select the best material, and yet there is very little chance that any juror will be asked to serve more than once.

The system distributes the service evenly through all precincts, but it is noticeable in the summary that some wards yielded a smaller percentage of eligibles than others. In the year 1937 one ward yielded only two jurors and another 178. This proves that the essential feature of selecting through personal examination was rigorously accomplished. Without this careful examination no system can rise above mediocrity, and in many places the systems fall far below. Those whose names are first taken by applying the key-number are directed to appear for examination. First, they filled out a questionnaire and that disposed of 66.4 per cent during the five-year period. Those remaining were individually examined, and 20 per cent were excused.

The system as used in Detroit permits of meeting the needs of jurors who can better spare the time in one month than another. An excellent feature also is the staggering of the terms, so that each week half of the required number are excused and as many are accepted. The average jury then is composed of persons who have had at least one week's experience.

In Detroit the judges examine on the *voir dire*, permitting counsel to suggest questions. This at once eliminates a very large proportion of the bunk commonly inherent in qualifying the jury. The high quality of the jury helps to justify the time-saving procedure. The jurors' choice of time for serving reduces the last-day applications for excuse from service.

The system is based on a carefully drafted statute and is operated for the court by a board of three commissioners who are appointed by the governor.

The California System

A plan for improved jury selection which was the result of two years of

investigation and study was brought to fruition during the past year. In 1935, Judge Edward T. Bishop, then Presiding Judge, appointed a committee of judges to make a study of methods of selecting prospective trial jurors and advise and direct the Jury Commissioner with respect to making up the trial jury lists. Theretofore the trial jury lists had been made up by the Jury Commissioner in a rather haphazard, hit-and-miss fashion by taking names from the rosters of various organizations, names suggested by judges and others for jury service, and names of persons who presented themselves as prospective trial jurors. After a lapse of three years many of these names again went back into the jury wheel to be used over. The most frequent criticism of the personnel of trial juries was that the same were composed in too large percentage of housewives, who had no experience in business or ordinary affairs of life outside of the home, and elderly men whose minds had become inactive.

At no time in Los Angeles County has there been a charge or even a suspicion voiced that juries had been "stacked" or that the names on the list had been selected to meet the requirements of public utility or other corporations or any individual attorneys or clique of lawyers. Fortunately, jury selection in Los Angeles County has for many years been entirely free from scandal. This has not been the case in a number of other metropolitan centers throughout the country. The suggestion for jury reform was prompted entirely by a desire to improve the personnel of jurors and to bring about the selection of a better cross-section of the citizens of the county.

The first work done by the committee was to make an investigation as to the methods of jury selection employed in other states, with particular reference to more populous communities. After considerable correspondence and the securing of reports and all available information, the committee concluded that it favored the methods of jury selection employed in Wayne County, Michigan, and Cuyahoga County, Ohio.

The plan set up in Los Angeles County is as follows in its operation: The names of all prospective jurors are taken from the list of registered voters of the county. This list at once answers a number of questions relating to the qualifications of jurors, including that of residence, citizenship and age. Moreover, by following a definite plan of selecting a portion of the names from each precinct in the county, it is possible to scatter the jurors over the county and thus comply with the statutory provision that a proportionate number of jurors be selected from each township within the county.

To accomplish this result an estimate is made of the number of persons required to be brought in and examined to produce the number of qualified jurors needed for a six-months period. Roughly, about four times the number of names are taken from the Great Register as will be required for the jury list. This number, compared with the total registration in the county, provided the "key number." For the first jury list drawn under the new plan each 12th name was taken from the list of registered voters in every fifth precinct in the county. The names and addresses are taken from the records in the office of the Registrar of Voters and to each a form letter is sent over the signatures of the Presiding Judge and the Jury Commissioner, requesting the addressee to appear before the Jury Commissioner.

Manifestly a list selected in this manner will contain the names of many persons unfit or undesirable to serve as jurors. The next problem is that of elimination. In this particular, in Los Angeles County we have devised a plan which is original and unique. So far as we know it has not been attempted in any other section of the country. The results of the past year have convinced us that while the plan is at present not perfect, nevertheless it is the most satisfactory method that has been brought to our attention.

When the citizen appears at the office of the Jury Commissioner, those who are manifestly unfit by reason of ill health, advanced age, poor use of the English language, or because of physical defects (such as poor hearing, poor eyesight, or inability to move from one court room to another) are immediately excused by an assistant. Such assistant, without taking the time of the Jury Commissioner, also

excuses a few others, such as mothers with young babies or persons having serious illness in their own family. The next problem is to determine whether the citizen has sufficient knowledge of the English language and adequate comprehension and mental capacity to understand proceedings in a court of law and comprehend the meaning of jury instructions. This is ascertained by a written test. The first test given is a vocabulary test. Twenty-five words ordinarily used during the trial of cases are set down in a column. After each word are placed three other words, one of which is a synonym. The prospective juror is asked to mark the word of similar meaning. In the second, the citizen is required to read several instructions ordinarily given in both criminal and civil cases and to mark certain statements appearing in connection therewith as "right" or "wrong."

In the preparation of the written test the committee had very valuable outside assistance of experts in the field of employment, a college professor, and the Chief Examiner of the Los Angeles County Civil Service Commission. After the written tests were prepared they were first submitted to a number of persons of average intelligence rating to discover the proper marking which would reveal the mental capacity of the persons taking the tests. The questions are so prepared that the percentage of correct answers can be determined by a clerk in a few seconds. The percentage is marked on the written sheet and immediately handed to the Jury Commissioner, who personally interviews each prospective juror. The result of both the written test and the interview is taken into consideration by the Jury Commissioner in determining whether or not the person is qualified to serve as a juror.

The Jury Commissioner at the time of the interview passes on excuses offered by citizens seeking to be relieved from jury service where it appears to him that there is little question that the juror would be excused by the Court. If in the mind of the Jury Commissioner the excuse might be held insufficient by the Court and if, in his opinion, the citizen is otherwise qualified, the name is added to the list and it is left to the Court upon the impanelment of a jury to pass upon the excuse.

In this manner the trial jury lists for the year 1937 have been made up. Thus persons in all walks of life, many of whom would never have been contacted for possible jury duty under the old system, are added to the jury list. It has been found that the plan yields more jurors in the prime of life; it eliminates the juror who is himself seeking jury service for the experience or other ulterior purpose; it is a complete answer to any possible charge of jury hand-picking, and the list when selected represents a fairly good cross-section of the citizens of the county. Moreover, in Los Angeles County, in which the present number of registered voters is 1,233,479, the supply of jury material is almost illimitable and standards can be raised as high as is thought advisable. The judges realize that the English jury system, as adopted in this country, calls for an average jury of average American citizens and no attempt has been made to raise the mental standard too high. The personal interview, supplementing the written test, permits the weeding out of persons who, though high in intelligence rating, appear to lack reason, or who have a wrong conception of government or law enforcement.

The following are statistics relative to the operation of this plan during the year 1937:

	Total letters sent	Number and % responses	Number and % names approved
* 1937-1.....	13,231	10,398—78.5%	3,306—24.9%
† 1937-2.....	20,495	18,004—87.8%	3,929—19.1%
	33,726	28,402—84.2%	7,235—21.4%

* Key, 1937-1: Names numbered 1 and 16, and each 85th name after the first and 16th names from the first and thereafter each fifth precinct in Los Angeles Judicial District.

† Key, 1937-2: Every first and thereafter tenth name in every fifth precinct, beginning with Precinct No. 2, Los Angeles Judicial District.

It will be noted that through the selective process a comparatively small percentage of citizens whose names were taken from the Great Register were finally approved for jury service. This does not mean by any means that prospective jurors are hand-picked. The eliminations were made by tests and standards applied to all alike. One of the principal advantages of the method is its uniformity. All persons over 70 years of age are eliminated unless at the time of the interview it appears to the Jury Commissioner that the citizen is in unusually good health and has retained unusual mental alertness. Under the methods previously employed, by reason of the fact that many more men seek to be excused from jury service than women, largely on account of business reasons, there was usually too large a percentage of women on the juries. It is sought to have the trial juries composed of about the same number of men and women, and by reason of the fact that additional business excuses are always presented to the judge who impanels the jury the names of more men than women are placed on the jury list.

As chairman of the Judges' Committee on Jury Selection, I desire to acknowledge the valuable services of Judge Henry M. Willis and Judge Thomas L. Ambrose. Before his elevation to the Supreme Court, Judge Douglas L. Edmonds was an equally valuable member of this committee.

Methods of Impaneling Juries

At the beginning of the year the single jury panel plan that has been in operation for the past several years was continued. Under this arrangement all jurors that are expected to serve in any department of the Superior Court are impaneled by one Judge. After impanelment all jurors for a time were required to report daily to a clerk in a central assembly room and thereafter sent to the various jury trial departments, either civil or criminal, as needed. This system is undoubtedly the most economical that has yet been tried, but after careful study and consideration it was felt that greater efficiency could be realized by splitting the panel so that jurors would serve all of their time in either criminal or civil departments. Under the provisions of the statute, jurors in the larger counties of the state may serve only 20 days in the actual trial of cases. Jurors should be confused as little as possible in the performance of their duties. Requiring jurors to serve in civil and criminal cases indiscriminately, it was found, did not produce the best results. It is difficult for the average juror, with no previous experience, to understand the distinction between the doctrine of reasonable doubt in criminal cases and the burden of proof in civil cases and apply instructions correctly during his limited period of service. It frequently happened that in civil personal injury actions, where evidence was introduced as to violations of the Motor Vehicle Act, jurors believed that such violation should be proved to a moral certainty. In criminal cases, differences of opinion between jurors who had been trying civil and criminal cases frequently arose, resulting in hung juries and mistrials.

It was therefore determined, during the early part of the year 1937, to adopt a new method of assignment of jurors by splitting the panel. Under the present practice a sufficient number of names is drawn out of the jury wheel to meet the requirements of both criminal and civil departments; all prospective jurors are required to appear before one judge for impanelment. He passes on all excuses and questions of qualifications or exemptions not covered by the Jury Commissioner. Thereafter the required number are selected by lot to serve in the criminal departments. These jurors are given preliminary instructions by one of the criminal judges (during the past year, Judge Charles W. Fricke) relative to the functions and duties of jurors in the trial of criminal cases. Those jurors who are to serve in civil departments are given similar general instructions by the impaneling judge (during the past year, Judge Ruben S. Schmidt). This division means greater expense to the county because all of those sent to the criminal side receive $3.00 per day during the entire period of their service, while civil jurors are paid $2.00 per day. However, the ad-

ditional expense has been justified in the decreased number of mistrials and in saving of time of the Court. Under the present system jurors assigned to criminal courts are permanently located in the Hall of Justice and do not have to be sent from the assembly room in the Hall of Records to criminal departments when needed for criminal trials as formerly.

Selection of Civil Juries

While no intimation has been made that names are selected by the clerk in charge of the jury assembly room for the trial of certain cases, any system which permits an assistant to designate jurors to go to particular departments readily lends itself to the possibility of suspicion of favoritism as between plaintiffs and defendants in civil actions. Therefore, to avoid such suspicion and to make it apparent to every litigant that he is being fairly treated in the matter of selection of jury personnel the following practice was put into operation during the past year: A small jury wheel was purchased and placed in a prominent place in the Master Calendar Department of the Presiding Judge. Into this jury wheel are placed the slips containing the names of all civil trial jurors not actually engaged in the trial of cases As new cases are assigned to trial departments at 9:30 o'clock each morning the bailiff of the department in open court spins the wheel, unlocks it, and draws therefrom a sufficient number of prospective jurors for each department. Unless the case is of unusual importance, 18 slips are withdrawn for each jury case. The slips then are placed in an envelope and sealed in open court and dispatched to the clerk in the trial department. A notation of the names is made by the clerk who then repairs to the jury assembly room and instructs the jurors by name to go to the designated department. Thus, through the method of making up the jury list and the selection of names for the trial of particular cases in open court, attorneys and litigants are impressed that the Court is treating every one with equal fairness.

Jury Expense

During past years considerable unwarranted expense fell upon the taxpayers by reason of the practice of some attorneys, particularly in personal injury actions, of demanding a jury and thereafter waiving trial by jury. Under this practice, many attorneys who were uncertain whether they desired to try their case before a jury or a judge sitting without a jury, would demand a jury and deposit a fee of $24.00. The cause would go on the calendar as a jury case and a sufficient number of jurors would in due course be provided and held in attendance for the trial of all jury cases. On the date of the trial it might develop that the case had been settled or at the last minute the attorney demanding a jury would decide to waive a jury, possibly after he learned of the department to which the case was assigned. This practice shifted much of the burden of payment of jurors from litigants in civil cases, where it properly belongs, to the taxpayers of the county. To meet this situation Rule 25 of the Rules of the Superior Court was amended, by the terms of which the return of the jury deposit is refused unless formal notification to the Court of waiver of jury is made three days, exclusive of Sundays and holidays, prior to the date of trial. During the past year it has been necessary to enforce this rule strictly and rigorously to stop the practice on the part of attorneys above referred to. The rule has been construed by the Court during the past year as covering cases where settlements have been effected and the cause goes off calendar on the date of trial without three-day notice to the Court. Such action on the part of the Presiding Judge proved unpopular with many trial attorneys, but it was effective nevertheless. During the year 1936 a total of $504.00 deposited as jury fees was retained by order of Court and transferred to the General Fund of the county; during the year 1937, by action of the Presiding Judge, a total of $5,256.00 deposited as jury fees was retained by order of Court and transferred to the county General Fund.

During the year the Department of

the Presiding Judge has cooperated with the County Auditor in devising ways and means to reduce jury expense. More careful checks have been made for the purpose of greater accuracy in the estimates of jury requirements so that by the end of the past year the handling of jurors had been placed on a much more efficient and economical basis.

REPORT

OF THE

COMMITTEE ON IMPROVEMENTS IN THE LAW OF EVIDENCE

To the Section of Judicial Administration:

Your committee, consisting of Mr. Robert G. Dodge, of Boston, Judge Ernest A. Inglis, of Middletown, Judge Merrill E. Otis, of Kansas City, Judge Walter E. Treanor, of Indianapolis, and Mr. John H. Wigmore, of Chicago, Chairman, presents the following Report, the result of correspondence since December 28, 1937. The Schedule of Dates, notified to the committee Chairman by letter of December 18, by Judge Parker, Chairman of the Section, called for a tentative draft report by February 1. Accordingly, each member of the committee was asked by the committee Chairman (by letter of December 28) to submit promptly his proposals for improvement in the law of evidence.

The proposals then received were promptly circulated to the other committee members for consideration, comment, and assent or dissent. The aggregate of these views was then assembled by the Chairman and put in the form of a proposal here presented. Each proposal is numbered and incorporated in the report; the votes and comments are then briefly stated. Thus in some cases the dissents are in the majority.

Later, the same method was used in circulating the Draft to the 66 Advisory Members. Thus each proposal independently exhibits the combined views on that particular topic.

The Report is divided into three parts:

Part I. General Considerations Affecting Proposals for Improvement;

Part II. Proposals Involving Evidence Administration in general;

Part III. Proposals Involving Specific Rules of Admissibility.

PART I. GENERAL CONSIDERATIONS AFFECTING PROPOSALS FOR IMPROVEMENT

In planning any proposals involving the improvement of the law of evidence, certain contrasts and diversities of interest and experience must be taken into consideration; for they affect the feasibility of securing professional support for any decided measures of improvement.

These features are mainly as follows:

a. *Metropolis vs. County Seat,* There is in probably every state a difference of conditions between the large cities and the ordinary county seat. In the former, the defects and abuses of the rules tend to be more marked, hence the need and the demand for improvement is apt to be greater. In the latter, there is therefore likely to be more inertia, and even more opposition to change. And the county-seat lawyers usually have the greater influence in the judiciary committees of the legislatures.

Moreover there are wide differences of experience between different *regions* of our country, in respect to many rules of evidence—a variance which appears even in the views of members of the committee.

Hence, a probable lack of united

professional support for any radical, or even any substantial changes.

b. Plaintiff's Lawyers and Defense's Lawyers. The practitioners making a specialty of trial practice, and therefore of evidence rules, include (mainly in the large cities, and often in the county seats) two large groups having opposite interests. The plaintiff lawyers wish to preserve every rule which favors getting the case to the jury and diminishing the judge's control over the evidence. The defense lawyers wish the opposite.

Hence, a decided division of opinion and prejudice favoring or opposed to the improvement (disinterested persons would call it) of certain rules.

c. Prosecution's Lawyers and Accused's Lawyers. Similarly, in respect to rules most commonly applicable in criminal trials, there is an opposition of interest and bias between practitioners acting habitually for the prosecution and those acting habitually for the accused. And here the opposition is often even more marked.

Hence, again, a probability of divided professional attitude for certain proposals.

d. Experienced and Inexperienced Lawyers. Today, in the large cities notably (though less so in the county seats), relatively few lawyers conduct trials frequently. Hence a large proportion of practitioners, through inadequate knowledge, use the rules crudely.

This affects the rules harmfully in two main respects:

(1) It leads to an excessive number of Supreme Court opinions reiterating truisms and cumbering the reports.

(2) It leads to an excessive invocation of some of the simple rules of thumb (*e.g.*, the opinion rule, the rule about cross-examining to one's own case), which anyone can learn by rote from a book; thus futilely obstructing the trial.

This feature raises the question how far any improvement of the rules themselves can help the situation, so long as the practitioners are ignorant and crude in their use of the rules.

e. Federal and State Rules. The variety of jurisdictions, and especially the diversity between federal and state trials within the same area, tends to multifariousness of rules and to burdensomeness in the task of mastering at least two sets of rules and sometimes more.

Any movement for improvement may well consider how far a Uniform State Evidence Act is feasible and desirable, and how far at least a state practice may be brought into harmony with the federal rules so far as contained in the new Federal Rules of Court.

f. Statute and Court Rule. Recent legislation has made it clear that the general subject of civil practice can best be governed by Rules of Court rather than by Legislative Statute. This view seems now on its way to ultimate general extension to all the states.

But the subject of evidence has not been included in that movement (except in a few sections of the new Federal Rules).

However, if procedure in general can well be so regulated, the question presents itself whether the same reasons of good policy do not apply equally to the rules of evidence.

In considering proposals for improvement therefore this possibility should be given consideration.

The foregoing general considerations are here noted as affecting the general prospects of achieving any improvements and the form which such improvements might take.

Part II. Proposals Involving Evidence Administration in General

The following proposals, involving no change in specific rules of admis-

sibility of evidence, deal with certain general features of procedure in the administration of those rules. These needs for improvement doubtless do not all exist in all communities, but whenever they do exist, the improvement should be undertaken. The measures are here recommended in the conviction that they aim to remedy shortcomings in the administrative environment of the system of evidence. Unless there be improvement in these shortcomings, the improvement of any specific rules will be more or less a mere academic achievement without practical results.

One of the notable fallacies in public opinion, widespread among us, is that a perfect law will produce by its own force the desired effect; the parole-offender-system is an example at hand. So in any proposed improvement of a rule of law, it is wise at the same time to take measures to insure a suitable environment and administration. Any proposed improvement in the rules of evidence must heed the same warning.

Some of the ensuing topics are indeed under consideration by other committees. But the present committee also may well regard the topics as germane to its specific field; and all these fields are interrelated in their problems.

These proposed auxiliary measures are as follows (conciseness has been kept in mind in stating them; chapters might be offered about each):

1. Judge's Comment on Evidence.
2. Judge's Charge Preceding Argument of Counsel.
3. Appellate Court's Attitude towards Trial Court's Errors in Dealing with Evidence.
4. Counsel's Objections and Exceptions.
5. Trial Court's "Discretion" in Rulings.
6. Simplification of the Body of Rules.
7. Calendar-Arrangement to Promote Convenience of Witnesses.
8. Continuances.
9. Court-House Conveniences for Witnesses and Counsel.
10. Intimidation of Witnesses.
11. Fees for Witnesses.
12. Legislative Star-Chamber Alteration of Rules.

1. Judge's Comment to the Jury on the Evidence

The trial judge's power and practice to comment to the jury upon the weight of the evidence, in order to aid them in considering the evidence, was an essential part of jury trial for centuries. It continued to be so in the United States until about a century ago, when a wave of political change, spreading through most of the older states, took away that power; and the newer states all followed this innovation.

A reaction has now set in, and the movement is towards restoring that power and practice. It has already been restored in two or three states.

The reasons for restoring it have been set forth in many articles of the last decade or so. The latest and most powerful presentation of them is found in the address of Judge Merrill Otis at the California State Bar September 10, 1937 (Proceedings of Tenth Annual Meeting, p. 3; also in the Journal of the American Judicature Society, XXI, 105, December 1937).

In our opinion the restoration of that power and practice is an essential condition to any substantial improvement in the rules of evidence The judge's comment would have the effect of reducing counsel's insistence on the technicalities of the evidence rules.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (41):

Ross (Ariz.)	Hilkey (Ga.)
Harrison (Calif.)	Leviton (Ill.)
Schatz (Conn.)	Bloss (Kan.)
Morford (Del.)	Herold (La.)
Long (Fla.)	Oakes (Me.)

Davis (Mass.)	Cheadle (Okla.)
Long (Mich.)	Rossman (Ore.)
Somerville (Miss.)	Hart (R. I.)
Clausen (Mo.)	Philip (S. D.)
Crossman (Nebr.)	Graves (Tex.)
Branch (N. H.)	Shields (Vt.)
Caffrey (N. J.)	Heath (Va.)
Botts (N. M.)	Beals (Wash.)
Tillett (N. C.)	Mack (Wis.)

At Large

Cherry (U. Minn.)	Morgan (Harv. U.)
Hale (Ill.)	Strahorn (U. Md.)
Wilson (Corn. U.)	McCormick (N'western U.)
Hale (U. So. Cal.)	Gausewitz (U. Wis.)
Maguire (Harv. U.)	Schnader (Pa.)
Tracy (U. Mich.)	Harno (U. Ill.)
Leflar (U. Ark.)	

Advisory Members Dissenting (3)

Rouse (Ky.)	Finkelnburg (Minn.)
Dickerson (Md.)	

2. *Judge's Charge Preceding Argument of Counsel*

In many states today, the judge's charge must precede the argument of counsel.

This procedure is unwise, for the same general reasons stated above in No. 1. But it has a special unwisdom in so far as it refers to the rules of evidence; for it subordinates the judge's disinterested instructions or comments to the counsel's partisan argument

Therefore, in company with the recommendation that the judge be authorized to comment on the evidence, we recommend that the judge's comment *follow* the counsel's arguments, instead of preceding them, whenever the latter is now the law.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs Dodge, Wigmore.

Advisory Members Assenting (37)

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Botts (N. M.)
Long (Fla.)	Tillett (N. C.)
Hilkey (Ga.)	Cheadle (Okla.)
Leviton (Ill.)	Rossman (Ore.)
Rouse (Ky.)	Hart (R. I.)
Herold (La.)	Philip (S. D.)
Davis (Mass.)	Graves (Tex.)
Long (Mich.)	Shields (Vt.)
Finkelnburg (Minn.)	Heath (Va.)
Somerville (Miss.)	Mack (Wis.)

At Large.

Cherry (U. Minn.)	Leflar (U. Ark.)
Hale (Ill.)	Morgan (Harv. U.)
Maguire (Harv. U.)	Strahorn (U. Md.)
Hale (U. So. Cal.)	Gausewitz (U. Wis.)
McCormick (N'western U.)	Schnader (Pa.)
	Harno (U. Ill.)

Advisory Members Dissenting (7):

Bloss (Kan.)	Caffrey (N. J.)
Oakes (Me.)	Beals (Wash.)
Dickerson (Md.)	

At Large:

Tracy (U. Mich.)	Wilson (Corn. U.)

3. *Appellate Court's Attitude towards Trial Court's Ruling on Evidence*

How shall an error in a ruling upon evidence affect the jury's verdict?

The jury are recognized as the finders of facts, and at the trial it is the jury's conclusions, not the judge's, that are to be given effect. But this need not mean that the jury's mental lucubrations are to be reverenced as all-wise and sacrosanct. Our very system of evidence is built throughout on the postulate that much evidential material is excluded because the jury might be misled by it or might abuse it. Hence, a fundamental part of jury-trial is that the jury indeed give the verdict, but under control of the law. If, then, the law empowers the judges to exclude evidence in *advance of verdict* because of rules of law aimed to prevent the jury from being misled by it or abusing it, logically the same principle allows the judges to control the jury *after the verdict* by declaring that the verdict *ought* not to have been affected if certain evidence had been admitted that was excluded, or had been excluded that was admitted. The latter action on appeal is no more radical a control of the jury than is the former. Moreover, the latter action lets the verdict stand, instead of upsetting it.

But in respect to this action by the Appellate Court, three distinct rules have obtained. They are as follows (and we need not here mass authorities in citation).

(A) One rule is substantially the rule above indicated as sound, *viz.*, the improper rejection or admission of evidence shall not be ground of

itself for directing a new trial if it appears to the reviewing court that *independently of the evidence objected to and admitted there was sufficient evidence to justify the decision,* or that *if the rejected evidence had been received, it ought not to have varied the decision.*

(B) Another form of rule is this: An error in the admission or rejection of evidence shall not be ground of itself for directing a new trial unless the appellate court after an examination of the entire cause is of opinion that the error has *resulted in a miscarriage of justice* or has *affected the substantial rights of the parties.*

(C) Still another form of rule is this: Error presumptively *works a prejudice to the party* against whom it is committed. Or, even more strictly: Error *works a reversal.*

The last form of rule, C, has been the bane of the rules of evidence. It is probably more responsible than any other one rule of law for new trials, and therefore for prolongation of litigation and its reduction to a tactical game of manoeuvring the opponent into putting an error in the record.

So, in reaction from those excesses, several state legislatures and courts shifted to the second form, B, of the rule. This form sounded well. But its abstract terms left much opportunity to interpretation. So the technical-minded courts, retaining their inveterate attitude impressed on them in their practice, applied the new rule only a little less strictly than before. This form of rule, regarded as putting an end to reversals on purely technical grounds, has been futile in almost every state; and copious instances could be given to demonstrate this.

The first above rule, Rule A, is the only logical rule, and also the only one that can avail to remove from the law of evidence its chief hindrance, *viz.*, a dry technicalism, forced upon it by using its rules so as automatically to "work a reversal."

Rule A is the one recommended by the great Judge Sir James Fitzjames Stephen, and adopted in his Evidence Act for India. Among many recent rulings employing it may be consulted the progressive opinion in State *vs.* Woods, 62 Utah 397.

It is proposed that Rule A be recommended for adoption.

Committee Members favoring Rule A:
Judges Otis, Treanor, Mr. Wigmore.

Committee Members favoring Rule B:
Mr. Dodge, Judge Inglis.

Advisory Members voting for Form (A) (17):

Ross (Ariz.)	Herold (La.)
Morford (Del.)	Finkelnburg (Minn.)
Long (Fla.)	Botts (N. M.)
Hilkey (Ga.)	Rossman (Ore.)
Rouse (Ky.)	

At Large:

Cherry (U. Minn.)	Hale (U. So. Cal.)
Morgan (Harv. U.)	Gausewitz (U. Wis.)
Strahorn (U. Md.)	Schnader (Pa.)
Wilson (Corn. U.)	Harno (U. Ill.)

Advisory Members voting for Form (B) (25).

Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Leviton (Ill.)	Tillett (N. C.)
Bloss (Kan.)	Cheadle (Okla.)
Oakes (Me.)	Hart (R. I.)
Dickerson (Md.)	Philip (S. D.)
Davis (Mass.)	Shields (Vt.)
Long (Mich.)	Heath (Va.)
Somerville (Miss.)	Beals (Wash.)
Clausen (Mo.)	Mack (Wis.)

At Large.

Hale (Ill.)	Leflar (U. Ark.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracey (U. Mich.)	

4. Counsel's Objections and Exceptions

It will of course be kept in mind (though, surprisingly, some judges and practitioners forget it) that the objection and the exception serve distinct purposes. The objection serves to stop temporarily the admission of the evidence, to request a ruling by the judge upon its admissibility, and to set forth the specific rule of evidence said to be violated. The exception comes *after* the ruling (of admission or rejection) and serves merely to indicate to the judge that his ruling is not assented to and will

later perhaps be made a ground of appeal.

(A) The *Exception* therefore is not essential at that point as an indication of counsel's dissent. That dissent can as well be indicated afterwards, at the time of making the motion for a new trial (or its equivalent).

The yapping "Except!" which has characterized many trials for so long a time is now recognized as a mere formal and needless feature of the proceedings. Accordingly it has been discarded in two or three states and in the new Federal Rules of Practice.

We recommend this improvement

(B) But the *Objection* cannot be dispensed with. As shown above, it serves an indispensable purpose, if the rules of admissibility are to be observed.

Nevertheless, its abuse is rife in many communities. The abuse consists in the opponent's making objections (from various motives) to trivial bits of evidence, and in making them constantly or frequently, to the annoyance of the witness, the bewilderment of the jury, and the disturbance of the peace of the courtroom. So serious has been this abuse that a practitioner of long experience has recently proposed the abolition of the objection (Thomas H. Hearn, "I Object," in California State Bar Journal, May 1932, p 103).

But the abolition of the right to object is impossible, for the reason above stated.

Nevertheless, is not its abuse capable of remedy?

The only remedy that we can see lies in the self-controlled behavior of the Bar. That behavior can be got at only by the adoption in the Canons of Ethics of a principle defining the standard of behavior in respect to captious objections. With such a standard once established, the younger members can be educated to observe it and the obstreperous veterans can (occasionally) be brought to book.

(a) We recommend that the Committee on Canons of Ethics be requested to prepare such a canon, and to use efforts to make it well known and enforced in all courts and law schools.

(b) But, further, the practitioners' misuse of objections can be discouraged on high in the reviewing courts by declining to take notice of appeals based on objections which should never have been made, being due only to ignorance or to a forlorn hope. A century ago that judicial giant of Pennsylvania was found dismissing a copious list of points of error in these words: *"These exceptions to evidence are so nice that it is unnecessary to say more in regard to them than that they are not sustained"* (4 Pa. St. 353, 357).

We recommend that appellate courts take courage and employ these words of Chief Justice Gibson as frequently as possible

Committee Members Assenting

Judges Inglis, Otis, Treanor; Messrs. Wigmore, Dodge.

Advisory Members voting for (A) and (B) (34):

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Caffrey (N. J.)
Morford (Del.)	Botts (N. M.)
Long (Fla.)	Cheadle (Okla.)
Hilkey (Ga.)	Rossman (Ore.)
Leviton (Ill.)	Hart (R. I.)
Bloss (Kan.)	Graves (Tex.)
Rouse (Ky.)	Shields (Vt.)
Herold (La.)	Heath (Va.)
Dickerson (Md.)	Beals (Wash.)
Somerville (Miss.)	

At Large

Cherry (U. Minn.)	Hale (U. So. Cal.)
Hale (Ill.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Strahorn (U. Md.)	Harno (U. Ill.)
Wilson (Corn. U.)	

Advisory Members voting for (A) only (2):

Long (Mich.) Finkelnburg (Minn.)

Advisory Members voting for (B) only (1):

Davis (Mass.)

Advisory Members voting against (A) and (B) (4):

Tillett (N. C.)	Mack (Wis.)

At Large

Maguire (Harv. U.)	Morgan (Harv. U.)

5. Trial Court's "Discretion" in Rulings

The reviewing courts are clogged with appeals. Hence, reports multiply intolerably; judges are overworked; lawyers' burdens in preparation of briefs are aggravated; expense and delay take place all around.

The question arises: Cannot the reviewing courts more strictly apply the principle to which they often give lip service, *viz.*, the "discretion" of the trial court?

The term is a misleading one. Nobody maintains that the trial court is controlled by no fixed rules and that he may decide matters according to good sense and justice as he sees it. But what is meant by that term "discretion," when it is applicable, is *finality of ruling, i.e.*, that his ruling upon the tenor of a rule of evidence, and upon its application to a particular offer of evidence is *final* and will not be reviewed on appeal, except for "abuse of discretion." This expression "abuse of discretion" has been justly censured by a wise judge:

"The appeal will lie, not because of any so-called abuse of discretion (a phrase unhappily framed, because implying a bad motive or wrong purpose) but because his ruling may appear to have been made on grounds and for reasons clearly untenable" (Benet, J., in Norris *vs.* Clinkscales, 47 So. Car. 488).

So the real question is: Cannot Supreme Courts more often give finality to trial courts' rulings on evidence?

Naturally, finality cannot be allowed in the trial court's *formulation* of the rule involved. But in the *application* of the rule to the facts of the case, finality could often be conceded—*e. g.*, qualification of witnesses, loss of an original document, corroboration of a witness when required, etc., etc. The books teem with appellate decisions on such rulings. It would be a substantial improvement in the administration of evidence rules if such appeals could be eliminated or reduced.

We recommend therefore to reviewing courts:

(A) That the terms "discretion" and "abuse of discretion" be *discarded*, as having false implications; and

(B) That the trial court's ruling be ordinarily treated as final, insofar as it involves the mere application of the rule to the facts; thus leaving to the reviewing court its proper function, *viz.*, the safeguarding of the tenor of the rule.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Wigmore, Dodge (Dodge as to B, for trial without jury).

Committee Members Dissenting:

Mr. Dodge (as to A)

Advisory Members voting for (A) and (B) (16):

Ross (Ark.)	Branch (N. H.)
Harrison (Calif.)	Caffrey (N. J.)
Morford (Del.)	Botts (N. M.)
Leviton (Ill.)	Rossman (Ore.)
Rouse (Ky.)	Hart (R. I.)
Dickerson (Md.)	Heath (Va.)
Somerville (Miss.)	

At Large

Cherry (U. Minn.)	Harno (U. Ill.)
Leflar (U. Ark.)	

Advisory Members voting for (A) only (2)

Clausen (Me.)

At Large

Gausewitz (U. Wis.)

Advisory Members voting for (B) only (8):

Cheadle (Okla.)	Beals (Wash.)

At Large

Hale (U. So. Cal.)

Advisory Members voting against (A) and (B) (21):

Schatz (Conn.)	Finkelnburg (Minn.)
Long (Fla.)	Crossman (Nebr.)
Hilkey (Ga.)	Tillett (N. C.)
Bloss (Kan.)	Philip (S. D.)
Herold (La.)	Graves (Tex.)
Oakes (Me.)	Shields (Vt.)
Davis (Mass.)	Mack (Wis.)
Long (Mich.)	

At Large

Hale (Ill.)	Morgan (Harv. U.)
Maguire (Harv. U.)	Strahorn (U. Md.)
Tracy (U. Mich.)	Wilson (Corn. U.)

6. Simplification of the Body of the Rules

All will agree that the body of the rules of evidence, in their skeleton framework, are wise and wholesome—in short, they are a valuable and unique contribution to the world's expedients in the investigation of truth. What is lamented is their infinitesimal, meticulous, petty elaboration into a mass not capable of being perfectly mastered and used by everyday judges and practitioners.

Hence an occasional loud call (usually from lay quarters) for their abolition. Hence also numerous legislative repudiations of them in constituting administrative tribunals. Hence also a frequent pointing to the experience of various investigatory bodies as being successful without using these rules.

This raises the question: Can the rules of evidence be simplified, by formulating a short code which shall contain only their wise essentials, but shall still be practicable?

We believe that the time has arrived when such a formulation should be seriously considered and attempted. Could not an "all-stations call" be issued, with a view to evoking competitive drafts of such code?

We recommend that the American Bar Association Committee on the Ross Bequest be asked to select, as the subject of a competitive award, *The formulation of a simplified code of evidence rules for use in jury trials.*

Committee Members Assenting:
Judges Inglis, Otis, Treanor, Messrs. Dodge, Wigmore.

Advisory Members Assenting (44):

Ross (Ariz.)	Long (Mich.)
Harrison (Calif.)	Finkelnburg (Minn.)
Schatz (Conn.)	Somerville (Miss.)
Morford (Del.)	Clausen (Mo.)
Long (Fla.)	Crossman (Nebr.)
Hilkey (Ga.)	Branch (N. H.)
Leviton (Ill.)	Caffrey (N. J.)
Bloss (Kan.)	Botts (N. M.)
Rouse (Ky.)	Tillett (N. C.)
Herold (La.)	Cheadle (Okla.)
Oakes (Me.)	Roesman (Ore.)
Dickerson (Md.)	Hart (R. I.)
Davis (Mass.)	Philip (S. D.)
Graves (Tex.)	Beals (Wash.)
Shields (Vt.)	Mack (Wis.)
Heath (Va.)	

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting:
None.

7. Calendar-Arrangement to Promote Convenience of Witnesses

The witness is the private soldier of the forensic battle; without him there could be no engagement. And, often enough he is treated like "cannon fodder." As a citizen he makes a sacrifice to assist the cause of justice to other citizens. He is compelled by state power to subordinate his own convenience to that of the courts and other parties. And when he arrives, he is further inconvenienced by delays and often hectored and made miserable, yet rarely thanked and rewarded.

So the least that the state can do for him is to reduce his sacrifice to the lowest terms.

In many cities today, a reform of the calendar-arrangements prevails, or is planned, to assist litigation in general. But we here emphasize its utility and necessity for the witness. In a certain city today, the calendar-clerk calls up every two hours the attorneys for cases that are being approached in the trial-calendar for the day; this makes it possible for the attorneys to keep their witnesses advised, thus minimizing their loss of time.

With the universal use of modern mechanical inventions in business and industry, why hang back in the administration of justice?

We recommend that every state and city bar association proceed to study the most improved methods of calendar-administration, with a view to reducing inconvenience to wit-

nesses, and that the associations urge the adoption of such methods by their local courts.

Committee Members Assenting:
Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (40):

Ross (Ariz.)	Crossman (Nebr.)
Harrison (Calif.)	Branch (N. H.)
Schatz (Conn.)	Caffrey (N. J.)
Morford (Del.)	Botts (N. M.)
Long (Fla.)	Tillett (N. C.)
Hilkey (Ga.)	Cheadle (Okla.)
Leviton (Ill.)	Rossman (Ore.)
Rouse (Ky.)	Hart (R. I.)
Herold (La.)	Graves (Tex.)
Oakes (Me.)	Shields (Vt.)
Dickerson (Md.)	Heath (Va.)
Long (Mich.)	Beals (Wash.)
Somerville (Miss.)	Mack (Wis.)
Clausen (Mo.)	

At Large:

Cherry (U. Minn.)	Leflar (U. Ark.)
Hale (Ill.)	Morgan (Harv. U.)
Maguire (Harv. U.)	Strahorn (U. Md.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Wilson (Corn. U.)	Schnader (Pa.)
Hale (U. So. Cal.)	Harno (U. Ill.)
McCormick (N'western U.)	

Advisory Members Dissenting (3):

Bloss (Kans.)	Finkelnburg (Minn.)
Davis (Mass.)	

8. *Continuances*

The abuse of continuances, where it exists, is a curse which falls heavily on the witness. In a recent burglary case in a certain city, there was no real doubt about the accused's guilt; but there were *19 continuances* before he was finally tried and convicted. Meanwhile, the witnesses were forced to come ten miles to the court, on 19 occasions, each time being sent home to reflect upon the course of justice.

Of course, this method of tiring out the witnesses is often due to local political intrigue, to slack judicial methods, to connivance of attorneys, etc., and it has its larger aspects. But here we emphasize that any improvement in the system of evidence must rest on the assumption that promptness of trial is essential to the preservation of testimony and to securing the goodwill and dependable mentality of witnesses.

We recommend to every state and city bar association to make a study of the abuse of continuances in their communities, and to demand of the courts that the abuses shall cease.

Committee Members Assenting:
Judges Inglis, Otis, Treanor; Mr. Wigmore.

Advisory Members Assenting (35):

Ross (Ariz.)	Crossman (Nebr.)
Harrison (Calif.)	Branch (N. H.)
Schatz (Conn.)	Caffrey (N. J.)
Morford (Del.)	Botts (N. M.)
Long (Fla.)	Cheadle (Okla.)
Hilkey (Ga.)	Rossman (Ore.)
Rouse (Ky.)	Hart (R. I.)
Oakes (Me.)	Graves (Tex.)
Dickerson (Md.)	Shields (Vt.)
Long (Mich.)	Heath (Va.)
Somerville (Miss.)	Beals (Wash.)
Clausen (Mo.)	

At Large:

Cherry (U. Minn.)	Hale (U. So. Cal.)
Hale (Ill.)	McCormick (N'western U.)
Maguire (Harv. U.)	Gausewitz (U. Wis.)
Tracy (U. Mich.)	Schnader (Pa.)
Leflar (U. Ark.)	Harno (U. Ill.)
Morgan (Harv. U.)	
Strahorn (U. Md.)	

Advisory Members Dissenting (9):

Leviton (Ill.)	Finkelnburg (Minn.)
Bloss (Kan.)	Tillett (N. C.)
Herold (La.)	Philip (S. D.)
Davis (Mass.)	Mack (Wis.)

At Large:
Wilson (Corn. U.)

9. *Court-House Conveniences for Witnesses and Counsel*

For the reasons already set forth, the state owes it to the witness to make the circumstances of his sacrifice as comfortable as possible. The mental state of the witness has an important relation to the reliability of his testimony. The typical witness is already upset at the necessity of coming at all. To get the best testimonial state of mind, he should be made comfortable while waiting.

Clean and spacious rooms; comfortable seats; lavatories; courteous court attendants; exclusion of all but the witnesses themselves; consulting chambers for counsel and witnesses; reading matter to reduce boredom. How many courts are thus equipped?

We recommend that all state and city bar associations call for commit-

tee reports on the court-house conveniences for witnesses in their communities, and make recommendations accordingly to the County Boards concerned.

Committee Members Assenting:
Judges Inglis, Otis, Treanor; Mr. Wigmore.

Committee Members Dissenting:
Mr. Dodge.

Advisory Members Assenting (36):

Ross (Ariz.)	Caffrey (N. J.)
Harrison (Calif.)	Botts (N. M.)
Schatz (Conn.)	Tillett (N. C.)
Morford (Del.)	Cheadle (Okla.)
Hilkey (Ga.)	Rossman (Ore.)
Leviton (Ill.)	Hart (R. I.)
Rouse (Ky.)	Philip (S. D.)
Oakes (Me.)	Graves (Tex.)
Dickerson (Md.)	Shields (Vt.)
Long (Mich.)	Heath (Va.)
Somerville (Miss.)	Beals (Wash.)
Crossman (Nebr.)	Mack (Wis.)
Branch (N. H.)	

At Large:

Cherry (U. Minn.)	Hale (U. So. Cal.)
Hale (Ill.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting (7).

Long (Fla.)	Davis (Mass.)
Bloss (Kan.)	Finkelnburg (Minn.)
Herold (La.)	

At Large.

Maguire (Harv. U.)	Wilson (Corn. U.)

10. Intimidation of Witnesses

In most of the large cities there is probably more or less intimidation of witnesses in felony cases. This, when it exists, is the supreme disgrace of our justice. It is well-known to all that the success of the "racket" is due chiefly to the lack of proof caused by the intimidation of witnesses. This intimidation takes place either in the court premises or outside of them.

(A) In the *court premises* it is the duty of the judge to install arrangements for protecting the witnesses (as proposed in No. 8 above), and also to instruct and require his bailiffs to exclude from the courtroom and its premises known bullies and touts. All this part of the remedy comes home to the judge's responsibility.

We recommend that all city bar associations make a careful inquiry into the intimidation of witnesses in their local court houses, and that they insist on measures that will eliminate this abuse where it exists.

(B) *Away from the court house,* intimidation of witnesses is a different problem, and a far more difficult and deep-rooted one. But it certainly involves the following two elements:

a. Does the state criminal law adequately provide for the crime of intimidating a witness?

b. Does the local prosecuting officer adequately undertake to search out and prosecute this crime?

We recommend that all state and city bar associations call for committee reports on these two subjects.

Committee Members Assenting:
Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (40).

Ross (Ariz.)	Somerville (Miss.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Caffrey (N. J.)
Long (Fla.)	Botts (N. M.)
Hilkey (Ga.)	Tillett (N. C.)
Leviton (Ill.)	Cheadle (Okla.)
Bloss (Kan.)	Rossman (Ore.)
Rouse (Ky.)	Philip (S. D.)
Herold (La.)	Graves (Tex.)
Oakes (Me.)	Shields (Vt.)
Dickerson (Md.)	Heath (Va.)
Davis (Mass.)	Beals (Wash.)
Long (Mich.)	Mack (Wis.)

At Large

Cherry (U. Minn.)	Hale (U. So. Cal.)
Hale (Ill.)	McCormick (N'western U.)
Maguire (Harv. U.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	
Wilson (Corn. U.)	

Advisory Members Dissenting:
None.

11. Fees of Witnesses

The "horse-and-buggy days" still exist in the figures allowed by most state laws for the fees of witnesses.

Will it be said that the difference between one dollar and five dollars is a trifling matter, in comparison to the general inconvenience of going to court and sacrificing one day's work? Rather, we believe, it is just

such small things that may make a difference between a witness' contentment and his resentment. The figure of a dollar or a dollar and a half (except to the citizen who is out of employment) seems incongruous, and rather excites his ridicule at the methods of justice. The figure should be either nothing at all or reasonably more. There are so many anachronistic features in our court methods that we cannot afford to leave the removable ones unremoved.

We are aware that in the rural districts there is often a traditional fear that, if the witness fee was anything but symbolic in its minuteness, a complaisant party might summon a tribe of friends who really know nothing of the case but would be glad to have a costless and well paid trip to the county seat. But this abuse, if it existed, could readily be stopped by disallowing in the court costs the fees of such persons.

We recommend that the state laws increase the present figures of witness fees to an amount more commensurate with modern wage standards

Committee Members Assenting:
Judges Otis, Treanor; Mr. Wigmore

Committee Members Dissenting
Judge Inglis, Mr. Dodge

Advisory Members Assenting (24)

Harrison (Calif.)	Branch (N. H.)
Morford (Del.)	Caffrey (N. J.)
Long (Fla.)	Botts (N. M.)
Leviton (Ill.)	Cheadle (Okla.)
Rouse (Ky.)	Rossman (Ore.)
Dickerson (Md.)	Shields (Vt.)
Davis (Mass.)	Heath (Va.)
Crossman (Nebr.)	Mack (Wis.)

At Large:

Cherry (U. Minn.)	McCormick (N'western U.)
Maguire (Harv. U.)	Gausewitz (U. Wis.)
Morgan (Harv. U.)	Schnader (Pa.)
Straborn (U. Md.)	
Hale (U. So. Cal.)	

Advisory Members Dissenting (19):

Ross (Ariz.)	Somerville (Miss.)
Schatz (Conn.)	Clausen (Mo.)
Hilkey (Ga.)	Tillett (N. C.)
Herold (La.)	Hart (R. I.)
Oakes (Me.)	Philip (S. D.)
Long (Mich.)	Graves (Tex.)
Finkelnburg (Minn.)	Beals (Wash.)

At Large:

Hale (Ill.)	Wilson (Corn. U.)
Tracy (U. Mich.)	Harno (U. Ill.)
Leflar (U. Ark.)	

12. Legislative Star-Chamber Alteration of Rules

The rules of evidence are supposed to be based on long-continued professional experience; and they are embedded in the knowledge and habits of the whole body of practitioners. Therefore to change them without consultation of representatives of the profession—much more to do so without notice—is unwise.

Yet this is what many state legislatures have been doing, at intervals, for years past.

Such legislative changes have been usually due to three different sources:

(a) Some progressive personality, happening to be in the Judiciary Committee of the legislature, proposes a worthwhile change, his complaisant colleagues agree, and the bill slips through.

(b) Some attorney, defeated by a judicial ruling which displeases him, travels to the Capital, applies to some friend on the Judiciary Committee, and the change is made—usually in some minute part of a rule.

(c) Some interested group of attorneys or of citizens, finding a rule of evidence obstructive to their personal interests, likewise slip through a change—usually in an important rule. The effects of this kind of legislation can usually be seen in statutory rules helping plaintiffs in personal injury cases and rules helping defendants in insurance cases and in criminal cases. A scrutiny of nearly every state code would disclose special statutory rules which reveal plainly that some special interest secured them to protect that self-interest.

This sort of legislative alteration of the rules is injurious to the whole morale of the system.

We recommend the adoption of a resolution requesting all state legislatures to make no change in the rules of evidence without due notice and opportunity of hearing to the state and local bar associations.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (40).

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Caffrey (N. J.)
Long (Fla.)	Botts (N. M.)
Hilkey (Ga.)	Tillett (N. C.)
Leviton (Ill.)	Cheadle (Okla.)
Rouse (Ky.)	Rossman (Ore.)
Herold (La.)	Hart (R. I.)
Oakes (Me.)	Philip (S. D.)
Dickerson (Md.)	Graves (Tex.)
Davis (Mass.)	Shields (Vt.)
Long (Mich.)	Heath (Va.)
Finkelnburg (Minn.)	Mack (Wis.)
Somerville (Miss.)	

At Large

Cherry (U. Minn.)	Hale (U. So. Cal.)
Hale (Ill.)	McCormick (N'western U.)
Maguire (Harv. U.)	Gausewitz (U. Wis.)
Morgan (Harv. U.)	Schnader (Pa.)
Strahorn (U. Md.)	Harno (U. Ill.)
Wilson (Corn. U.)	

Advisory Members Dissenting (2)

Beals (Wash.)

At Large

Leflar (U. Ark.)

Conclusion

The foregoing measures are recommended in the conviction that they aim to remedy shortcomings in the administrative environment of the system of evidence. Unless there be improvement in this environment, the improvement of any specific rules will be more or less a mere academic achievement without practical results.

Part III. Proposals Involving Specific Rules of Admissibility

Improvement of details throughout the system of rules is not here proposed. This committee has merely selected certain rules as to which an improvement seems most simple, feasible, and necessary.

Accordingly, the following selection is limited to rules which (*a*) represent a *general* practice in most states, and not merely a local practice; (*b*) are most *frequently invoked* in trials; and (*c*) involve in experience the most *obvious obstruction* to the rational investigation of facts in jury trials.

They are as follows:

1. Survivor's Testimony against Representative of Deceased Party.
2. Business Records
3. Opinion Rule.
4. Expert Testimony.
5. Deceased Person's Hearsay.
6. Certified Copies.
7. Oath Administration.
8. Discovery before Trial.
9. Cross-Examination to One's Own Case.
10. Psychiatric Examination in Sex Complaints.
11. Attorney and Client Privilege
12. Physician and Patient Privilege.
13. Privilege against Self-Crimination.
14. Burden of Proof.
15. Proof of Foreign Law.
16. Evidence in Trials without a Jury.
17. Marital Testimony Privilege.
18. Novel Privileges.
19. Bona Fide Dispute of Facts
20. Hearsay Rule Exceptions Codified.

1. Survivor's Testimony against Representative of Deceased Party

There remains today in our law only one relic of the long-abolished disqualification of interested persons as witnesses, *viz.*, the prohibition of the survivor of a transaction with a person now deceased to give evidence against the deceased's representative. This rule, in various forms, prevails in the great majority of states.

Of late years, it has often been reproached as an anachronism and an obstruction to truth—partly on the ground that its inherent details are highly technical and have no relation to the psychology of veracity (in one state alone, a textbook devotes nearly 400 pages to the interpretation of a 14-line statute), and partly on the ground that it obstructs honest claims as often as it defeats unjust claims.

This rule was made the subject of thorough inquiry in 1921-27 by a com-

mittee of experts (two judges and six professors of the law of evidence), appointed by the Legal Research Committee of the Commonwealth Fund of New York; the Committee's Report was published in 1927 by the Yale University Press under the title "The Law of Evidence; Some Proposals for its Reform"; Chap. III *dealing with this rule.*

That committee approached the *subject from the pragmatic point of* view, *i. e*, by asking, How does the rule work? For this purpose, they circularized some 300 judges and lawyers of trial experience, the answers being carefully classified according to length and scope of experience, etc. The committee selected as its test the statute of Connecticut, which *permits* the survivor to testify but also admits the declarations or memoranda of the deceased. The questionnaire asked the Connecticut profession whether in the experience of Bench and Bar this rule caused injustice, or aided in the ascertainment of truth. Two hundred answers from persons having had trial experience with the statute gave the following results:

	Per cent
In favor of the statute:	
Higher Court Judges.....	89
Practitioners having some experience	60
Practitioners having experience in 6 or more cases..	84.5

This pragmatic result would seem sufficient to allay the apprehensions of those who have believed that the removal of the prohibition would assist in the recovery of unjust claims.

The above committee of experts recommended the substitution of a rule similar to the present permissory statute of Connecticut for the prohibitive statute of the other states. (Text given in the Appendix.)

We indorse that recommendation.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting **(41):**

Ross (Ariz.)	**Somerville (Miss.)**
Harrison (Calif.)	**Clausen (Mo.)**
Schatz (Conn.)	**Crossman (Nebr.)**
Morford (Del.)	**Branch (N. H.)**
Long (Fla.)	**Caffrey (N. J.)**
Hilkey (Ga.)	**Botts (N. M.)**
Leviton (Ill.)	**Tillett (N. C.)**
Bloss (Kan.)	**Cheadle (Okla.)**
Rouse (Ky.)	**Rossman (Ore.)**
Herold (La.)	Hart (R. I.)
Oakes (Me.)	Philip (S. D.)
Dickerson (Md.)	*Graves (Tex.)*
Davis (Mass.)	*Heath (Va.)*
Finkelnburg (Minn.)	*Mack (Wis.)*

At Large:

Cherry (U. Minn.)	*Wilson (Corn. U.)*
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	
Leflar (U. Ark.)	Gausewitz (U. Wis.)
Morgan (Harv. U.)	Schnader (Pa.)
Strahorn (U. Md.)	Harno (U. Ill.)

Advisory Members Dissenting **(3):**

Long (Mich.)	Beals (Wash.)
Shields (Vt.)	

2. Business Records

The old common law rules for the admission, as a partial exception to the hearsay rule, of records of business transactions involving the participation of several persons in the transaction recorded, have long been recognized as out-of-date. Their details, complicated by historical relics, by early statutes, and by judicial interpretation, now form a needless obstruction in the investigation of facts.

This subject also was examined thoroughly by the above-named Committee of the Commonwealth Fund. As one example of the cumbrousness and practical impossibility of satisfying scrupulously the demands of the antiquated common-law rule, the committee received from one manufacturer a statement showing that to complete a single order for sale and delivery of linoleum at an agreed price to a customer, the record made *would* involve in the operation 43 different persons, who *might* be any of 150 individuals, many of whom could never be identified as to their precise share in preparing the consignment.

It is in parts of the law like this that something can and should be

done to help restore to the business world a respect for and confidence in the efficiency of legal procedure. It can here only be a question of the best formulation of an improved rule.

Three drafts of such a rule have been made:

(A) The Commonwealth Fund Committee Draft of 1923 (found at p. 63 of their above-cited report). This draft (with occasional alterations) has already been enacted into law in some half-dozen states and in a federal statute.

(B) The Uniform Laws Conference Draft of 1936 (found in the Conference Proceedings for 1936); offered as an improvement on Draft A.

(C) The Illinois Draft of 1937 proposed by Roscoe L. Barrow (found in the Illinois Law Review, XXXII. 334); offered as an improvement on the two foregoing drafts.

We recommend the adoption of any one of these drafts, but preferably the second, because it would more probably lead to uniformity (Texts set forth in the Appendix.)

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs Dodge, Wigmore.

Advisory Members Assenting (44):

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Caffrey (N. J.)
Long (Fla.)	Botts (N. M.)
Hilkey (Ga.)	Tillett (N. C.)
Leviton (Ill.)	Cheadle (Okla.)
Bloss (Kan.)	Rossman (Ore.)
Rouse (Ky.)	Hart (R. I.)
Herold (La.)	Philip (S. D.)
Oakes (Me.)	Graves (Tex.)
Dickerson (Md.)	Shields (Vt.)
Davis (Mass.)	Heath (Va.)
Long (Mich.)	Beals (Wash.)
Finkelnburg (Minn.)	Mack (Wis.)
Somerville (Miss.)	

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (U. Harv.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting:

None.

3. Opinion Rule

The Opinion Rule is the rule prohibiting a qualified lay witness from stating the inference drawn by him from something he has seen (*e. g.*, whether a sidewalk hole was dangerous, a signal light could have been observed, etc.), and also prohibits even an expert witness from stating his opinion in certain cases (*e. g.*, as to cause, direction, possession, etc., etc.).

This rule is probably the most frequently invoked rule in the whole list of evidence rules. Many persons have come to the belief that its technicalities as used today are an obstruction to the investigation of facts, and that its benefit, if any, is negligible. Judge Learned Hand has publicly said: "No rule is subject to greater abuse. It is frequently an obstacle to any intelligible account of what happens. . . . . I know of none more baffling to a witness. . . . . Whatever its logical justification, it is the most annoying rule in its application that I know" (*United States vs.* Cotter, 1932, 60 Fed. 2d 689; Lectures on Legal Topics, N.Y. 1926, p. 97). In 1934 the New York Commission on the Administration of Justice recommended the rule's abandonment in the following terms: "It is proposed that ordinary witnesses may state their conclusions with respect to ordinary matters subject to explanation, thus permitting a witness to state his observation in a natural and non-technical manner."

We recommend that the measure proposed by the New York Commission be enacted.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Committee Members Dissenting:

None.

Advisory Members Assenting (38):

Ross (Ariz.)	Leviton (Ill.)
Harrison (Calif.)	Herold (La.)
Schatz (Conn.)	Oakes (Me.)
Long (Fla.)	Dickerson (Md.)
Hilkey (Ga.)	Long (Mich.)

Finkelnburg (Minn.) Rossman (Ore.)
Somerville (Miss.) Hart (R. I.)
Clausen (Mo.) Philip (S. D.)
Crossman (Nebr.) Graves (Tex.)
Branch (N. H.) Shields (Vt.)
Caffrey (N. J.) Heath (Va.)
Botts (N. M.) Beals (Wash.)
Cheadle (Okla.) Mack (Wis.)

At Large:

Cherry (U. Minn.) Hale (U. So. Cal.)
Hale (Ill.) McCormick (N'western U.)
Maguire (Harv. U.) Gausewitz (U. Wis.)
Leflar (U. Ark.) Schnader (Pa.)
Morgan (Harv. U.) Harno (U. Ill.)
Strahorn (U. Md.)
Wilson (Corn. U.)

Advisory Members Dissenting (6):

Morford (Del.) Davis (Mass.)
Bloss (Kan.) Tillett (N. C.)
Rouse (Ky.)

At Large:

Tracy (U. Mich.)

4. *Expert Testimony*

The complications, futilities, and dissatisfaction associated with expert testimony have long been the subject of discussion, both within and without the profession.

It would be superfluous here to enumerate the various grounds of criticisms. The literature is an extensive one.

But, as it happens, the whole subject has recently been taken up for thorough consideration by a special Committee of the National Conference of Commissioners on Uniform State Laws. The report of this committee was subjected to three years of active debate, in the Conference, and their draft statute (which covers all the aspects that have been indicated as calling for remedy) went through the crucible of repeated revision. It was finally adopted unanimously at the Conference of 1937 (published in the 1937 Proceedings). We believe that the subject calls for improvement, and that nothing better can be done than to adopt this Uniform Act.

We recommend the enactment of the Uniform Act of 1937. (Text set forth in the Appendix.)

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (43):

Ross (Ariz.) Somerville (Miss.)
Harrison (Calif.) Clausen (Mo.)
Schatz (Conn.) Crossman (Nebr.)
Morford (Del.) Branch (N. H.)
Long (Fla.) Botts (N. M.)
Hilkey (Ga.) Tillett (N. C.)
Leviton (Ill.) Cheadle (Okla.)
Bloss (Kan.) Rossman (Ore.)
Rouse (Ky.) Hart (R. I.)
Herold (La.) Philip (S. D.)
Oakes (Me.) Graves (Tex.)
Dickerson (Md.) Shields (Vt.)
Davis (Mass.) Heath (Va.)
Long (Mich.) Beals (Wash.)
Finkelnburg (Minn.) Mack (Wis.)

At Large:

Cherry (U. Minn.) Wilson (Corn. U.)
Hale (Ill.) Hale (U. So. Cal.)
Maguire (Harv. U.) McCormick (N'western U.)
Tracy (U. Mich.) Gausewitz (U. Wis.)
Leflar (U. Ark.) Schnader (Pa.)
Morgan (Harv. U.) Harno (U. Ill.)
Strahorn (U. Md.)

Advisory Members Dissenting (1):

Caffrey (N. J.)

5. *Deceased Person's Statements*

The hearsay rule, requiring that all testimonial assertions be subjected to the scrutiny and test of cross-examination, and therefore excluding all statements made out of court and not so tested, is a most valuable rule, being one of the great contributions of Anglo-American law for the methodical investigation of facts.

But of course it has always had to recognize exceptions; there are a dozen or more of them, having large scope. Many or most of them are based on situations where the test of cross-examination is no longer practicable—the person being deceased or otherwise unavailable—and that therefore it is better to accept what can be got than to reject it entirely.

The scope of these exceptions has been gradually enlarged, over the past century. And just 40 years ago the State of Massachusetts (at the instance of Professor James Bradley Thayer, known as the greatest authority on the law of evidence) undertook to make another enlargement, *viz.*, to admit in general the declaration of a deceased person who had had personal knowledge and spoke or wrote in good faith before controversy had arisen.

This sensible statute was later made the subject of a thorough and pragmatic inquiry by the Commonwealth Fund Committee above mentioned. They sent out a questionnaire to Massachusetts lawyers, seeking answers from those who had had experience with the statute. Of those who had used it (or had it used against them) in from 100 to 500 cases the answers were unanimous that it did more good than harm; of those who had had less experience with it, some 80 per cent favored it as beneficent; while of those who had had no experience with it, some two-thirds favored it. Thus, the opposing opinions were in inverse relation to experience with it.

The Massachusetts statute has given rise to virtually no technical trouble in interpretation and it stands today as indorsed by 40 years of trial experience.

We recommend the enactment of a law similar to the Massachusetts statute. (Text set forth in the Appendix.)

Committee Members Assenting

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (43):

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Long (Fla.)	Caffrey (N. J.)
Wilkey (Ga.)	Botts (N. M.)
Leviton (Ill.)	Tillett (N. C.)
Bloss (Kan.)	Cheadle (Okla.)
Rouse (Ky.)	Rossman (Ore.)
Herold (La.)	Hart (R. I.)
Oakes (Me.)	Philip (S. D.)
Dickerson (Md.)	Graves (Tex.)
Davis (Mass.)	Shields (Vt.)
Long (Mich.)	Heath (Va.)
Finkelnburg (Minn.)	Beals (Wash.)
Somerville (Miss.)	Mack (Wis.)

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting (1):

Morford (Del.)

6. *Certified Copies*

The English common law court records were all centered in a single custody in a single city—the Chancellor's archives in London. Thus their mode of proving copies was simple. In the courts of the United States, lacking such a centralized system, the simple rules inherited from England were found inadequate.

Everywhere, therefore, legislatures came to aid with statutes. In California, where the Code of Procedure of David Dudley Field was adopted, a few broad generalizations made adequate provision for the whole subject, and almost no judicial interpretation has been required for those Code provisions. But in most of the other states, and in the Federal Congress, the legislation took place in patches and casually, over a century, as some special situation was presented and happened to get attention. The result has been some thousands of patchwork statutes covering specific kinds of records, and on the other hand large blanks (in some states) where nothing has been done to facilitate proof.

In a certain state, for example, any one of a hundred petty statutes must be sought. Again, in the federal jurisdiction, several dozen statutes provide respectively for certified copies, *e. g.*, of the clerk's records of the Western District of this or that state, for certified copies of a second-class postmaster's accounts, etc., etc.

A recent federal case revealed the absurd inadequacy of our statutory provisions in this field. It was at the trial of the parties charged with fraud in collecting funds to establish the heirship to the English estate of Sir Francis Drake, who died in the 1500's. Now Sir Francis left a will, and there could be no intestate heirs. The will was duly probated at the time and is on file in the official Registry of Wills in London. So the prosecution brought over an English barrister bearing a purporting certified copy, verified by the usual (in England) simple certificate of the official custodian. But this copy the federal judge found himself obliged to reject as in-

adequate. So when, in the ensuing year, another trial of accomplices in the same fraud took place in the Federal Court in Chicago and the English barrister came over again to prove the Drake will, he was this time well fortified with an imposing portfolio of certificates bearing copious seals all the way up in the official hierarchy—presumably to the Lord Chancellor himself with his Great Seal, as required by the common law of England of a century ago and still obtaining in the federal courts.

This defect in our law will now be remedied (in great part, at any rate) by the new Federal Rules for Civil Procedure, Rule 45. But the remedy still remains needful in most states. And it would be highly convenient if states attempting a remedy should accept and follow the terms of the new federal rule.

We recommend that legislation be enacted adopting the new Federal Rule, Rule 45, for proof of records by certified copy. (Text set forth in the Appendix.)

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs Dodge, Wigmore.

Advisory Members Assenting (44):

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Caffrey (N. J.)
Long (Fla.)	Botts (N. M.)
Hilkey (Ga.)	Tillett (N. C.)
Leviton (Ill.)	Cheadle (Okla.)
Hoss (Kan.)	Rosaman (Ore.)
Rouse (Ky.)	Hart (R. I.)
Herold (La.)	Philip (S. D.)
Oakes (Me.)	Graves (Tex.)
Dickerson (Md.)	Shields (Vt.)
Davis (Mass.)	Heath (Va.)
Long (Mich.)	Beals (Wash.)
Finkelnburg (Minn.)	Mack (Wis.)
Somerville (Miss.)	

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting:

None.

7. *Oath*

The sense of responsibility impressed by the oath is still (despite certain theological changes) decidedly felt by most persons called as witnesses. Inasmuch as it helps to that extent to stir the conscience and elicit truth, it must be preserved.

But the degenerate form of its *administration*, as practised today in most courts, is calculated to minimize the effect of the oath. The administration must positively be improved, to obtain maximum efficiency for the oath. The usual spectacle is that of a group of persons, scattered here and there in the courtroom, commanded by the bailiff, "All witnesses stand up and be sworn"; then by the clerk, a gabble "You smly swear m-m-m-m-God"; all sit down again (if indeed all had risen), and the busy court routine is resumed. Contrast this with the scene in the German courtroom at Leipzig in 1921 at the trial of the German officials charged with cruelty to prisoners of war (Sir Ellis Hume, "The World, the House, and the Bar," 1932, p. 178):

> "One thing also which remains firmly in my mind is the impressive manner in which the oath to a witness is administered. The President rises and removes his viretta or head-dress, the other Judges do the same, and the whole Court stands; then the President himself administers the oath, and not until the witness has taken it do the judges and the public resume their seats—surely a preferable system to ours, where the oath is administered by a minor official of the Court, and no one seems to take much if any interest in the ceremony."

To obtain the maximum efficiency of the oath, the following features should be restored:

(1) It should be administered by the *judge*, not the clerk.
(2) It should be *repeated*, word for word, by the *witness*.
(3) It should be administered *anew* to each witness on coming to the stand, not to a group and in advance.
(4) The judge and all persons in the courtroom should *stand* while the oath is pronounced.

We recommend that all state and city bar associations request their local courts by rule to adopt these features for the administration of the oath to witnesses.

Committee Members Assenting:
Judge Inglis (items 1 and 3 only).
Judge Otis (item 3 only).
Mr. Dodge (item 3 only).
Judge Treanor and Mr. Wigmore.

Committee Members Dissenting.
None.

Advisory Members voting for Item 1 (12):

Ross (Ariz.)	Crossman (Nebr.)
Leviton (Ill.)	Botts (N. M.)
Bloss (Kan.)	Heath (Va.)
Dickerson (Md.)	

At Large:

Hale (Ill.)	Wilson (Corn. U.)
Maguire (Harv. U.)	Hale (U. So. Cal.)
Tracy (U. Mich.)	

Advisory Members voting for Item 3 (34):

Ross (Ariz.)	Crossman (Nebr.)
Harrison (Calif.)	Branch (N. H.)
Schatz (Conn.)	Caffrey (N. J.)
Morford (Del.)	Botts (N. M.)
Hilkey (Ga.)	Tillett (N. C.)
Leviton (Ill.)	Cheadle (Okla.)
Bloss (Kan.)	Hart (R. I.)
Oakes (Me.)	Phillip (S. D.)
Davis (Mass.)	Graves (Tex.)
Finkelnburg (Minn.)	Shields (Vt.)
Somerville (Miss.)	Heath (Va.)
Clausen (Mo.)	Mack (Wis.)

At Large:

Hale (Ill.)	Hale (U. So. Calif.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Harno (U. Ill.)
Morgan (Harv. U.)	
Wilson (Corn. U.)	

Advisory Members voting for all four Items (6):

Rouse (Ky.)	Rossman (Ore.)
Long (Mich.)	

At Large:

Cherry (U. Minn.)	Schnader (Pa.)
Strahorn (U. Md.)	

Advisory Members voting against all four Items (8):

Long (Fla.)	Beals (Wash.)
Herold (La.)	

8. *Discovery before Trial*

That the use of discovery before trial could and should be much extended, and that such extension would receive the support of Bench and Bar, was shown in the recent monograph of Mr. George Ragland, Jr. ("Discovery before Trial," Chicago, 1932), who based his conclusions on correspondence with practitioners throughout the union. And that such extension may now be regarded as an orthodox improvement is shown by its embodiment in the new Federal Rules for Civil Procedure. The subject needs here no further exposition in support of the rules. Moreover, uniformity of procedure would be desirable.

We therefore recommend that all state courts and legislatures be asked to adopt rules for discovery similar to those of the new federal rules.

Committee Members Assenting:
Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (40):

Ross (Ariz.)	Crossman (Nebr.)
Harrison (Calif.)	Branch (N. H.)
Schatz (Conn.)	Botts (N. M.)
Morford (Del.)	Tillett (N. C.)
Long (Fla.)	Cheadle (Okla.)
Hilkey (Ga.)	Rossman (Ore.)
Leviton (Ill.)	Hart (R. I.)
Bloss (Kan.)	Philip (S. D.)
Rouse (Ky.)	Graves (Tex.)
Herold (La.)	Shields (Vt.)
Oakes (Me.)	Heath (Va.)
Dickerson (Md.)	Beals (Wash.)
Davis (Mass.)	Mack (Wis.)
Somerville (Miss.)	

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting (2):

Long (Mich.)	Caffrey (N. J.)

9. *Cross-Examination to One's Own Case*

The orthodox mode of examination, under which jury trial was practised for centuries, allowed the cross-examiner to ask the witness, when first called, about any matter (known to him) relevant to any part of the issues, including the cross-examiner's own case. But the local practice to the contrary in Pennsylvania was sanctioned as a federal court rule, a century ago, in an opinion of Justice Story; and the practice thus sanctioned spread later to a majority of the state courts.

This so-called "American rule"

(which should not be called American but Pennsylvanian) seemed to have a logical justification in its distinction allotting (1) to the cross-examination, only matters weakening the direct examination and (2) to the opponent's recall of the witness for direct examination, matters supporting his own case. But this distinction has proved theoretical rather than practical. The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the opinion rule) leading in trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeals on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

In Louisiana in the new Code of Criminal Procedure (1928) the orthodox rule has been restored, as also in the new Federal Rules for Civil Procedure (Rule 44) as proposed by the Advisory Committee to the Supreme Court (though the Court itself has not accepted it).

We recommend that the rule allowing questions upon any part of the issues known to the witness as embodied in the federal rule proposed be adopted in all states not now practising it. (Text set forth in Appendix.)

Committee Members Assenting:

Judges Otis, Treanor; Messrs. Dodge, Wigmore.

Committee Members Dissenting:

Judge Inglis.

Advisory Members Assenting (29)

Ross (Ariz.)	**Somerville (Miss.)**
Schatz (Conn.)	**Crossman (Nebr.)**
Long (Fla.)	**Branch (N. H.)**
Hilkey (Ga.)	**Botts (N. M.)**
Rouse (Ky.)	**Tillett (N. C.)**
Herold (La.)	**Cheadle (Okla.)**
Oakes (Me.)	**Rossman (Ore.)**
Davis (Mass.)	**Graves (Tex.)**
Long (Mich.)	**Heath (Va.)**
Finkelnburg (Minn.)	**Beals (Wash.)**

At Large:

Cherry (U. Minn.)	***Morgan* (Harv. U.)**
Leflar (U. Ark.)	**Strahorn (U. Md.)**
Hale (U. So. Cal.)	**Gausewitz (U. Wis.)**
McCormick (N'western U.)	**Schnader (Pa.)**
	Harno (U. Ill.)

Advisory Members Dissenting (13)

Harrison (Calif.)	**Caffrey (N. J.)**
Morford (Del.)	**Hart (R. I.)**
Leviton (Ill.)	**Philip (S. D.)**
Bloss (Kan.)	**Shields (Vt.)**
Dickerson (Md.)	**Mack (Wis.)**
Clausen (Mo.)	

At Large:

Maguire (Harv. U.)	**Wilson (Corn. U.)**

Advisory Members voting for the Supreme Court Amendment (2)

At Large

Hale (Ill.)	**Tracy (U. Mich.)**

10. Psychiatric Examination of Witnesses in Sex Cases

The penalties for sex crimes are very severe—justly so, in most cases. But the very severity of the penalty calls for special procedural precautions to protect an innocent accused from condemnation by unreliable testimony.

Modern psychiatry has already made its bow and been introduced properly to the criminal courts, by way of examining the mental condition of the accused. But there is also a necessity for invoking its aid for a certain type of witness in a certain class of criminal charges.

Today it is *unanimously* held (and we say "unanimously" advisedly) by experienced psychiatrists that the complainant woman in a sex offense should *always* be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases. (See some of the statements of eminent specialists collected at sec. 924*a* of the 1934 Supplement to Wigmore's Treatise on Evidence.)

The imperative nature of this measure is further emphasized by the legal fact that the penalty for intercourse with a girl under 16 years ((so-called "statutory rape") is extremely heavy—sometimes 20 years; in one state, life imprisonment! Thus the

erotic imagination of an abnormal child of attractive appearance may send a man to the penitentiary for life. The warnings of the psychiatric profession, supported as they are by thousands of observed cases, should be heeded by our profession.

We recommend that in all charges of sex offenses, the complaining witness be required to be examined before trial by competent psychiatrists for the purpose of ascertaining her probable credibility, the report to be presented in evidence.

Committee Members Assenting

Judges Inglis, Otis, Treanor, Messrs. Dodge, Wigmore

Advisory Members Assenting (42):

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Caffrey (N. J.)
Long (Fla.)	Botts (N. M.)
Hilkey (Ga.)	Tillett (N. C.)
Leviton (Ill.)	Cheadle (Okla.)
Rouse (Ky.)	Rossman (Ore.)
Herold (La.)	Philip (S. D.)
Oakes (Me.)	Graves (Tex.)
Dickerson (Md.)	Shields (Vt.)
Davis (Mass.)	Heath (Va.)
Long (Mich.)	Beals (Wash.)
Finkelnburg (Minn.)	Mack (Wis.)
Somerville (Miss.)	

At Large.

Cherry (U. Minn.)	Wilson (Colo. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting (2):

Bloss (Kan.) Hart (R. I.)

11. Privilege for Attorney and Client Communications

The privilege for communications between attorney and client has always been accepted as necessary to ensure freedom of consultation and as not causing any substantial obstruction to the investigation of facts. It is not an obstruction, because in civil cases the party can always be required to take the stand and disclose his knowledge and also to make discovery before trial, and his documents cannot be kept from disclosure merely by handing them to his attorney; and because in criminal cases the accused's privilege gives him the option not to testify, so that the attorney's knowledge of the accused's admission (if any) is no more of an obstruction than the privilege already is, and if the attorney were compellable to disclose them the privilege would virtually be evaded.

But there is one important situation (and of late years not an infrequent one) where this privilege does become a positive obstruction. That is the situation where the attorney has acted as a go-between or agent in the perpetration of a crime or fraud, or in suppressing the means of its discovery. Can anything be done here to remove the public impression that our law of evidence is impotent to investigate effectually the facts in such a situation?

This question was made the subject of an earnest proposal for improvement by an eminent practitioner and former judge of New York State, Samuel Seabury, in his address before the American Law Institute at the 1932 Annual Meeting. The speaker solemnly asserted the privilege in such cases to be "a reflection upon the legal profession as a whole, which it should in my judgment exert itself to make impossible."

In view of the eminent experienced source of this plea for improvement of the law, we believe that it cannot be ignored by this Association.

Judge Seabury's proposal (though not formulated in the precise terms of a statute) was that the privilege should cease when the attorney's "dealings have been with public officials or in relation to public affairs." This form of proposal was of course due to his recent investigation into charges affecting public officials and public affairs.

But the scope of such a proposal, if feasible, may well be larger. The ramifications of organized crime extend beyond "public affairs" and include the notorious practices of

"rackets" and "gangsterism," and a certain type of lawyer has usually been found among those syndicates.

So the question would be whether it is feasible to preserve the general privilege while defining an exception to cover the above situations.

The general privilege has always been understood as having an exception for communications made in the perpetration of a crime or fraud or in a conspiracy to commit one. The desired extension of that exception would deny the privilege where the attorney had knowledge (or ground to believe) that the client was contemplating the commission of a crime (as held in State *vs.* Ross, 312 Mo. 512) or was attempting to suppress the discovery of a crime already committed. What would be needed here would be to provide flexibility to the privilege by allowing the court to require disclosure where on the facts such knowledge by the attorney might be presumed to exist.

We recommend that the Section on Criminal Law be requested to study and report on this subject, with a draft statute if deemed feasible.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs Dodge, Wigmore.

Advisory Members Assenting (42):

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Botts (N. M.)
Long (Fla.)	Tillett (N. C.)
Hilkey (Ga.)	Cheadle (Okla.)
Leviton (Ill.)	Rossman (Ore.)
Bloss (Kan.)	Hart (R. I.)
Rouse (Ky.)	Philip (S. D.)
Herold (La.)	Graves (Tex.)
Oakes (Me.)	Shields (Vt.)
Dickerson (Md.)	Heath (Va.)
Davis (Mass.)	Beals (Wash.)
Finkelnburg (Minn.)	Mack (Wis.)
Somerville (Miss.)	

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Straborn (U. Md.)	

Advisory Members Dissenting (1):

Long (Mich.)

12. Communications between Physician and Patient

The privilege for communications between physician and patient was not recognized at common law, but now exists by statute in about half the states.

It is rarely invoked or applicable except in the following three classes of issues: (1) mental capacity of a testator; (2) nature of a personal injury; (3) nature of an insured person's health. The purpose of the statute was mainly to conform to the physician's ethical canon of secrecy, on the theory that the personal privacy of the patient's body was entitled to be respected. And yet the odd thing about the privilege is that it is usually invoked to protect from disclosure a bodily condition which has not been kept secret at all from friends and neighbors, and which only the tribunal of justice must not learn about. In personal injury claims particularly is the privilege ridiculously incongruous; for the plaintiff comes into court alleging a specific injury and then refuses to let the court listen to testimony concerning that injury.

The amount of truth that has been suppressed by this statutory rule must be extensive. We believe that the time has come to consider the situation. We do not here recommend the abolition of the privilege, but we do make the following two recommendations:

(A) The North Carolina statute allows a wholesome flexibility. Its concluding paragraph reads: "Provided that the presiding judge of a superior court may compel such a disclosure if in his opinion the same is necessary to the proper administration of justice." This statute has needed but rare interpretation. It enables the privilege to be suspended when suppression of a fraud might otherwise be aided.

We recommend the enactment of the North Carolina proviso.

(B) In malpractice suits against a

medical practitioner (which are of late apparently increasing in number) the plaintiff is seriously handicapped in obtaining competent testimony from other practitioners.

The reason for this handicap is that a universal medical canon of ethics (usually contained in the local medical society's constitution) forbids a member to testify in court against any other member of the profession. The canon does not use those clear words; but it is usually so understood and practised. More than that, we are informed that in certain forms of contract of insurance, obtainable by a medical practitioner to cover his liability for malpractice, a clause appears avoiding the contract if the insured takes the stand against another practitioner. Such a clause is of course an indefensible attempt to *suppress evidence; it would probably* be held void if the issue should be raised; and it might be deemed to be *in contempt of court.*

However that may be, the handicap for honest plaintiffs suing incompetent medical men is a serious one. For in most states there has of late been established a rule that in malpractice suits the plaintiff *must* adduce, on the technical nature of the injury, a qualified medical expert (and not go to the jury on lay testimony alone). The plaintiff is thus in this dilemma, *viz.*, that he *must* in law have that testimony but in medicine he *cannot get it*—at least from any practitioner who observes his professional canon. In Rhode Island, not long ago (Coleman *vs.* MacCarthy, 1933, 53 R I. 266), the plaintiff complained to the court of being in this dilemma, but got no satisfaction.

We recommend that the American Medical Association be requested to examine into the facts, with a view to effecting a solution of this deadlock, which is no credit to either profession.

In view of the constant use of medical testimony in a variety of issues, we believe that these two proposals are important for consideration

Committee Members Assenting:
Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (39):

Ross (Ariz.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Botts (N. M.)
Long (Fla.)	Tillett (N. C.)
Hilkey (Ga.)	Cheadle (Okla.)
Leviton (Ill.)	Rossman (Ore.)
Bloss (Kan.)	Hart (R. I.)
Rouse (Ky.)	Philip (S. D.)
Herold (La.)	Graves (Tex.)
Dickerson (Md.)	Shields (Vt.)
Davis (Mass.)	Heath (Va.)
Somerville (Miss.)	Beals (Wash.)
Clausen (Mo.)	Mack (Wis.)

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	
Leflar (U. Ark.)	Gausewitz (U. Wis.)
Morgan (Harv. U.)	Schnader (Pa.)
Strahorn (U. Md.)	Harno (U. Ill.)

Advisory Members Dissenting:
Finkelnburg (Minn.)

Advisory Members voting for (A) only:
Oakes (Me.)

Advisory Members voting for (B) only (2):
Harrison (Calif.) Long (Mich.)

13. *Privilege against Self-Crimination*

Much has been said of late years, especially in lay publications, in criticism of the privilege against self-crimination

(A) But, without taking the time and space to set forth our reasons, we do not believe that the time has yet come for our profession to consider seriously the abolition of the privilege by constitutional amendment. We do however think it fit to mention one of the reasons that count against such a proposal, *viz.*, the vehement and sometimes unscrupulous conduct of prosecutions by district attorneys in many communities. Usually young and zealous, moved largely by the desire to make a high record of convictions and thus confirm and assure the electoral choice of their constituents, they conduct the prosecution in a manner which reminds one rather of the traditional methods of the old régime in the Continental countries of Europe rather than of a democracy of liberties and

fair trials. So until a decided change for the better is observable in the communities where such an attitude prevails, it is hardly worth while to consider removing the constitutional protection given to an accused by the privilege.

We therefore do not recommend its abolition.

(B) But the less extreme proposal has often been pressed, *viz.*, that after claim of the privilege by the accused in failing to take the stand in his own behalf, the prosecuting counsel be allowed to comment on that failure and to indicate to the jury that they may draw inferences from it.

This measure was introduced in Ohio, by constitutional amendment in 1912; and also very recently in California by constitutional amendment. Whether it could be done by statute, while leaving the privilege in the Constitution, is of course still open to speculation. In Vermont a recent statute has so provided; but in another state where this had been attempted (South Dakota) it has proved futile (*State vs.* Wolfe, 1936, *64 S.D.—, 266 N.W. 116; holding St.* 1927, *c.* 93, unconstitutional). In England, the judge, in Iowa the prosecuting attorney, and in New Jersey both judge and prosecuting attorney, may comment.

However, the experiments in Ohio and South Dakota and the other states point a plain lesson to us. (It was James Lord Bryce who told us that our country of 48 states was the greatest legislative experimental laboratory in the world.) The experience in the other three jurisdictions would also be valuable. The chief argument against this measure of allowing comment to be made is that it would practically force the accused to take the stand and thus would expose him to a cross-examination on his possible bad life record, which might alone suffice unjustly to convict him. Now this argument is based on a speculative apprehension of what *would* or *might* follow. But why speculate, when we have at hand a laboratory where the matter has been under long experimentation? In Ohio this measure has been the established law for a quarter of a century; in South Dakota it was in effect for some eight years, and for other periods in other states. Why not send there and learn the facts that have developed from the experiments?

We recommend that the Section on Criminal Law be directed to arrange for a thorough study to be made of the experience in all the above-named jurisdictions where the law allows the judge or the prosecuting attorney to comment on the accused's failure to take the stand.

Committee Members Asserting:

Judges Inglis, Otis, Treanor, Messrs. Dodge, Wigmore

Advisory Members Assenting (37):

Ross (Ariz.)	Branch (N. H.)
Harrison (Calif.)	Botts (N. M.)
Schatz (Conn.)	Tillett (N. C.)
Morford (Del.)	Cheadle (Okla.)
Long (Fla.)	Rossman (Ore.)
Hilkey (Ga.)	Hart (R. I.)
Bloss (Kan.)	Philip (S. D.)
Rouse (Ky.)	Graves (Tex.)
Davis (Mass.)	Shields (Vt.)
Somerville (Miss.)	Heath (Va.)
Clausen (Mo.)	Beals (Wash.)
Crossman (Nebr.)	Mack (Wis.)

At Large

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Schnader (Pa.)
Morgan (Harv. U.)	Harno (U. Ill.)
Straborn (U. Md.)	

Advisory Members Dissenting (2):

Oakes (Me.)	Finkelnburg (Minn.)

Advisory Members Dissenting from (B) only (4):

Levitan (Ill.)	Dickerson (Md.)
Herold (La.)	Long (Mich.)

Pursuant to the recommendation with which the Committee closes, President Vanderbilt requested Chairman Rollin Perkins of the Criminal Law Section to survey, by questionnaire, the judges and attorneys in the five states, *viz.*, California, Iowa, New Jersey, Ohio, and Vermont, in which there has been experience as to

allowing comment on the failure of the accused to testify. The full figures obtained in answer to that questionnaire will appear later in the Journal of Criminal Law and Criminology, but at this point will be inserted only a summary statement showing the result of the experience of those five states, as follows:

178 judges answered the questionnaire, in which the questions were as follows: Does the defendant take the stand in felony trials? If the defendant does not take the stand in felony cases, is this fact commented upon by the prosecuting attorney? The effect which such comment has upon the jury is probably .....? Does the threat of such comment cause the defendant to take the stand when otherwise he would not do so? Where a defendant has been induced to take the stand because of the threat of such comment, has a past criminal record been exposed on cross-examination? Has the prosecuting attorney been distinctly less diligent in the search for evidence of guilt than he would have been had such comment been forbidden?

The replies of the judges show that 93.65 per cent regard comment as an important and proper aid in the administration of justice, while only 2.65 per cent consider it definitely unfair to the accused (the others listing it as relatively unimportant.) Over 85 per cent say that it seldom if ever causes the prosecuting attorney to be less diligent in his search for evidence of guilt. The answers of the judges are most important, partly because of the lack of any prejudice in their point of view and partly because many of them have had experience both as prosecuting officers and as defense counsel before being elevated to the Bench.

14. Burden of Proof

Much has been printed, in recent discussion, about the theory of burden of proof and the refined technicalities by which the parties are controlled and the jury instructed in the application of the theory.

All practitioners and judges will probably agree that the jury in too many trials gives no attention to these instructions, so that they are futile in their main purpose, and that the varied forms of instruction have been argued about, only too often, on the mere hope of getting error into the record. On the other hand, there has seemed no logical escape from dealing with the theory somehow or other in the instructions.

What the subject needs is a deliberate study of the entire subject, with a view to the feasibility of formulating a simplified and readily understandable set of rules that can be used to control the parties and guide the jury.

We recommend that the Association of American Law Schools be requested to appoint a committee charged with studying the needs and the possibilities of a simplified set of rules for defining burden of proof and presumptions.

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore

Advisory Members Assenting (44):

Ross (Ariz.)	Somerville (Miss.)
Harrison (Calif.)	Clausen (Mo.)
Schatz (Conn.)	Crossman (Nebr.)
Morford (Del.)	Branch (N. H.)
Long (Fla.)	Caffrey (N. J.)
Hilkey (Ga.)	Botts (N. M.)
Leviton (Ill.)	Tillett (N. C.)
Bloss (Kan.)	Cheadle (Okla.)
Rouse (Ky.)	Rossman (Ore.)
Herold (La.)	Hart (R. I.)
Oakes (Me.)	Philip (S. D.)
Dickerson (Md.)	Graves (Tex.)
Davis (Mass.)	Shields (Vt.)
Long (Mich.)	Heath (Va.)
Finkelnburg (Minn.)	Beals (Wash.)

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	
Leflar (U. Ark.)	Glusewitz (U. Wis.)
Morgan (Harv. U.)	Schnader (Pa.)
Strahorn (U. Md.)	Harno (U. Ill.)

Advisory Members Dissenting:

None.

15. Proof of Foreign Law

By a curious anomaly of usage, inherited from the tradition of insular England, any state other than the state of the forum is for our country a "foreign" state. Thus every one of our sister states in the union is a "foreign" state. So when that "foreign" law becomes material, it is not (at common law) *judicially* noticed, and as an ordinary "fact" it is to be evidenced to the jury and decided by them.

In England this double rule led to little inconvenience, for the occasions in which the law of France, Germany, or Italy came into issue were relatively few. But in this union of 50 independent jurisdictions, each one "foreign" to the other (though not to the federal courts), and each one's law constantly coming into issue in extra-state intercourse, the traditional rule became anomalous. In the first place, it is comparatively a simple matter to invoke judicial notice of a sister state's law in the usual manner, *i. e.*, by producing the statutes and decisions of that state for information of the court. And, in the second place, the proof of such law to the jury is unsatisfactory, in substituting the usual 12 laymen for the law-trained judge.

Dissatisfaction with this double rule started a decade ago. Not only in the United States, but also in Canada, a dozen or more jurisdictions have provided by statute that the law of a sister state (Manitoba includes even a state of the United States) shall be subject to judicial notice. Meanwhile, several Supreme Courts had accepted the view that this "foreign" law is to be evidenced to the judge, and not to the jury.

These statutes and rulings not being uniform in details, and the movement having evidently gained progress, the National Conference of Commissioners on Uniform State Laws appointed a committee to formulate a statute which should serve as a uniform text for extending the legislation to other states. A brief and simple Uniform Act, after four years of debate and revision, was adopted unanimously at the 1936 Conference (published in the 1936 Proceedings).

We recommend that the Uniform Act on Judicial Notice of Foreign Law be enacted by all legislatures. (Text set forth in Appendix.)

Committee Members Assenting:

Judges Inglis, Otis, Treanor; Messrs. Dodge, Wigmore.

Advisory Members Assenting (43):

Ross (Ariz.)	Clausen (Mo.)
Harrison (Calif.)	Crossman (Nebr.)
Schatz (Conn.)	Branch (N. H.)
Morford (Del.)	Caffrey (N. J.)
Long (Fla.)	Botts (N. M.)
Hulsey (Ga.)	Tillett (N. C.)
Leviton (Ill.)	Che die (Okla.)
Bloss (Kan.)	Rossman (Ore.)
Rouse (Ky.)	Hart (R. I.)
Herold (La.)	Philip (S. D.)
Oakes (Me.)	Graves (Tex.)
Dickerson (Md.)	Shields (Vt.)
Davis (Mass.)	Heath (Va.)
Long (Mich.)	Beals (Wash.)
Somerville (Miss.)	Mack (Wis.)

At Large:

Cherry (U. Minn.)	Wilson (Corn. U.)
Hale (Ill.)	Hale (U. So. Cal.)
Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	
Leflar (U. Ark.)	Gausewitz (U. Wis.)
Morgan (Harv. U.)	Schnader (Pa.)
Strahorn (U. Md.)	Harno (U. Ill.)

Advisory Members Dissenting:

Finkelnburg (Minn.)

16. Evidence in Trials before a Judge without a Jury

The rules of evidence are designed primarily to meet the necessities of trial by jury. In cases tried by a judge alone they are of much less importance; and rulings there with regard to evidence should not give ground for appeal except where the substantial rights of a party are really affected. The substantial rights of the parties cannot be adversely affected if the judge admits what is really probative evidence, even though its admission may transgress some technical rule. It should be possible to trust him not to give weight to anything that is not material.

It is recommended that a new trial be not granted on account of the alleged wrongful admission of evidence in such case, except in the rare instance where the judge's conclusion is based on evidence really not entitled to probative weight.

Committee Members Assenting:
Judge Treanor; Messrs. Dodge, Wigmore.

Committee Members Dissenting:
Judges Inglis, Otis.

Advisory Members Assenting (19):

Ross (Ariz.)	Clausen (Mo.)
Long (Fla.)	Tillett (N. C.)
Hilkey (Ga.)	Cheadle (Okla.)
Bloss (Kan.)	Rossman (Ore.)
Long (Mich.)	Hart (R. I.)
Finkelnburg (Minn.)	Beals (Wash.)

At Large

Cherry (U. Minn.)	Hale (U. So. Cal.)
Hale (Ill.)	McCormick (N'western U.)
Leflar (U. Ark.)	Harno (U. Ill.)
Strahorn (U. Md.)	

Advisory Members Dissenting (21):

Harrison (Calif.)	Somerville (Miss.)
Schatz (Conn.)	Crossman (Nebr.)
Morford (Del.)	Branch (N. H.)
Leviton (Ill.)	Botts (N. M.)
Rouse (Ky.)	Philip (S. D.)
Oakes (Me.)	Shields (Vt.)
Dickerson (Md.)	Heath (Va.)
Davis (Mass.)	Mack (Wis.)

At Large.

Tracy (U. Mich.)	Gausewitz (U. Wis.)
Morgan (Harv. U.)	Schnader (Pa.)
Wilson (Corn. U.)	

17. *Marital Testimony*

Husband and wife at common law were disqualified to testify for each other and each was privileged not to testify against the other nor to be testified against by the other. The disqualification has long been abolished in all but two or three states. The privilege has been abolished in only a few states; but a tendency to extend the abolition has recently been apparent, not only for civil litigation but in criminal prosecutions.

There is also a distinct privilege for confidential communications between husband and wife, whether parties or not; no state has proposed to change this.

It is recommended that the privilege protecting from being called one against the other be abolished (1) in civil cases, and (2) in criminal cases.

Committee Members Assenting:
Judge Otis, Mr. Wigmore.

Committee Members Dissenting:
Mr. Dodge.

Advisory Members Assenting (23):

Ross (Ariz.)	O'Brian (N. Y.)
Hilkey (Ga.)	Tillett (N. C.)
Herold (La.)	Hart (R. I.)
Dickerson (Md.)	Graves (Tex.)
Davis (Mass.)	Shields (Vt.)
Clausen (Mo.)	Heath (Va.)
Branch (N. H.)	

At Large:

Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Gausewitz (U. Wis.)
Leflar (U. Ark.)	Wickes (U. Tex.)
Strahorn (U. Md.)	Hale (Ill.)
Fegtly (U. Ariz.)	
Hale (U. So. Cal.)	

Advisory Members Dissenting (13):

Harrison (Calif.)	Somerville (Miss.)
Long (Fla.)	Crossman (Nebr.)
Leviton (Ill.)	Philip (S. D.)
Oakes (Me.)	Beals (Wash.)
Long (Mich.)	Finkelnburg (Minn.)

At Large

Cherry (U. Minn.)	Schnader (Pa.)
Wilson (Corn. U.)	

18. *Novel Privileges*

Of recent years, there have appeared on the statute book of several legislatures certain novel privileges of secrecy. Their history has not been traced; but they bear the marks of having been enacted at the instances of certain occupational organizations of semi-national scope. The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications.

The analogies are not convincing (though this is not the place for a demonstration). Moreover, the tendency is an unwholesome one. Yet it threatens to spread not only to other legislatures but to other occupations. The correct tendency would rather be to cut down scope of the existing privileges, instead of to cre-

ate any new ones. We recommend that the legislatures refuse to create any new privileges for secrecy of communications in any occupation; and particularly we recommend against any further recognition of

(A) Privilege for information obtained by *Accountants;*

(B) Privilege for information obtained by *Social Workers;*

(C) Privilege for information obtained by *Journalists.*

Committee Members Assenting.
Judge Otis; Messrs. Dodge, Wigmore

Advisory Members Assenting to (A) (B) (C) (28):

Ross (Ariz.)	Crossman (Nebr.)
Harrison (Calif.)	Branch (N. H.)
Long (Fla.)	Tillett (N. C.)
Hilkey (Ga.)	Hart (R. I.)
Levitan (Ill.)	Philip (S. D.)
Herold (La.)	Graves (Tex.)
Oakes (Me.)	Shields (Vt.)
Davis (Mass.)	Heath (Va.)
Somerville (Miss.)	Beals (Wash.)
Clausen (Mo.)	

At Large:

Maguire (Harv. U.)	Gausewitz (U. Wis.)
Tracy (U. Mich.)	Wickes (U. Tex.)
Hale (U. So. Cal.)	Schnader (Pa.)
McCormick (N'western U.)	Fegtly (U. Ariz.)
	Hale (Ill.)

Advisory Members Assenting to (A) and (B) only:

At Large
Wilson (Corn. U.)

Advisory Members Assenting to (C) only (2):

Dickerson (Md.)	Long (Mich.)

Advisory Members Dissenting on (A) (B) (C) (4).
Finkelnburg (Minn.)

At Large:

Cherry (U. Minn.)	Strahorn (U. Md.)
Leflar (U. Ark.)	

19. Bona Fide Dispute of Facts

One of the notable features that go to increase the technical disputatiousness of trials is the frequent invocation of evidence rules to defeat an opponent for lack of proper evidence, when the objecting party does not really dispute the fact that the opponent is seeking to prove with his inadequate evidence. All parties may be aware that the alleged fact is a fact; and so the trial becomes merely a game of rules, in which one party has lost, in spite of the facts.

This subject was fully examined by the learned professional committee of the Commonwealth Fund, a decade ago. Their report unanimously deprecated that feature of our trial practice. They recommended a general rule whose aim was to restrict and minimize such use of the rules of evidence. The rule they recommended reads as follows.

> "Any rule of evidence need not be enforced if the trial judge, on inquiry made of counsel or otherwise, finds that there is no *bona fide* dispute between the parties as to the existence or non-existence of the facts which the offered evidence tends to prove, even though such fact may be in issue under the pleadings. No error can be assigned or predicated upon the violation of any rule of evidence, either at law or in equity, when it appears from statements of counsel or from other evidence in the case [or is shown in any other lawful way], that there is no *bona fide* dispute between the parties as to the fact sought to be proved or disproved by the offered evidence, even though such fact may be in issue under the pleadings."

We recommend the adoption of the above principle, subject to a possible revision to omit the bracketed clause

Committee Members Assenting:
Judge Otis, Messrs. Dodge, Wigmore.

Advisory Members Assenting (32):

Ross (Ariz.)	Crossman (Nebr.)
Long (Fla.)	Branch (N. H.)
Hilkey (Ga.)	O'Brian (N. Y.)
Levitan (Ill.)	Tillett (N. C.)
Herold (La.)	Hart (R. I.)
Oakes (Me.)	Philip (S. D.)
Dickerson (Md.)	Graves (Tex.)
Finkelnburg (Minn.)	Heath (Va.)
Somerville (Miss.)	Beals (Wash.)
Clausen (Mo.)	

At Large:

Cherry (U. Minn.)	McCormick (N'western U.)
Maguire (Harv. U.)	Gausewitz (U. Wis.)
Tracy (U. Mich.)	Wickes (U. Tex.)
Leflar (U. Ark.)	Schnader (Pa.)
Strahorn (U. Md.)	Fegtly (U. Ariz.)
Wilson (Corn. U.)	Hale (Ill.)
Hale (U. So. Cal.)	

Advisory Members Dissenting (3):
Harrison (Calif.) Shields (Vt.)
Davis (Mass.)

20. Hearsay Rule Codified

Experience indicates that adoption of the "Massachusetts hearsay statute" (Proposal No. 5 herein), either in its original form or in an improved form, will proceed slowly. Meanwhile state and federal courts will continue to deal extensively with the old-fashioned exceptions to the hearsay rule. These exceptions contain a number of anomalous special limitations, so that the present structure lacks both simplicity and symmetry. It would be worth while to study the present phrasing of all the hearsay exceptions, with an eye toward making them a better fit for a common formula. In a way, this might expedite adoption of the "Massachusetts statute," because the placing of the numerous present exceptions more completely on a common base would naturally suggest the desirability of fusing the little exceptions into a single big one.

It is recommended that a committee be appointed, or that some other body be requested, to examine all the exceptions to the hearsay rule with a view to codifying or formulating them in a model statute and to general improvement in the use of the rule.

Committee Members Assenting:
Judge Otis; Messrs. Dodge, Wigmore.

Advisory Members Assenting (29):

Ross (Ariz.)	Crossman (Nebr.)
Hilkey (Ga.)	Branch (N. H.)
Leviton (Ill.)	O'Brian (N. Y.)
Herold (La.)	Tillett (N. C.)
Oakes (Me.)	Philip (S. D.)
Dickerson (Md.)	Graves (Tex.)
Finkelnburg (Minn.)	*Shields (Vt.)*
Somerville (Miss.)	Heath (Va.)
Clausen (Mo.)	Beals (Wash.)

At Large:

Maguire (Harv. U.)	McCormick (N'western U.)
Tracy (U. Mich.)	Wickes (U. Tex.)
Leflar (U. Ark.)	Schnader (Pa.)
Strahorn (U. Md.)	Fegtly (U. Ariz.)
Wilson (Corn. U.)	Hale (Ill.)
Hale (U. So. Cal.)	

Advisory Members Dissenting (6):

Harrison (Calif.)	Davis (Mass.)
Long (Fla.)	Hart (R. I.)

At Large

Cherry (U. Minn.)	Gausewitz (U. Wis.)

Respectfully submitted,

ROBERT G. DODGE, Boston, Mass.
MERRILL E. OTIS, Kansas City, Mo.
ERNEST A. INGLIS, Hartford, Conn.
WALTER E. TREANOR, Indianapolis, Ind.
JOHN H. WIGMORE, *Chairman*, Chicago, Ill.

ASSOCIATE AND ADVISORY COMMITTEE

Alabama	MILTON H. LANIER, Huntsville
Arizona	HENRY D. ROSS, Phœnix
Arkansas	THOMAS GAUGHAN, Camden
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Colorado	ROBERT W. STEELE, Denver
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Delaware	JAMES R. MORFORD, Wilmington
Dist. of Columbia	JAMES J. HAYDEN, Washington
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Idaho	WILLIAM F. MCNAUGHTON, Cœur d'Alene
Illinois	CHARLES LEVITON, Chicago
Indiana	HENRY M. DOWLING, Indianapolis
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Kentucky	SHELLEY D. ROUSE, Covington

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Maine	Raymond S. Oakes, Portland
Maryland	Edwin T. Dickerson, Baltimore
Massachusetts	Harold W. Davis, Boston
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Mississippi	Robert N. Somerville, Cleveland
Missouri	E. W. Clausen, St. Louis
Montana	W. S. Hartman, Bozeman
Nebraska	Raymond M. Crossman, Omaha
Nevada	E. F. Lunsford, Reno
New Hampshire	Oliver W. Branch, Manchester
New Jersey	Edwin C. Caffrey, South Orange
New Mexico	C. M. Botts, Albuquerque
New York	John Lord O'Brian, Buffalo
North Carolina	C. W. Tillett, Jr., Charlotte
North Dakota	W. H. Hutchinson, Wahpeton
Ohio	W. P. Barnum, Youngstown
Oklahoma	John B. Cheadle, Norman
Oregon	George Rossman, Salem
Pennsylvania	William A. Schnader, Philadelphia
Rhode Island	Henry C. Hart, Providence
South Carolina	William H. Grimball, Charleston
South Dakota	George Philip, Rapid City
Tennessee	John A. Chambliss, Chattanooga
Texas	Ireland Graves, Austin
Utah	W. H. Leary, Salt Lake City
Vermont	Charles A. Shields, St. Johnsbury
Virginia	James Elliott Heath, Norfolk
Washington	Walter B. Beals, Olympia
West Virginia	Carney M. Layne, Huntington
Wisconsin	Edwin S. Mack, Milwaukee
Wyoming	Harry P. Ilsley, Newcastle
Philippine Islands	Guillermo B. Guevara, Manila
At Large	Wilbur H. Cherry, Minneapolis, Minn
	Samuel M. Fegtly, Tucson, Ariz
	Alfred L. Gausewitz, Madison, Wis
	William B. Hale, Chicago, Ill
	William G. Hale, Los Angeles, Calif
	Mason Ladd, Iowa City, Iowa
	Robert A. Loeffler, Fayetteville, Ark.
	Charles T. McCormick, Chicago, Ill
	John Maguire, Cambridge, Mass.
	Harold R. Medina, New York City
	Edmund M. Morgan, Cambridge, Mass
	John S. Strahorn, Jr., Baltimore, Md
	John E. Tracy, Ann Arbor, Mich
	Joseph A. Wickes, Austin, Tex.
	Lyman P. Wilson, Ithaca, N. Y

APPENDIX

TEXT OF STATUTES REFERRED TO IN THE REPORT

Proposal No. 1. Survivor's Testimony (Commonwealth Fund Committee Report, page 35)

No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement

of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.

Proposal No. 2. Business Records

(A) *Commonwealth Fund Committee's Act* (*Report*, page 63)

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind.

(B) *Uniform Act* (Commissioners' Proceedings 1936, page 351)

Uniform Business Records as Evidence Act

Be it enacted, etc. (use the proper enacting clause for the state):

Section 1. (Definition.) The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

Sec. 2. (Business Records.) A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission.

Sec. 3. (Uniformity of Interpretation.) *This act shall be so interpreted* and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. 4. (Short Title.) This act may be cited as the Uniform Business Records as Evidence Act.

Sec. 5. (Repeal.) All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

Sec. 6. (Time of Taking Effect.) This act shall take effect .....

(C) *Illinois Draft* (XXXII Ill. L. Rev. 334 (1937))

Section 1. The term "business" shall include the operation of institutions, every kind of profession, occupation, or calling, whether or not carried on for profit. The term "record" shall include any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, condition, occurrence or event, including any transfer of cash. The term "record" shall include the records made by or for a party to the suit, and the records made by or for any third person not a party to the suit.

Sec. 2. Any record shall, in so far as relevant, be competent evidence if any person who is familiar with the regular course of the business, even though a party or interested person, testifies to its identity, the mode of its preparation, and that it appears that the record was made in the regular course of the business at or near the time of the act, transaction, condition, occurrence, or event. All other circumstances of the making of such record, including lack of personal knowledge of the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility.

Sec. 3. Any record of a deceased person shall, in so far as relevant, be competent evidence if the personal representative of such deceased person shall testify that such record was found in the effects of the deceased, that the record is the same as at the

time such record was found in the effects of the deceased, and that, in the knowledge of such personal representative, there are no witnesses capable of testifying to the identity of such record, the mode of its preparation, and that such record was made in the regular course of the business at or near the time of the act, transaction, condition, occurrence, or event. The personal representative shall testify that he has no knowledge or information indicating that the record was not made in the regular course of business at or near the time of the act, transaction, condition, occurrence, or event.

Sec. 4. The absence of an entry regarding any act, transaction, condition, occurrence, or event in any record where it would have regularly been recorded had it taken place, shall be received as competent evidence that no such act, transaction, condition, occurrence, or event did take place.

Proposal No. 4 EXPERT TESTIMONY (Uniform Laws Conference, 1937 Proceedings)

A UNIFORM ACT EMPOWERING THE COURT TO APPOINT EXPERT WITNESSES IN CIVIL AND CRIMINAL PROCEEDINGS, PROVIDING FOR CONFERENCES AND JOINT REPORTS OF EXPERT WITNESSES, AND THE COMPENSATION OF EXPERT WITNESSES

Be it enacted, etc.

Section 1. (Court Empowered to Appoint Expert Witnesses.) Whenever, in a civil or criminal proceeding, issues arise upon which the Court deems expert evidence is desirable, the Court, on its own motion, or on the request of either the state or the defendant in a criminal proceeding, or of any party in a civil proceeding, may appoint one or more experts, not exceeding three on each issue, to testify at the trial.

Sec. 2. (Notice When Called by Court.) The appointment of expert witness by the Court shall be made only after reasonable notice to the parties to the proceeding of the names and addresses of the experts proposed for appointment.

Sec. 3. (Notice When Called by Parties.) Unless otherwise authorized by the Court, no party shall call a witness, who has not been appointed by the Court, to give expert testimony unless that party has given the Court and the adverse party to the proceeding reasonable notice of the name and address of the expert to be called.

Sec. 4. (Agreement on Expert Witnesses by Parties.) Before appointing expert witnesses, the Court may seek to bring the parties to an agreement as to the experts desired, and, if the parties agree, the experts so selected shall be appointed.

Sec. 5. (Inspection and Examination of Subject Matter by Experts.) Expert witnesses appointed by the Court shall, at the request of the Court or of any party, make such inspection and examination of the person or subject matter committed to them as they deem necessary for the full understanding thereof and such further reasonable inspection and examination as any party may request. Reasonable notice shall be given to each party of the proposed inspection and examination of persons, things, and places, and each party shall be permitted to be represented at such inspection and examination. Experts called by the Court or by the parties in the proceeding shall be permitted access to the persons, things, or places under investigation for the purpose of inspection and examination.

Sec. 6. (Report by Experts and Filing Thereof.) The Court may require each expert it has appointed to prepare a written report under oath upon the subject he has inspected and examined. This report shall be placed on file with the clerk of the court at such time as may be fixed by the Court and be open to inspection by any party. By order of the Court, or on the request of any party, the report shall be read, subject to all lawful objections as to the admissibility of the report or any part thereof, by the witness at the trial.

Sec. 7. (Conference and Joint Report by Expert Witnesses.) The Court may permit or require a conference before the trial on the part of some or all of the expert witnesses, whether summoned by the Court or the parties or both; and two or more

of them may unite in a report which may be introduced at the trial by any party or by order of the Court, subject to all lawful objections as to the admissibility of the report or any part thereof.

Sec. 8. (Expert Witnesses Called to Testify by Court or Parties.) At the trial the Court or any party may call any expert witness appointed by the Court. The fact that he has been appointed by the Court shall be made known to the jury, and he shall be subject to cross-examination by any party on his qualifications and the subject of his testimony. Any party to the proceeding may also call other expert witnesses, subject to the provision of Section 3, but the Court may impose reasonable limitations upon the number of witnesses so called.

Sec. 9. (Examination of Experts.) (1) An expert witness may be asked to state his inferences, whether these inferences are based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which these inferences are based.

(2) An expert witness may be required, on direct or cross-examination, to specify the data on which his inferences are based.

Sec. 10. (Compensation of Expert Witnesses.) The compensation of expert witnesses appointed by the Court shall be fixed by the Court at a reasonable amount. In criminal proceedings it shall be paid by the [county] under the order of the Court, as a part of the costs of the action. In civil proceedings the compensation of experts appointed by the Court shall, after it has been fixed by the Court, be paid in equal parts by the opposing litigants to the clerk of the Court at such time as the Court shall prescribe, and thereafter assessed as costs of the suit. The fee of an expert witness called by a party but not appointed by the Court shall be paid by the party by whom he was called, and the amount of such fee shall be disclosed if requested upon cross-examination. The receipt by any witness appointed by the Court of any compensation other than that fixed by the Court, and the payment of, or the offer or promise by any person to pay such other compensation shall be unlawful.

Sec. 11. (Uniformity of Interpretation.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. 12. (Severability.) If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Sec. 13. (Short Title.) This act may be cited as the Uniform Expert Testimony Act.

Sec. 14. (Repeal.) All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

Sec. 15. (Time of Taking Effect.) This act shall take effect.....

Proposal No. 5 Deceased Persons' Statements (Commonwealth Fund Committee's Report, page 49)

A declaration, whether written or oral, of a person deceased, insane, or otherwise unavailable, shall not be excluded as hearsay if the trial judge shall first find as a fact (1) either that the declarant is dead or insane or that after due diligence he cannot be produced in court and his deposition cannot be taken; (2) that the declaration was made; and (3) that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

Proposal No. 6. Certified Copies (Federal Rules of Civil Procedure, Rule 45)

Rule 45. Proof of Official Record

(a) (Authentication of Copy.) An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office

in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) (Proof of Lack of Record.) A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) (Other Proof.) This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute, or by the rules of evidence at common law.

Proposal No. 9. Cross-Examination to One's Own Case (Federal Rules of Civil Procedure, Rule 44, par. b)

A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. [Except as stated in the last preceding sentence, any witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action.]

(The bracketed sentence was rejected by the Supreme Court.)

Proposal No. 15. Judicial Notice of Foreign Law

Uniform Act (Commissioners' Proceedings 1936, page 357)

Be it enacted, etc. (use the proper enacting clause for the state):

Section 1. (Judicial Notice.) Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

Sec. 2. (Information of the Court.) The Court may inform itself of such laws in such manner as it may deem proper, and the Court may call upon counsel to aid it in obtaining such information.

Sec. 3. (Ruling Reviewable.) The determination of such laws shall be made by the Court and not by the jury, and shall be reviewable.

Sec. 4. (Evidence as to Laws of Other Jurisdictions.) Any party may also present to the trial court any admissible evidence of such laws; but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

Sec. 5. (Foreign Country.) The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the Court, but shall not be subject to the foregoing provisions concerning judicial notice.

Sec. 6. (Interpretation.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. 7. (Short Title.) This act may be cited as the Uniform Judicial Notice of Foreign Law Act.

Sec. 8. (Repeal.) All acts or parts of acts inconsistent with the provisions of this act, are hereby repealed.

Sec. 9. (Time of Taking Effect.) This act shall take effect.....

REPORT

OF THE

COMMITTEE ON SIMPLIFICATION AND IMPROVEMENT OF APPELLATE PRACTICE

To the Section of Judicial Administration:

In dealing with the problems involved in this report, the active members of the committee have had the benefit of a great deal of thought and attention on the part of the Advisory members, most of whom submitted comprehensive suggestions in writing. While unanimity of views as to details could not be expected, it is believed that the proposals set forth herein represent the consensus of opinion of most of the Advisory as well as of the active members of the committee.

General Purpose of the Committee

Simplification and improvement of appellate practice in the United States might be sought through the adoption of uniform rules in the various jurisdictions. The new federal rules have already provided a modernized uniform system of procedure for all the federal districts, and they deal with many features of appellate practice. Those rules could easily be supplemented for state use by adding whatever further provisions might be necessary to cover the matters not now included. Such a system of uniform practice would have much to recommend it.

But mere uniformity is not a matter of primary importance in the administration of justice. There are usually various ways of reaching a desired result, which are often of substantially equal merit, and whether one or another would best meet the need in any state depends quite largely on local conditions, practices and experience.

Of far more vital concern to the profession and to the public is the question of the operating efficiency of the courts. There is much evidence of public dissatisfaction with the standards now prevalent. It is commonly believed that the courts lack the capacity to render the type of prompt, effective and inexpensive service to which the public feels itself entitled. The complaisancy of the legal profession in adhering to traditional forms, its tremendous overemphasis upon procedural technique, and its apparent indifference or hostility to new methods better adapted to the needs of the modern litigant, have raised widespread doubts regarding the fundamental soundness of our judicial system. New agencies, organized as administrative boards and commissions, and employing summary and non-technical methods of procedure, are being proposed as substitutes for the judicial tribunals in which the people are losing confidence.

The seriousness of this situation can hardly be exaggerated. It strikes at the very root of our democratic institutions, all of which rest upon a fundamental faith in the validity of the judicial process.

This is a matter which concerns the legal profession of the entire nation. It is not a local question whether a state shall allow its judicial system to decay. Loss of respect for the courts in one state will inevitably weaken them in others. In our commonwealth of

states each has a heavy stake in the ability of the rest to maintain a government based on law.

The purpose of the committee in presenting the suggestions which follow has been to identify, so far as possible, the more important points of popular dissatisfaction with current methods of appellate review, and to indicate in regard to each the nature of the remedies which appear to be most appropriate and effective. The principles which must be employed to restore public confidence in our judicial institutions, by making the courts more responsive to the needs of the people, are of universal validity, and it is to these principles that the committee has sought to direct the serious attention of the profession. The manner in which they may best be utilized in the several states is in each instance a local problem, with which the committee does not attempt to deal.

Specific Proposals

1. Appeals from Inferior Courts by Trial de novo in Higher Courts

It is common practice to permit appeals from justices of the peace and other inferior courts by way of a trial de novo in a higher court. Frequently this is allowed as a matter of right. This makes it possible in every petty case for a party to be forced into the expense of a superior court trial.

The amount involved in such cases is insufficient to warrant such procedure. If the inferior court trial is so little worthy of respect that it may be completely repudiated at the election of the losing party, the proper cure is a better inferior court, not a second trial in a higher court.

We recommend that appeals from inferior courts by way of full re-trial in a higher court should be avoided as far as possible, by improving the quality of the inferior courts. And we recommend, as a means of obtaining better inferior courts, that the abolition of justice of the peace courts should be seriously considered, substituting therefor municipal courts or courts with wider territorial jurisdiction, properly organized and housed, having trained and salaried judges, competent clerks, office equipment sufficient for keeping proper records, and sitting, so far as practicable, at such times and places as the needs of the community indicate.

2. Pecuniary Limitations upon the Right of Appeal

The review of a civil judgment ought not, in general, to impose an economic burden upon the parties or upon the public out of proportion to the amount or value involved. In accordance with this principle absolute pecuniary limitations are often placed upon the right of appeal.

On the other hand, since our law is largely developed through the decisions of courts, it should be possible to present important questions of law to an appellate tribunal for final determination as precedents, even though they arise in a case involving a small amount. To carry out this principle, all pecuniary limitations are frequently dispensed with.

The ends sought by these two contradictory methods of regulation are not inconsistent, and may both be accomplished by allowing an appeal as of right where more than a designated value or amount is involved, and allowing it only on leave of the reviewing court where less than that value or amount is involved.

We recommend that a pecuniary limit be fixed for all courts, above which an appeal may be taken as of right and below which an appeal may be had only by leave of the reviewing court, on a showing that an important question of law is involved.

3. Jurisdictional Requirements for Appeal

Some act, taken or directed by the appellant, should be required to vest

jurisdiction in the reviewing court. But it should be single, simple, definite and convenient. Since jurisdictional defects are fatal and cannot be cured, the jurisdictional step should be as free as possible from risk of error, and should not depend upon the form or legal sufficiency of any document or upon the performance of any condition precedent.

We recommend that the filing of a simple notice of appeal, or of an application for leave to appeal, or some simple equivalent therefor, be the sole step required to vest jurisdiction in the reviewing court, and that defects in the notice or application shall not affect the jurisdiction. This notice should preferably be filed in the lower court, in order to serve the convenience of the appellant and to constitute a more easily effective notice to the appellee, and the clerk should be required to send a notice by mail to the appellee.

4. Supersedeas Bonds

The supersedeas bond serves the sole purpose of protecting the appellee, and should be no more burdensome than is necessary to accomplish that end. The common requirement of a bond equal to twice the amount of a money judgment operates as a penalty, is of direct benefit chiefly to the surety companies, and is often an insuperable obstacle to a stay which ought to be granted.

We recommend that the supersedeas bond shall be fixed by the Court at such an amount only as will adequately secure to the appellee the full benefit of his judgment, and that such bond may be filed at any time before satisfaction of the judgment, but that the judgment appealed from should not be stayed until the bond is filed.

5. Assignments of Error

Assignments of error serve only two useful purposes. They enable the appellee to determine what portions of the trial court record and proceedings should be incorporated into the appellate record in order to fully safeguard the position he will take on the appeal. They also serve to inform the appellee as to the points relied upon as grounds for reversal.

Very frequently, however, the record on appeal includes the entire proceedings and record of the trial court. In such cases there is no occasion whatever for assignments of error as a basis for making up the appellate record. Being entirely useless at that stage they should be postponed until the appellant announces them in his brief as the points upon which he relies. The appellant's brief should of course be served in time to give the appellee adequate opportunity for preparing his own brief.

There is an additional reason for employing no assignment of error other than the statement of points in the brief when such a course is possible. Assignments of error are often treated by appellate courts as limitations upon the scope of the review, and no questions will be considered unless they are shown to be embraced within the formal assignments, even though they are plainly disclosed by the record, have been clearly raised by the appellant in his brief and argument, and the appellee has had full opportunity to answer them. Technical hazards of this kind should not exist in a modern system of appellate procedure.

We recommend that assignments of error shall be required prior to making up the record on appeal only when the appellant proposes to omit some portions of the proceedings and record of the trial court, and that in other cases errors as well as cross-errors shall be assigned only in the briefs in the form of points relied upon for reversal. This is the method adopted by the new Federal Rules. We also recommend that assignments of error made otherwise than in the briefs shall not constitute limitations upon the scope of review except so far as may be

necessary to protect parties from actual prejudice.

6. Appeals on Short Records

It has already been suggested that appeals involving less than a designated amount or value should be allowed only by leave of the appellate court, on a showing that the case presents an important question or questions of law which ought to be reviewed in order to clarify the law.

If the justification for the appeal is to be the desirability of reviewing such questions, the scope of the appeal ought to be restricted to the purpose for which it is allowed. The record required for such a review would frequently be a full record of the ordinary type, but in a large number of cases a brief statement of facts, settled by the trial judge, would be an entirely adequate basis for the appeal. In exercising its discretion to allow an appeal it would be possible for the Court to direct whether it should be taken on a full record or upon a settled statement of facts.

An appeal on a question of law taken upon a brief statement of facts would be analogous to the practice of certifying questions on a division of opinion, which has been employed in the federal courts since 1802, or certifying questions of law in respect to which the Circuit Court of Appeals desires instructions, which has been used since 1891, or certifying questions of importance under various state statutes. (3 Ency. Pl. & Pr. 918.)

The saving of time and expense to the parties in preparing such questions and supporting statements of facts, and the convenience with which they could be examined by the reviewing court, suggests the desirability of a study of the extent to which such a method of appeal might be usefully employed.

We suggest that such a study be made.

7. Printed or Typewritten Records

The expense of an appeal is a serious hardship upon many litigants, and a large part of the expense is due to the common provision that the records shall be printed. Some appellate courts in this country make no such requirement, and printed records are not required in the English Court of Appeal.

The largest part of the record on appeal usually consists of the testimony, and since a typewritten transcript is always made by the stenographer as the first step in the preparation of the record, that transcript, in its original form, could be made to serve as the final record of the testimony without further expense or trouble. Rules giving specifications as to size of type, spacing, inking, and quality and size of paper, would secure legible and standardized records. The party would be free to print in his brief such parts of the record as he particularly desired the judges to read.

If the use of typewritten records were permitted in every case at the option of the appellant, and if the cost of printing were not made taxable, a poor appellant would be able to escape an expense to which he ought not to be subjected, and he might even find it possible to take an appeal which would otherwise be beyond his means; and a poor appellee would not be in danger of having the cost of a printed record taxed against him.

Excessive costs of appeals not only diminish the net value of the services rendered by appellate courts and deter parties from recourse to them, but they discourage resort to the trial courts, because every trial involves the possibility of an appeal. In a social system like ours, where free access to the courts is indispensable to the preservation of individual liberty and security, no unnecessary burdens should be placed upon the use of judicial remedies.

We recommend that the use of typewritten records, prepared in accordance with proper specifications, shall be permissible in all cases, and that if either party elects to print the record the cost thereof shall not be taxable.

8. Sending up Original Records to Appellate Courts

There is no very persuasive reason why pleadings and other papers on file in the trial court should not be enrolled and set up to the appellate court for such use as the judges wish to make of them, instead of requiring copies to be made and sent up. It would seldom be necessary for the judges to examine them, since the parties will give such abstracts or quotations in their briefs as they consider essential, but in case of a dispute the original papers would be available to the Court.

This would save a considerable amount of expense in preparing the record. All the parties to the action ordinarily have copies of these papers in their own files, which would suffice for use in writing the briefs. Often there are very extensive exhibits attached to the pleadings, and sometimes very long depositions are on file in the trial court. To copy these documents when the originals could conveniently be used is largely an economic waste.

The practice here suggested is by no means novel. One of the Associate and Advisory members of this committee, who is personally familiar with the practice, recommends it strongly, and states that he has never heard of any inconvenience caused by the temporary absence of the files from the trial court. When the reviewing court is through with them the files are sent back.

We recommend that so far as possible all papers on file in the trial court which are to constitute a part of the appellate record shall be sent to the appellate court in their original form and copies thereof shall not be required for the use of the court.

9. Abstracts of the Record

It is the practice in many states to require, in addition to the record itself, a complete abstract thereof, which must be printed for the use of the members of the Court. This abstract usually contains marginal references to the pages of the full record. In some states omissions from the abstract cannot be supplied by the record.

The abstract is designed to enable the Court to ascertain the facts of the case without reading the record. But since it is prepared *ex parte*, the appellee must be permitted to present a counter abstract if, as is often the case, he does not approve the appellant's statement. This, of course, introduces some confusion. On the whole, however, the abstract is a convenience to the Court, notwithstanding the burden and expense which it places upon the parties.

It would seem, however, that the Court would enjoy every benefit derived from the abstract, while the parties would be saved the burden of preparing it, if the facts relied upon by each party were to be stated in the briefs, with ample references to the record.

Such statements of facts would often be much shorter than an abstract, for they would include only the matters relevant to the precise points argued in the brief, instead of covering the substance of the entire record, as the abstract is required to do.

Furthermore, the facts can be shown more effectively in the briefs, because the omission of matters not essential to the points argued provides space for a more detailed statement of those facts which are essential, including such quotations from the testimony as the parties particularly desire the judges to read.

If the briefs are utilized in this way the judges will have very little oc-

casion to refer to the record itself. In such case, every objection to using a typewritten record would substantially disappear, and one copy would probably suffice for the use of the Court. In jurisdictions where abstracts are required, a single typewritten copy of the record is deemed sufficient, and it would serve equally well if the brief were substituted for the abstract.

We recommend that abstracts of the record should not be required, but that such matters in the record as the parties desire to bring to the attention of the Court should be set forth in appendices to the briefs, either by summarized statement or by quotation.

10. Form of Testimony in the Appellate Record

At common law testimony was presented in the bill of exceptions in narrative form because there were no stenographers to take down the questions and answers. The custom has survived in some states. The stenographic record, however, is so much superior to a narrative translation, the labor of reducing it to narrative form is so burdensome upon counsel, and any substantial saving of time and effort on the part of appellate judges in reading the narrative has been so generally doubted or denied, that there is little to be said in its favor

A stenographer's transcript is the original record of the proceedings, is always available, is presumably accurate and complete, and presents the best possible account of what actually happened. Less important parts may often be conveniently condensed. But either party should be entitled to bring before the reviewing court the exact record of the proceeding, in its primary and most authentic form. This is the view embodied in the new Federal Rules.

We recommend that in preparing the record on appeal the appellant be permitted to set forth all or any part of the testimony in question and answer form, and the appellee be permitted to require that testimony in question and answer form be substituted for any condensed statement in narrative form prepared by the appellant.

11. Correcting the Record on Appeal

Where the record on appeal is so imperfect by reason of defects or omissions that the rights of the parties cannot properly be determined, various results may follow. "In some cases the appeal will be dismissed or quashed, in others the judgment below will be affirmed, in others an opportunity will be afforded to correct the defects, in others the appellate court may require such omitted parts to be certified and sent up, in others the cause will be remanded, while in yet others the disposition of the case is dependent upon the discretion of the court in view of all the circumstances." (4 C. J. 483.)

If the defects are to be corrected, questions of conflicting jurisdiction arise as between the trial and appellate courts, and if the appellate court is to act in the matter there is often doubt whether it may act directly or only by means of a remand with directions to the trial court.

Since the purpose of an appeal is to review the case on a true record, the simplest, most direct and most effective means should be provided for correcting a record which does not properly present the case. All technical requirements, conditions and restrictions, and all procedural and jurisdictional hazards, should be eliminated, and the amending of an appellate record should be as simple a process as the amendment of a pleading in the trial court.

We recommend that the trial and the appellate court should each have power at any time to make an order authorizing any amendment of the record on appeal which is necessary to present the case fully and correctly, upon such showing, in such manner

and on such terms as may be just. This is substantially the new Federal Rule. (R. 75(h).)

12. Stating the Issues in the Brief

As a means of aiding counsel to analyse their cases and present the controlling questions to the Court in an effective way, the rule has long been in operation in both the Supreme and Superior Courts of Pennsylvania, that the appellant shall, on the first page of his brief, without any other matter appearing thereon, set forth separately each question involved in the case, in general terms and without names, dates, amounts or other particulars, and whenever possible follow the question by an answer stating whether it was affirmed, negatived, qualified or not answered by the Court below. The rule is declared to be in the highest degree mandatory, and ordinarily no point will be considered which is not set forth in this way. (Rule 50, Supreme and Superior Courts.)

The rule has proved of very great value in Pennsylvania. It has been adopted in Michigan and in Florida with satisfactory results. It exists in Maryland but is not enforced.

In Connecticut a modification of the Pennsylvania rule is employed, regarding which Chief Justice Maltbie has written as follows to the committee:

> "There is a very great value in the Pennsylvania rule, particularly under a system of oral argument such as we follow. It enables the court from the very beginning to know just what the main or essential questions to be argued are and to follow the case with a great deal more appreciation of the points made. It also is a very valuable thing from the standpoint of the lawyer, because it compels him, in advance of his argument, to formulate those main or essential issues and so qualifies his own thinking. I doubt, however, whether it is advisable to adopt a rule as rigorous as is that followed in Pennsylvania, because we have found that a good many lawyers, doing the very best they can, are not able to comply very satisfactorily with it."

The modified form of this practice adopted in Connecticut, which has proved satisfactory, requires the appellant, in the first paragraph of his brief, to state very briefly, without detail or discussion, the essential or principal issue or issues involved in the appeal. The statement should be framed in such a manner that, by reading it, the Court, without being compelled to examine the argument of counsel or any other part of the brief or record, may quickly see the nature of the legal issues, and in a general way, what points it will be called upon to decide.

We call attention to the advantages of the rule, either in the mandatory and rigid form used in Pennsylvania or in the more flexible form used in Connecticut, as an aid to both Court and counsel in dealing with appeals.

13. Length of Briefs

The cost of printing briefs and the labor imposed upon the judges in reading them, increase directly with their length. Furthermore, excessively long briefs are likely to result from insufficient study, lack of analysis, and careless writing, and they often give the Court very little aid in understanding and deciding the case.

An absolute limitation on the length of briefs would be impractical, but counsel might be persuaded not to allow their briefs to run to excessive length by limiting the taxable costs for printing.

We recommend a rule that no more than a designated number of pages in any brief shall be taxable as costs.

14. The Oral Argument

The oral argument when properly employed is an extremely effective aid to a correct decision. In the

English Court of Appeal the oral argument is the only means employed for presenting the views of counsel, for no briefs are ever used. The American system of written briefs has raised questions as to whether or to what extent they should take the place of an oral argument.

Members of the Bar are almost unanimously in favor of preserving and encouraging the oral argument as an aid to counsel in presenting his case and as an aid to the Court in rightly deciding it. Many lawyers feel that the oral argument is one of the most effective means of preventing "one-man" decisions.

Many appellate judges also value the oral argument highly, but some do not. Judges doubtless look at it more objectively than do members of the Bar. Lawyers tend to appraise it on the basis of its great possibilities, while judges are perhaps inclined to appraise it on the more realistic basis of the average actual performance. If the oral argument could be made more effective it would more clearly justify the high regard in which it is held by the Bar, and it would probably dispel much of the hostility or indifference with which it is frequently viewed by appellate judges.

Courts and lawyers have failed to give adequate attention to methods by which the quality and effectiveness of the oral argument can be improved. It is a matter of the highest importance, which can be satisfactorily dealt with only by cordial cooperation between the bar and the appellate bench.

Many plans have been tried and many suggestions made. Some of them are as follows:

Require an exchange of points between appellant and appellee ten days before the oral argument; and allow no other matters to be discussed.

Provide for a conference of the judges to be held immediately after the arguments, with a view to reaching a tentative decision while the points under discussion are fresh in their minds.

Hold frequent sessions of the court, each limited to a small number of cases, with intermissions sufficient for considering the decisions and writing the opinons before hearing the next group of cases.

So arrange the business of the court that every judge will have an opportunity and will feel an obligation to read all the briefs and enough of the record to become familiar with the exact questions involved, in advance of the argument. This has been stressed by a number of judges. In one appellate court each judge is expected to examine the record and briefs with sufficient care to make up a written abstract of the points and to participate in a conference regarding the case, before the oral argument takes place.

Allow more time for the oral argument.

Provide that the judges shall examine the records and briefs and notify counsel a sufficient time in advance as to those matters upon which the Court desires to hear argument.

Encourage a more active participation in the argument on the part of the judges.

Employ the Pennsylvania rule, or some modification thereof, requiring all the questions involved to be stated on the first page of the brief, as a means of keeping counsel's attention fixed on controlling features of the case and enabling the court to follow the argument more easily.

Require, as one court has done, that one of the judges shall prepare a statement of the facts of each case and read it to counsel from the Bench when the case is called, for the purpose of then and there settling the statement of facts in a form acceptable to counsel, so that the argument may proceed upon the basis of the statement so settled.

Promulgate definite and detailed suggestions and directions, prepared by the Court or by a joint committee

of the appellate bench and bar, regarding the specific purposes which the oral argument should serve, the methods ordinarily best suited for their accomplishment, and the common errors to be avoided. Directions intended to aid counsel in the effective preparation of briefs are frequently found in the rules of appellate courts, and there appears to be no reason why similar means should not be employed to improve the effectiveness of oral arguments. Few lawyers appear often enough before appellate courts to develop a satisfactory technique based entirely upon their own experience.

We recommend that a systematic effort be made by the bar and the appellate bench in each state and in each federal circuit, through joint committees of lawyers and appellate judges, to examine the causes which are operating to limit the effectiveness of the oral argument, and to adopt such measures as may seem proper to restore it to the position of importance which it ought to occupy in our system of jurisprudence.

15. "One-Man" Decisions on Appeal

There is a persistent and widespread feeling among the members of the bar in many jurisdictions that the decisions of appellate courts do not receive the full and effective consideration of all the judges. This gains color from the almost universal American practice of appointing one of the judges to speak for the entire Bench in giving the opinion of the Court.

It has been the custom in England from earliest times, with the exception of the period of Lord Mansfield's dominance, for the judges to give their opinions seriatim. This compelled each judge to examine the case in order to be able to write his individual opinion. Under such a practice there could be little possibility of "one-man" decisions.

Thomas Jefferson, in a letter to Justice William Johnson, then sitting upon the Supreme Court of the United States, expressed great concern over the growing practice in this country of announcing the views of the court by means of a single opinion written by one of its members. "The practice," he wrote, "is certainly convenient for the lazy, the modest and the incompetent. It saves them the trouble of developing their opinion methodically and even of making up an opinion at all. That of seriatim argument shows whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another's sleeve. It would certainly be right to abandon this practice in order to give to our citizens, one and all, that confidence in their judges which must be so desirable to the judges themselves." 10 Writings of Thomas Jefferson (Ford) 225.

Although the practice objected to by Jefferson is so thoroughly established that it is probably no longer a profitable subject for discussion, the tendency which he points out necessarily inheres in the system, and is accentuated by the relatively heavier case loads carried by modern appellate courts. Obviously the only effective way to counteract this tendency is to provide that each judge who participates in the decision shall become sufficiently familiar with the facts and the law of the case, by examining the records and briefs and hearing oral argument, to enable him to form a sound independent opinion.

A conference is an inadequate safeguard, unless it is based on a prior study of the case by each judge. If one member of a court prepares the statement of facts or memorandum of opinion upon which the judges act in conference, he obviously holds a position of superior and perhaps controlling influence if the others are not able to fully check and verify his interpretation from their own inde-

pendent knowledge of the facts and the law.

A judge who has not read the record or briefs is naturally reluctant to oppose the views of a judge who has read them, and the result is that the court is inclined to follow the lead of the judge who has specially studied and reported upon the case.

Every appellate court is conscious of the existence of this problem, but too little effort has been made to analyze the conditions under which modern courts operate with a view to insuring the greatest possible participation of all the judges in the decision of every case.

In at least one court, whose procedure has been described to the committee, the oral argument, which is always encouraged, is followed on the same day by a conference. Each judge thereafter prepares a separate memorandum opinion in each case, which invariably requires him to make an independent study of the record and briefs. At the final conference each judge presents his views and usually reads his memorandum opinion, whereupon the case is decided and one of the judges is then assigned to write the final opinion of the court. Such a system is excellently adapted for obtaining the well considered opinion of the entire bench.

One of the Associate and Advisory Members of the Committee, who has had an extensive experience as an appellate judge, suggests that oral arguments should always be required when possible, but that no case should be called for argument or considered on briefs until every judge has certified that he has personally read all the briefs and has examined the record in sufficient detail to fully understand the nature of the case. Information so acquired as a basis for hearing the oral argument would of course be equally useful at the conference subsequently held.

The problem involved is a very complex one, consisting partly of the specific measures which should be employed to secure equal participation of all the judges, and partly of questions regarding improvements in organization, methods of handling business, provision for supplying the judges with competent and well trained law clerks, and increases in personnel, which might be necessary in order to provide the additional time required for accomplishing the result sought.

We recommend that the problem be made the subject of cooperative studies by the appellate bench and bar in the various jurisdictions.

16. Enlarging the Capacity of Courts of Review—Divisional Organizations vs. Intermediate Appellate Courts

The most efficient court is the court with the smallest number of judges, because a large part of its work involves a duplication by each judge of the work done by each of the others. This is true of reading records and briefs, hearing oral arguments and holding conferences. In performing these duties the aggregate time and effort required increases in proportion to the number of judges, while the final result remains constant, so that nothing is gained in speed of operation by enlarging the size of the court. Only in writing opinions does the work done by one judge directly reduce the amount of work to be done by the rest.

In respect to capacity for rendering satisfactory judicial service, small courts have never proved inferior to large ones. Almost all the courts of last resort in the United States have been three-judge courts for considerable periods, and they were enlarged in size not because of dissatisfaction with the quality of the judicial service rendered, but because of the necessity for utilizing whatever advantage could be derived from a larger court in dealing with the increasing load of business.

If the judicial quality of the decisions of small courts of three or four members has been satisfactory, as experience seems to have demonstrated, the quality of the decisions rendered by the same number of judges sitting as divisions or departments of large courts ought to be equally satisfactory. This also seems to have been demonstrated by experience.

The English Court of Appeal consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, five Lords Justices of Appeal, and the ex-Lord Chancellors of Great Britain, making a court of from nine to a dozen members. It never sits in banc, but always in divisions of not more than three judges, two such divisions usually sitting simultaneously, with a third division added when necessary. (9 Halsbury's Laws of England 64.) There has never been any complaint regarding the use of the three-judge divisions, and no demand for the participation of a larger number of judges.

The House of Lords as a judicial tribunal consists of the Lord Chancellor, seven Lords of Appeal in Ordinary, and such peers as have held high judicial office. In 1936 nine different judges sat in this court, but never more than five together and sometimes only three. In the same year 15 different judges sat on the Judicial Committee of the Privy Council, which is the final court of appeal from the British dominions, but there were never more than five of them sitting together and in some cases only three.

The same system is used in the federal circuits. Only three judges sit in each case, although the number of circuit judges varies from three to six in the different circuits and additional judges can always be called from the district bench to sit upon the Circuit Court of Appeals. The five-judge Court of Appeals of the District of Columbia has no greater prestige, merely on account of its numbers, than the three-judge courts of the circuits.

The highest courts of almost half the states sit in divisions or have done so at some time, and 15 others, which now have five members, could organize two divisions by the addition of one judge.

If a court operates in two divisions instead of in banc, and still continues to dispose of the same number of appeals, each judge will have only half as many records and briefs to read, half as many oral arguments to hear and half as many cases to discuss in conference, while maintaining undiminished his output of written opinions. Or, if each judge is to continue to read the same number of records, hear the same number of arguments and participate in conferences concerning the same number of cases, the Court will dispose of twice as many appeals. The process of enlarging the capacity and improving the efficiency of the Court by increasing the number of divisions can go on indefinitely.

The advantages of the divisional arrangement in reducing excessive duplication of effort on the part of the judges and thereby enabling them to devote more attention to each case, or to dispose of more cases, or both, are obvious. The objection that no appellate court ought to act except through a majority of its members is theoretical and traditional, and draws no support from the actual results of experience. Inconsistencies between decisions of different divisions regarding the same matter may easily be prevented by proper administrative safeguards, and have in fact never constituted a serious problem. Rehearings before a larger division or before the whole court, in case of dissent on the first hearing, or where constitutional questions are involved, or in other proper cases, can be provided to give the decisions under such circumstances the added

weight of a larger group of participating judges.

On the other hand, there is no theoretical justification for a hierarchy of appellate courts, with successive appeals from one court to another. It greatly increases expense and delay introduces additional hazards and uncertainties into litigation, and produces a body of precedents from the inferior appellate court which the bar is obliged to use but which the higher appellate court will feel under no obligation to follow.

When the English Court system was reorganized in 1873 the system of double appeals, which had existed for centuries, was brought to an end by the very simple expedient of abolishing the jurisdiction of the House of Lords as a final court of appeal. This was one of the major purposes of the judicature acts, but it was defeated by a wave of sentimentality which at the last moment restored the jurisdiction of the House of Lords. But the English have never been satisfied with the result. As late as 1932 Lord Tomlin, himself a distinguished judge of the House of Lords, urged the repudiation of the "system of double appeals, which not only produced uncertainty in the law but added to the expense and delay of litigation." (London *Times*, Nov. 25, 1932.)

A single review by a three-judge division of the Court of Appeal is all that is deemed necessary for the protection of the litigant and for the development of the law. English lay opinion, as expressed editorially by the London *Times*, has condemned the double appeal as the cause of "grievous delay and heavy expense," and as productive of a general want of confidence on the part of the profession and the public in the decisions of courts of review.

The principal reason for the establishment of intermediate appellate courts, with the accompanying burden of a double appeal as an actual or possible threat in every case, is the inability of the court of last resort to dispose of all the cases coming up for review. There are certainly very definite limitations upon the number of cases which a single bench of judges can deal with in banc, but by the use of divisions those limitations can be completely removed.

A Court of last resort sitting in as many divisions as the business required, could readily dispose of all the appeals from the trial courts of general jurisdiction in any state. When the Lord Chancellor's Committee on the Business of the Courts reported, in 1934, in favor of enlarging the jurisdiction of the Court of Appeals, it answered the objection that this would overload the court by saying: "Let there be more divisions of the Court of Appeal; as many as may be necessary to deal with appeals, and let them sit as long as may be necessary to deal with the new as well as the old work that will be brought before them."

This is the plan used in a number of states in this country where all appeals go directly to a single appellate court of last resort which sits in as many divisions as circumstances require. Each division speaks for the Court, and its decision is as binding as though rendered by the Court in banc. Various plans have been successfully used to co-ordinate the work of the different divisions in order to avoid inconsistent decisions, or decisions which do not in fact represent the views of all or a majority of the judges of the court.

We recommend, as the most satisfactory method of dealing with appeals from courts of general jurisdiction, that a single appellate court should ordinarily be employed, with final jurisdiction in all cases, to be organized into as many divisions as may be necessary to deal with the cases brought before it.*

* This recommendation was recommitted to the committee for further study and report (see footnote, p. 505, *supra*).

17. Memorandum Opinions

It is generally believed that opinions could be greatly reduced in length in cases where no new principle or novel application of law is involved, without impairing their value.

There are many cases in which a brief summary of the facts followed by a reference to the statutes or the cases which are deemed by the Court to fully control the decision would serve every purpose of a fuller discussion.

We recommend that in cases of this type an effort be made by the judges to limit their opinions as above suggested.

18. Review of Non-Jury Cases

The problems involved in the review of non-jury cases are essentially the same whether such cases are legal or equitable in their nature. In each type of case questions of fact are decided by the trial judge in the same way, and there is no constitutional reason why there should be any difference in regard to the conclusiveness of the decision. If questions of fact are to be reviewed on appeal in equity cases, every reason in support of such a review applies with equal force to the review of facts in law cases tried without a jury. On the other hand, if the decision of the trial court on questions of fact is to be deemed conclusive on appeal in law cases tried by the court, the same result should follow in equity cases. In other words, it is not the distinction between law and equity which should produce differences in the mode of trial or review, but the distinction between jury and non-jury determination of questions of fact. This principle has been embodied in the new Federal Rules.

Whether the principle traditionally employed in courts of chancery, allowing a full review of the facts, produces a sounder administration of justice than the opposite principle, followed in some states, that the decision of the court is always to be given the same effect as the verdict of a jury, may perhaps be a matter open to legitimate argument. If so, it should probably be considered a local question, to be determined by each state in accordance with its conceptions of public policy.

But whatever view may be taken regarding the advantages of allowing or denying a review of facts, nothing can be said in favor of a rule under which the review would depend on whether the case technically falls within the field of equity or the field of law.

We recommend that findings of fact shall have the same effect on appeal in all cases tried by the Court without a jury, whether they are cases at law or cases in equity.

19. Regulation of Appellate Procedure

All judicial procedure should doubtless be subject to regulation by those best fitted to appreciate its purpose, understand its operation and appraise its results. This points definitely to regulation by Rules of Court. But the problem is one which goes far beyond the field of appellate procedure, and a full discussion of it is not within the jurisdiction of this committee.

For the purpose of completing its report, however, the committee assumes, in accordance with the almost universal opinion of those who have given the matter close attention, that regulation of procedure by Rules of Court is essential to the development of a flexible and efficient system for administering justice.

We recommend, therefore, that appellate procedure should be regulated by Rules of Court.

20. Power of Appellate Courts

New trials are an economic waste and should never be ordered by an

appellate court if justice can be satisfactorily administered without them.

We recommend, therefore, that appellate courts should have power to enter or order the proper judgment without a new trial when the record of the proceedings shows as a matter of law what such judgment should be; and when error affects only a part of a case, the Court should have power to remand for a new trial of that part only, if such remand will not prejudice the substantial rights of any litigant.

Respectfully submitted,

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MINORITY REPORT

OF THE

COMMITTEE ON SIMPLIFICATION AND IMPROVEMENT OF APPELLATE PRACTICE

To the Section of Judicial Administration:

There has been submitted to me a draft of a report prepared by the very able Chairman of our committee. The letter submitting it indicated there may be some slight changes in its final form, and my suggestions as to possible modifications have been asked. My disagreement with underlying principles of the report and with many of its recommendations, are too sharp to make such suggestions profitable. I realize that minority reports are generally as useless as dissenting opinions. Nevertheless, each sometimes serves a useful purpose.

General Purpose of the Committee

At the outset I may state that personally I have very grave doubts as to whether the American Bar can study with any profit the general question of "simplification and improvement" of appellate practice as applied to the several states, especially in the manner in which that subject has been dealt with in the Majority Report. It seems to me that a number of the details of appellate practice touched upon in that report are purely local questions in which a National Bar should not interest itself. Thus, the question as to the length of briefs, how they shall be arranged, whether the Pennsylvania method of printing abstract questions involved upon the flyleaf or requiring, as do some Courts, a brief summary of the argument to precede the same, are all questions of local practice which, in my judgment, should be left entirely to the rules of each appellate court. Some judges prefer one method, some another. The bar of a state that is accustomed to one method will find difficulty in changing to another. Personally, I cannot see the advantage of the appellant being required to reprint in his opening brief the assignments of error which are printed in the transcript, as is required by the present rules of the Ninth Federal Circuit Court of Appeals. I have discussed this with several justices of that court and they all feel that in the main, the requirement is helpful to them and conducive to keeping the arguments in the brief directly to the points which should be decided by the court. If that court prefers that method of presentation, why should it not be permitted to require briefs filed with it to be so prepared? On the other hand, why should some other court which likes another and different method be required to use or observe the rules of the Ninth Circuit Court? It seems to me that these are all purely local questions and that consideration should be left entirely to local, federal or state bars.

In the Majority Report it is said, "Simplification and improvement of appellate practice in the United States might be sought through the adoption of uniform rules in the various jurisdictions. . . . . Such a system of uniform practice would have much to recommend it."

Personally, I can see nothing to be

gained by a uniform appellate practice, even if it were possible to obtain one. In my judgment, there is no reason why the appellate practice of California should coincide with that of Arizona, or that of Pennsylvania fit in any way that of the states of Kansas or of North Dakota.

Great Delay in Termination of Appeals

In my judgment, there can be no doubt whatever as to the correctness of the conclusion of the committee that there is growing public dissatisfaction with the present administration of justice in most jurisdictions; that this dissatisfaction is due largely to the great delays attendant upon final determination of most litigation. I also think there is no doubt that in many jurisdictions a major portion of the delay is to be found in the time elapsing between the institution and the final determination of an appeal. I agree that everything should be done to eliminate as much of this delay as possible. While, I believe the method by which the appeals are to be speeded up, is, in the first instance, a local question for the bar of each state. I am not prepared to say that the question is not one which cannot be profitably studied by the American Bar Association. I am, however, firmly convinced in my own mind that nothing important will be accomplished by mere change in the details of procedure.

In California, and I believe in many other states, a great portion of the time of our appellate courts is taken up in construing new and supposedly improved rules of practice and procedure which have been substituted for well-settled and thoroughly construed rules. If forms of procedure are well-settled and understood by the Bar, they do not in and by themselves cause any great amount of delay or inconvenience, and are usually more easily followed, with fewer mistakes, than is some change and supposedly simpler system. In California, an appeal is taken by the method recommended by the report, viz., by simply serving and filing a notice of appeal. Our alternative method of presenting the record is substantially that recommended by the committee. There are really no rules or regulations as to how the briefs are to be prepared. On the other hand, in the federal court practice, leave to appeal must be taken and the practice at present is about as technical and cumbersome as can well be devised. Yet, in the federal courts of the ninth circuit, an appeal is usually heard and determined within a third of the time that elapses in the case of an appeal in the state courts.

In my judgment, the underlying theory of the majority report is erroneous and, if adopted, its practical effect, instead of shortening the time for the determination of appeals, would necessarily greatly lengthen it.

If I correctly interpret the draft of the report furnished me, its underlying theory is that appeals should be encouraged, the cost should be so greatly reduced, and the method of taking and presenting them so simplified that any dissatisfied litigant may appeal from an adverse judgment with scarcely any cost and with hardly any risks of penalty. In my judgment, this theory is erroneous. I believe that instead of encouraging appeals, it should be the policy of the court to discourage them. No one can believe more strongly than I that any unsuccessful litigant who honestly and in good faith believes that the judgment against his is legally erroneous should have the right of an appeal from that judgment. That right, however, in my judgment, should not exist merely because the unsuccessful litigant is dissatisfied with the adverse judgment. Nearly every unsuccessful litigant feels that the judgment against him is unjust, but I do not think he should be encouraged to or even permitted to

appeal, except under the danger of severe penalties, where he has no real reason to believe there is any substantial chance of the judgment being reversed. I believe that at least 50 per cent of the appeals now prosecuted in those jurisdictions with which I am familiar are spurious, that is to say, there is little or no real basis for believing that the judgment or order appealed from will be modified or reversed. The great delay attendant upon the decision of the average appeal is largely due to the volume of work which is now being thrown upon the appellate courts—at least that is so in California. Regardless of the calibre or ability of appellate court justices, there is just so much work that a three, five or seven-man court can perform within a given period of time, and if the number of appeals is increased, the necessary result must inevitably be a lengthened time after the taking of an appeal before it can be considered. It is no practical answer to say that appellate and supreme courts may impose penalties by way of fines for frivolous appeals. Judges who hold their office through popular election will not exercise that salutary power either with sufficient frequency or severity.

If a defeated litigant suspends the finality of a judgment by taking an appeal, and then loses, there is no reason why he should not pay all of the costs which he has compelled the other party to incur, and the recommendation of the committee that only a very small portion of the cost of printing the brief of the prevailing party should be taxable, is, in my judgment, unsound. Briefs of undue length should not be permitted, but the regulation of the length and form of briefs, as I have indicated before, should be left to each appellate court.

As I have said, in California at least, the increasing number and volume of appeals which have little or no merit in them has been so great that there is a decided sentiment growing in both the lay public and the profession to drastically limit the right of appeal.

Specific Recommendations of the Committee

I will now notice briefly, but not in the order followed in the report, some of the specific recommendations with which I do not agree.

(1) *Exemption from Pecuniary Limitations upon the Right of Appeal Where There Are Interesting Questions of Law Involved*

The report points out that because the expense of litigation should not be out of proportion to the amounts involved "pecuniary limitations are often placed upon the right of appeal." The report then proceeds to point out that as the law is largely developed through decisions of the courts, where in a case involving a small amount there is a question of special interest to the state *the pecuniary limitation upon the right of appeal should be waived*, and concludes: "We recommend that a pecuniary limit be fixed for all courts, above which an appeal may be taken as of right and below which an appeal may be had only by leave of the reviewing court, on a showing that an important question of law is involved."

In my judgment there are three fallacies in this recommendation.

(1) Civil courts are maintained only for the purpose of allowing citizens who cannot compose their differences to obtain a judicial determination of them. The individual litigants in any case are interested only in the liability or non-liability of the defendant. They are not interested in abstruse questions of law and they ought not to finance the judication of those questions merely because the determination thereof might be of interest to the bar of the state. The promulgation of proper

rules of law should usually be left to the legislature.

(2) In my judgment, it should not be the policy of the law to encourage the submission to an appellate court for final determination of questions of general interest to the body politic in petty litigation where the amounts involved are so small that the parties litigant cannot afford to have them properly presented.

It is very seldom in litigation involving small amounts that counsel for either party has sufficient experience to properly brief and present any really important question of law, and still more unusual where both sides are represented by counsel of such ability. But in such exceptional cases, counsel, if they do the proper research to fully present the question to the Supreme Court, must either charge their clients far in excess of the amount involved, or themselves receive inadequate compensation. I believe the majority of lawyers will agree with me that most of our ill-considered decisions arise in cases that have not been properly presented, or have been well presented by one side and inefficiently by the other.

(3) The report seems to be based upon the theory that there is need of further judicial exposition of the law. I think this is erroneous. I do not believe there is a state in the union that is suffering from any dearth of judicial decisions. Indeed nearly all of the uncertainty in the law and the difficulty that the average practitioner finds in advising his clients arises from the plethora of statutory laws and the multiplicity of judicial decisions.

(2) *Filing of Original Judgment Roll in Lieu of Printed Record and Reporter's Transcript in Lieu of Bill of Exceptions*

Personally, I am very much opposed to filing the original reporter's transcript instead of a printed bill of exceptions. I am frank to say, however, that the majority of the bar of this state probably holds contrary views. In California either method is permitted, the filing of the reporter's transcript being employed by a large majority of the bar. My own view is, that it is in the long run more expensive, burdensome, and certainly imposes additional work upon the appellate courts. For instance, there may be a colloquy between Court, counsel and witness covering 30 or 40 pages, which may be condensed to a single sentence in a bill of exceptions and so cited in a printed brief, whereas, with the reporter's transcript to demonstrate the same fact, you must cite and the appellate court examine, the 30 or 40 typewritten pages.

The transmission of the original records by the clerk of the trial court to the clerk of the appellate court presents an entirely different question. Laying aside the possibility of such records being lost in transit from one court to another (a contingency that will occasionally, though not frequently, occur), it seems to me that the recommendation loses sight entirely of the practical effect upon the appellate court. The average judgment roll is awkward to handle and in any complicated case, difficult of physical examination. The report of the committee calls attention to the growing resentment of the bar to what it conceives to be one-man decisions, and properly suggests that everything should be done to ensure the decision of appellate courts being by the entire court and not simply by one member. Yet, in the next breath, it suggests the filing of the original judgment roll by the clerk of the lower court in the appellate court. Certain it is that if there is but a single typewritten record, the tendency to leave the examination of that record to one judge will be increased rather than decreased. I believe further the committee has

overlooked the great burden which the average American appellate court today is under. The examination of voluminous records and briefs is a nerve-exhausting task at the best. Examination of a printed record and brief is much easier than typewritten documents. Personally, I think that where an appellant feels that a judgment has been erroneously rendered against him and desires to appeal therefrom, if he has any hope of the record really being considered by all the justices of the appellate court, he should be required to furnish in a compact, concise volume, bound in book form, a printed or typed copy of the record upon which he bases his appeal, and sufficient legible copies thereof to permit each of the judges of the court to have one for his personal examination.

I am aware that the method recommended by the committee of presenting the record to the appellate court is substantially the one in vogue in England, but the character, viewpoint, and method of presentation and consideration of appeals of the English Bench and Bar is so essentially different from that of the Bench and Bar in most of our states that many incidents of the English practice, in my opinion, cannot be successfully incorporated into our practice.

(3) *Intermediate Appellate Courts and Division of the Supreme or Appellate Court*

I am not sure that I understand the committee's recommendations on this subject. It certainly leaves much that is vital to surmise and speculation.

Personally, I can see very little advantage in permitting successive appeals, first to one court and then as a matter of right to a still higher court. However, New York and Illinois both have some system of intermediate appellate courts, and my impression is that the bar of each state is fairly well satisfied with its system. Regardless of whether that conclusion is correct or incorrect, I do not know why the American Bar Association should be interested in or should recommend a change in either state.

The report of the committee seems to recognize the fact that in most states a single supreme court will not be able to handle all the appellate work with any due expedition. It, therefore, recommends the division of the court into departments. The necessary, practical result will be a number of appellate courts, and this will be so even though they are denominated departments of a supreme court. Where there are separate courts, there will necessarily be conflicting decisions. It seems to me it is essential that there be a tribunal which shall have power to maintain a uniformity of decision in somewhat the method that such uniformity is attempted to be maintained by the Federal Supreme Court through its power to grant a writ of certiorari after decision by a court of appeals.

It is also my opinion that such court must be an independent tribunal. If you have one large supreme court broken up into three, four, five or six divisions of three justices each, I do not think you can maintain much uniformity of decision or secure satisfactory results by allowing a petition for rehearing to the whole court in banc. Obviously, the court would be too unwieldy. There would also be the objections which obtained in the old territorial practice, where all the trial judges of a territory formed its supreme court, viz., that if A did not grant a rehearing as to B's opinion, B would not vote for a rehearing of A's opinion.

Thirty-four years ago in this state, it was found that one supreme court of seven justices was unable to expeditiously handle the vast volume of appeals, and to relieve the court, we created three courts of appeal of three judges each. These three courts have since been increased to six courts, so

that we have 18 appellate judges. These are now inadequate to handle all of our appellate business, and the bar is about to propose a constitutional amendment revamping the appellate court structure and increasing the number of appellate court justices to 28. It should need no argument that a court in banc of 28 justices would be to unwieldy to serve any useful purpose. Also, it must be apparent that the frequent convening of the entire court in banc to consider and pass upon the petitions for rehearing would very greatly slow up the determination of pending appeals. Yet unless there is some power of supervision of these independent courts, it is certain that there would be a bewildering conflict of decisions.

I am not certain that the report intended to eliminate petitions for rehearing or in the nature of petitions for writs of certiorari as in the present federal practice, but I am not sure that it does not. This is one of the respects in which the report is quite indefinite. Certain it is that in one sense such petitions may be considered as a further appeal. Usually they must be answered, and if granted, a second appeal is actually effected.

(4) *Oral Argument*

I concur in the views of the committee on the question of oral argument. My only difference would be, if possible, to make the recommendation stronger. Personally, I believe oral argument is an indispensable requisite to a proper appellate system.

(5) *Assuming that Recommendations Are To Be Made for a Simplified Appellate Practice Throughout the 48 States of the Union, the Subject Has Not Had Sufficient Study*

In any and all events I am certain that the committee has not been given, nor had sufficient time, for any proper study of the subjects upon which it has made its recommendation. This is not a criticism of the committee. After the last convention it was appointed and expected to make a report before the next convention. Obviously, this is insufficient time for any proper study of a subject of the scope submitted to it. The committee did the best it could. Questionnaires were sent out to some 55 so-called associate and advisory members. Their replies were digested and the committee then met for a day in Chicago. The committee comprises among its members some very distinguished jurists and professors of the law. Doubtless, each has for many years considered the subjects upon which the committee has reported, and their individual views can in no sense be thought or considered as premature; but there is a vast difference between the matured views of individuals and the matured views of a committee composed of the same individuals. I can best illustrate what I mean by reference to the study of this matter by the Committee on Administration of Justice of the State Bar of California. That committee is as fair a cross-section of the bar of this state as a committee of 16 can well be. It comprises not only some of the ablest minds of our bar, but is representative of nearly every element in the bar. During the course of our study there has not been a single member, either of the committee or of any sub-committee, who has not, at one time or another changed or greatly modified the individual views which he had previously strongly held as a result of individual experiences. Again, the committee as a whole has changed its viewpoint on questions both of major and minor importance after considering the views of the various local bar and civic organizations of the state. At the end of two and a half years, we are reaching what we believe to be a fairly practical solution of some of the major problems of our appellate practice and procedure, a solution

which, we believe, the crystallized sentiment of 90 per cent of the Bar will approve. But there are a number of other important questions connected with that practice which we have not had time to consider and which lie before the state bar for study. How, then, can it be practically possible for six men, no matter how able, or how much they have individually studied the subject, to attempt to draft even a most general code for 48 separate states, the practice, nisi prius and appellate, differing in the several states as do the legal requirements of those states because of the difference in population, climatic and soil conditions, and the legal precedents by which the several states have been guided for a century? How is it possible to attempt to do so in one day's meeting, even after receiving answers to a questionnaire from 55 associate or advisory members?

I respectfully but earnestly submit that the American Bar should not make recommendations upon subjects of such wide scope without a much more exhaustive study and without receiving the matured views of the various bar associations of each of the states.

(6) *Written Decisions and Publication of Law Reports*

There is one subject of which I think the American Bar Association might with profit undertake, and that is the study of written opinions by appellate courts, and the publication of these reports. Unless something is done to curb the increasing flood of published opinions the reporter system will inevitably break down under its own weight. The California Committee on Administration of Justice realizes it is a problem, but we do not know the answer to it. Further it is bound to be so controversial that we felt it inadvisable to consider it before disposing of some of the more pressing problems of our appellate practice. While in some of its aspects it may be local, still I believe it is a problem common to every state, and one deserving of long and careful study by the national bar.

(7) *Underlying Causes for Dissatisfaction with the American Administration of Justice*

During the last several decades whenever there has been a miscarriage of justice in some trial attracting public attention, or the public has been led to believe that there has been such miscarriage, there has at once arisen a hue and cry for the rewriting of the rules of procedure and practice. I think everyone will agree with me that thus far at least, the administration of justice has not been improved by that method.

While there are a number of contributing causes, not here commented upon, in my judgment, there are three major basic causes for the dissatisfaction with the administration of justice in this country.

(1) The unbridled and unlicensed comment in advance of trial by the public press on the merits of pending cases that attract the attention of the press.

(2) In nearly all metropolitan areas an over-crowded, imperfectly disciplined, and partly incompetent bar

(3) In a majority of the states, the judges, trial and appellate, are chosen for the bench and maintained thereon by popular vote, and under the direct primary, in many of the states the candidates for judicial office are self-nominated.

I fully realize that each of the above enumerated defects in the administration of justice in this country is a subject for study by other committees of the American Bar Association; that they are not within the purview of the committee of which I am a member and have not been touched upon by the majority report. Hence, at first blush it might seem inappropriate to mention them in a minority

report. I have adverted to them because in my judgment they are the basic causes for the growing dissatisfaction with the administration of justice in this country. While I realize the American Bar Association has and will continue to exert great influence for their eradication, personally, I should like to see it concentrate all of its efforts along those lines, for, until their eradication is achieved, I think attempts to improve the administration of justice by changing rules of practice and procedure are wholly superficial.

As long as we have as large and as undisciplined a bar as exists at present in most metropolitan centers, with a large number incompetent for trial work; as long as we have self-nominated judges (as we do in many states) elected through newspaper and radio publicity, and who, no matter how thorough and able their work upon the bench may be, must obtain re-election through the same method; as long as we permit the newspapers to comment at length and without restraint upon the supposed merits of any pending case, we can write and rewrite the rules of procedure, nisi prius and appellate, until we are black in the face without in any wise improving the actual administration of justice.

Respectfully submitted,

NORMAN S. STERRY.

REPORT

OF THE

COMMITTEE ON ADMINISTRATIVE AGENCIES AND TRIBUNALS

To the Section of Judicial Administration:

The function of this committee is to consider and recommend measures for improving the administration of justice in matters relating to administrative agencies and tribunals

The subject is of such magnitude and importance that quite obviously the committee has not been able, during the few months since its creation, to do more than prepare the groundwork for a thorough study of the subject. So much is being said and written at this time about administrative tribunals and their relation to the judiciary, that a mere survey of the recent literature on the subject is a considerable task, to say nothing of attempting to arrive quickly at any worth-while conclusions as to how this branch of jurisprudence may be improved.

It has seemed to us that the logical way to approach the subject is to ascertain first of all the *facts* as to the present methods of administering justice in cases coming out of the administrative tribunals. In other words, what is the scope of judicial review of administrative determinations at present, and how is it working? A compilation and study of all the information that can be gathered on that subject will give us a basis for intelligent selection among the methods now in vogue, or possibly for concluding that none of those present methods fills the need. This factual survey is the object of the present report, which is merely a report of progress in the early stages of a study that may run for some time into the future.

Our subject naturally divides itself into two branches, based on the dual form of our government—namely, federal and state. In the national government, the growth in number and the increase in power of administrative tribunals are one of the outstanding phenomena of recent history. The extent to which, and the methods by which, the determinations of these tribunals should be reviewed by the judicial branch of the government, is a problem whose perplexity is heightened by the vast number of administrative determinations involved and their varied character. This branch of the subject has been for the past several years the special concern of the American Bar Association's Special Committee on Administrative Law, which came forward at the 1937 convention of the association with specific recommendations for a substantially uniform system of judicial review of federal administrative determinations.[1] The House of Delegates at Kansas City approved the recommendations in principle and directed the preparation of a bill for presentation to Congress, subject to approval of the Board of Governors of the association.[2] Pending the result of this further work by the Special Committee on Administrative Law, we have thought it unwise to make any excursion into the federal field ourselves, and have confined our study, during the few months of our existence as a com-

[1] 1937 A.B.A. Rep., 789-850.

[2] *Ibid.*, pp. 250-290, esp. pp. 288-290.

mittee, to the relations between the administrative tribunals and the judiciary in the several states.

Since this is a committee of the Section on *Judicial* Administration, we have limited our investigation, for the present at least, to the subject of judicial review of administrative determinations, disregarding all questions of procedure *within* the administrative tribunals except as the standing of their decisions in the courts is thereby affected. Furthermore, we have not deemed it of primary importance to our study that we should ascertain what is the minimum amount of judicial review that will satisfy the requirements of state and federal constitutions. Quite clearly, any review that does not satisfy the constitutional minimum is a denial rather than an administering of justice, and while the question of the constitutional requirements will naturally and incidentally crop out in any discussion of the subject, our objective is not to find out how little the constitutions demand in the way of judicial review, but to ascertain what measures will produce the closest approach to absolute justice in this field. That objective is not by any means arrived at in this report; we are here presenting only a factual basis on which the committee can proceed with its further studies.

Six subjects stand out as the principal, or at least the most conspicuous fields of administrative action in the states:

Public utilities, including railroads,
Securities (Blue Sky laws),
Workmen's compensation,
Unemployment compensation,
Insurance,
Income taxes.

With respect to these six subjects, we have made an examination of the statutes in all the states, and of the judicial decisions to some extent, with the object of presenting in this report a bird's-eye view of the methods of judicial review now in vogue throughout the country. In addition, we have examined into a few other subjects of administrative action in each state, more or less at random, to see what variations in method or review we can conveniently uncover. Necessarily this later portion of our search has been fragmentary, because investigation discloses that on the average there are some 40 to 50 different kinds of administrative boards, commissions and departments in every state, and it would be a heroic task to examine them all. The detailed results of our examination are contained in an appendix to this report; and the contents of this appendix are the basic material on which we arrive at the generalizations contained in the report proper.

Scope of the Judicial Review of Administrative Determinations

The basic question to be answered in considering the question of judicial review is, how far shall the judiciary be asked or permitted to go? On this question there are two extremes of viewpoint: one consisting of those who fear and distrust the politically appointed boards and commissions, and feel that their determinations should be subject to complete review by the judiciary; and the other consisting of those who deem the courts incompetent to pass upon technical matters that have been decided in the first instance by "experts" on the administrative boards. Between these extremes there are many graduations of opinion. Undoubtedly the temporary ascendancy of one or the other of these viewpoints at the time of the enactment of the various administrative statutes in the several states has been the principal cause of the wide variation in the scope of judicial review adopted in the same state at different times and on different subjects.

A study of the material contained

in the appendix* discloses that the scope of judicial review of administrative decisions, as set forth in the administrative statutes themselves, runs the following gamut:

1. Review on questions of law only, the board's findings of fact being expressly made conclusive by the statute.
2. Review of questions of law, with sufficient examination of the record made before the board to ascertain whether there is *any* evidence to sustain the findings of fact.
3. Review of questions of law, coupled with an inquiry as to whether the findings of fact are so far supported by evidence that they would stand if made by a jury in a court of law (the New York rule).
4. Review of questions of law, together with independent consideration, by the judge, of the evidence in the record made before the board, to ascertain where the weight of the evidence lies. (In this type of review the board's order is often aided by statutory provision that it shall be deemed *prima facie* correct, or shall be upheld unless against the manifest weight of the evidence, or that its unreasonableness or unlawfulness must be established by clear and satisfactory evidence.)
5. Review of questions of law, together with an examination of the record made before the Board, and the presentation of such additional evidence as the parties may offer, leading to an independent determination of the facts by the trial judge (subject, in some cases, to statutory presumptions such as are mentioned in paragraph 4).
6. A complete trial *de novo* before the judge alone, without regard to the record made before the board.
7. A complete trial *de novo* before a jury.[3]

Roughly speaking, the first three of these types of review may be characterized as a review upon questions of law only (treating a complete lack of supporting evidence as raising a question of law, as is the common-law rule in certiorari); and the last four types may be said to constitute a review of both law and fact. On that basis of classification, the table on page 618 shows how the six major subjects of administrative action are handled in the statutes of the several states.

It may be worth while to consider in some detail these six subjects of regulation separately, with a glance at the history of each.

Public Utilities

Among the earliest of the modern regulatory acts affecting public service corporations was the Wisconsin

* This appendix, which may be found in 63 A.B.A. Rep. at 632-656 (1938), contains, for each state, a brief summary of the methods of judicial review provided by statute with respect to (1) public utilities, (2) securities, (3) workmen's compensation, (4) unemployment compensation, (5) insurance, and (6) income taxes; also a similar summary as to a few other administrative activities in each state, selected more or less at random. There is also included a reference to a few of the leading judicial decisions in the several states bearing on the scope of judicial review and the constitutional requirements with reference thereto.

[3] It is interesting to note that both extremes of the foregoing list have been challenged as a denial of due process, and both sustained by the United States Supreme Court. Cases involving the first three types of review—those which limit the review actually or virtually to questions of law—are numerous and familiar (see, for example, Phillips *vs.* Commissioner of Internal Revenue, 283 U.S. 589, 600, 75 L. Ed. 1289, 51 Sup Ct. 608, 612, and cases cited); but it was not until this present year that the Court was confronted with the claim that a trial *de novo* by jury in a public utility rate case is a denial of due process of law. Considering the fact that trial by a jury of one's peers has always been regarded as of the essence of due process, the Court found no difficulty in sustaining the constitutional validity of the procedure. United Gas Public Service Co. *vs.* Texas, 82 L. Ed. 490, 499, 58 Sup. Ct. 483, 492.

Railroad Commission Law of 1905, followed by a complete public utility law in 1907. The framers of these acts saw fit to include a provision for trial *de novo* in an action to review an order of the commission, with provision that the order should be deemed *prima facie* valid and that the burden should rest upon the aggrieved party to show its unreasonableness or unlawfulness by clear and satisfactory evidence. This public utility law was widely copied in other states, and its exact language on the subject of judicial review is still found in perhaps as many as half of the utility acts now in force.

The requirement of an opportunity for full judicial examination of the facts in public utility cases was given the status of a constitutional principle by the United States Supreme Court in the celebrated Ben Avon case,[4] where it was held that when an administrative board makes determinations of a *legislative* character, and the board's action is claimed to result in confiscation of property, due process of law requires "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." The rule of the Ben Avon case, though considerably questioned in recent years, still stands as the constitutional rule for public utility cases.[5] But in cases where the issue is not confiscation of property, but merely the reasonableness or correctness of the administrative order, the Supreme Court has made it clear that the legislature may validly limit the judicial inquiry to ascertaining whether there is any evidence to support the finding.[6]

Despite the rule of the Ben Avon decision, it will be noted that our tabulation shows eight states in which judicial review in public utility cases is limited to what we have characterized as questions of law. In New York, for example, the review is by a form of statutory certiorari under which the court is limited to determining (in addition to questions of jurisdiction and of law) whether, upon the evidence, there is such a preponderance of proof against the existence of the facts found by the commission "that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court triable by a jury, would be set aside by the court as against the weight of the evidence."[7] In other words, in New York the commission's finding has the weight of a jury verdict. In California and Utah the public utility law makes the commission's findings of fact conclusive, "including ultimate facts." Colorado and Idaho also make the findings conclusive, and the Maine, Vermont

[4] Ohio Valley Water Co. *vs.* Ben Avon Borough, 253 U.S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908.

[5] See St. Joseph Stock Yards Co. *vs.* United States, 298 U.S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033 (1936), where the rule was reaffirmed by the majority of the court and was thoroughly discussed in the dissenting opinion of Mr. Justice Brandeis.

[6] St. Joseph Stock Yards Co. *vs.* United States, *supra*, at page 51.

[7] New York Civil Practice Act, Section 1304. This type of review is applicable not only to public service commission orders, but is a unified method that is applied to practically all the administrative tribunals of the state. The Appellate Division has held, however, that if a utility claims that its property is being confiscated, the remedy by certiorari is not exclusive, but the utility may have a review of facts as well as law in an action for injunction (Pennsylvania Co. *vs.* Public Service Comm., 211 App. Div. 253, 207 N.Y.S. 599); and on the basis of that ruling the Supreme Court of the United States recently indicated that New York offers a sufficiently broad review in confiscation cases to escape the condemnation of the Ben Avon case. People *ex rel.* Consolidated Water Co. *vs.* Maltbie (1938), 82 L. Ed. 489, 58 Sup. Ct. 506.

TABLE

SHOWING, AS TO THE SIX PRINCIPAL SUBJECTS OF ADMINISTRATIVE ACTION IN THE STATES, THE SCOPE OF JUDICIAL REVIEW UNDER PRESENT STATUTES

State	Public Utilities	Securities	Workmen's Compensation	Unemployment Compensation	Insurance	Income Tax
Alabama	Fp	F	C	F	L	Fp
Arizona	Fp	N	L	L	F	Fp
Arkansas	Fp	F	..	L	F	F
California	L	Fp	L	N	F	L
Colorado	L	F	L	L	Fj	F
Connecticut	F	F	L	L	F	..
Delaware	..	..	F	L	F	F
Florida	Fp	F	F	L	F	..
Georgia	Fp	F	L	L	F	F
Idaho	L	F	Fp	Fp	F	F
Illinois	Fp	Fp	F	L	Fp	..
Indiana	Fp	F	L	L	F	F
Iowa	Fp	F	L	L	F	F
Kansas	F	Fp	F	L	F	F
Kentucky	Fp	F	L	F	F	F
Louisiana	F	Fp	C	L	F	F
Maine	L	F	L	L	F	..
Maryland	Fp	..	Fjp	L	F	L
Massachusetts	Fp	Fp	L	F	F	L
Michigan	Fp	L	L	L	F	..
Minnesota	Fp	L	L	F	Fp	Fp
Mississippi	F	F	..	L	F	F
Missouri	Fp	F	L	L	F	Fp
Montana	Fp	Fp	F	L	F	F
Nebraska	Fp	Fp	F	F	F	..
Nevada	Fp	..	N	L	F	..
New Hampshire	Fp	N	C	F	F	F
New Jersey	Fp	C	F	F	F	..
New Mexico	F	Fp	C	L	F	..
New York	L	C	L	L	L	F
North Carolina	Fp	Fp	L	L	F	Fp
North Dakota	F	Fp	L	F	F	F
Ohio	F	F	Fj	F	F	..
Oklahoma	Fp	Fp	L	..	F	F
Oregon	Fp	F	Fj	L	F	F
Pennsylvania	Fp	Fp	L	L	Fp	Fp
Rhode Island	F	F	F	F	F	..
South Carolina	F	F	L	L	F	F
South Dakota	F	L	L	L	F	F
Tennessee	F	F	C	L	F	F
Texas	Fp	Fp	F	F	F	..
Utah	L	F	L	L	F	F
Vermont	L	F	Fj	F	F	F
Virginia	Fp	Fp	L	L	Fp	F
Washington	F	Fp	Fp	L	F	Fp
West Virginia	F	..	F	F	Fp	F
Wisconsin	Fp	Fp	L	L	F	Fp
Wyoming	L	F	C	L	F	..
Total "L"	8	3	23	32	2	3
Total "F"	39	37	16	14	46	32
Total "N"	0	2	1	1	0	0

"L" indicates review on questions of law only (construed as including the question whether any evidence supports the order).

"F" indicates review as to facts as well as law. When followed by "j," statutory provision for jury trial is indicated. When followed by "p," a statutory presumption in favor of the correctness of the administrative determination is indicated.

"N" indicates that no judicial review is provided in the administrative statute.

"C" indicates that the subject is handled by the courts from the beginning, and not by an administrative body.

A blank indicates that the subject-matter is not regulated in the particular state.

and Wyoming statutes make them conclusive if supported by any evidence. In New Jersey the statutory rule is somewhat confused, for while there is in that state a general provision (applicable to nearly all of the boards and commissions) for a statutory form of certiorari under which the evidence may be reviewed by the court and new evidence may be offered, there is also a special provision in the public utility act that the order may be reversed only if it clearly appears to have been made without the support of any evidence. The courts, however, seem to have resolved the confusion by treating the last-mentioned provision as a mere presumption and adhering to the broader review provided by the general certiorari statute.[8]

To generalize on the subject of judicial review of the orders of public service commissions, it may be said that the great preponderance of present-day practice is to give the aggrieved party a trial *de novo*, with opportunity to present new evidence in the reviewing court.

Securities (Blue Sky Laws)

Nearly all of the states which have a so-called Blue Sky Law administered by a board or commission with power to make administrative orders, provide for a complete judicial review upon the facts as well as the law. The first group of Blue Sky Laws was enacted in 1913, when six or eight states entered the field at once with acts which were very similar in pattern, all containing provision for full judicial review; and that has been the prevailing system ever since. Only Michigan, Minnesota and South Dakota seem to limit the review to questions of law, by confining it to a proceeding of certiorari. In Arizona, Maryland and New Hampshire, however, the statute makes no provision at all with respect to judicial review.

Workmen's Compensation

When we come to the workmen's compensation acts we note for the first time a definite trend against the granting of a review upon the facts. Historically the reason for this departure is quite plain. The first workmen's compensation act in this country was that of Wisconsin in 1911, and the provisions of this act set the pattern for many of the other states. The original Wisconsin act was purely elective on the part of both employer and employee, and it was thought by the framers of the act that because acceptance of its terms made the obligation of the employer contractual rather than one legally imposed, the virtual elimination of judicial review would be valid and would make for efficiency and expedition in the administration of the act. They were correct on both points, for the United States Supreme Court sustained the act—as against an attack based on inadequacy of judicial review—on the very ground contemplated by its framers;[9] and the meagerness of the provision for review has unquestionably made for efficiency in administration. A majority of the states have adopted the same type of review, which is virtually a review by certiorari with provision for reversal on the facts only if the award is wholly without supporting evidence or is produced by fraud. Fraud, it is held, means in this connection some dereliction on the part of the commission or its employees, not the fraud or perjury of a party to the compensation proceeding.[10]

[8] Public Service Gas Co *vs.* Board of Public Utility Commissioners, 84 N.J. L. 463, 87 Atl. 651, affirmed on this point in 87 N.J. L. 581, 92 Atl. 606; Erie R. Co. *vs.* Board of Public Utility Commissioners, 85 N.J. L. 420, 89 Atl. 1001.

[9] Booth Fisheries Co. *vs.* Industrial Commission, 271 U.S. 208, 46 Sup. Ct. 491, 70 L. Ed. 908.

[10] Buehler Bros. *vs.* Industrial Commission, 220 Wis. 371, 265 N. W. 227.

In spite of the very limited nature of the review in most states, a large number of workmen's compensation cases are constantly going to the courts. In Wisconsin, for example, the court of last resort has handed down written opinions in about 425 such cases from the enactment of the law up to the beginning of 1937, and a large number of additional cases were decided without written opinion during the same period. We note also that it required 133 finely printed pages of the West Publishing Company's General Digest for 1937 to digest the workmen's compensation decisions for that year alone, throughout the United States. It may well be, therefore, that workmen's compensation is one type of administrative activity in which a limitation of the review to questions of law is indicated as the more workable system, even though miscarriages of justice may sometimes result—simply on the ground of the very heavy burden that would be thrown upon the courts if the review of compensation awards were made more liberal.

It is to be noted, however, that the states which permit a review upon the facts in workmen's compensation cases are by no means a negligible minority, as there are 16 in which that type of review is provided. But the prevailing view of the courts even in those states is that the commission's award is entitled to an exceedingly strong presumption of correctness, and the courts will reverse only for flagrant error.[11]

Unemployment Compensation

We have included unemployment compensation among the six major subjects of administrative activity, not because the awards made under these acts will probably lead to any great volume of litigation—the amounts paid in individual cases are too small for that—but because these acts are the most recent administrative statutes that have been passed generally throughout the country, and on the subject of judicial review they exhibit a strikingly uniform pattern. With the exception of the Wisconsin Act, which was passed in 1932, all of the unemployment compensation acts have come into existence during the years 1935 to 1937. The stampede to get them on the books was due to the compulsion exerted by the federal Social Security Act, which imposes a heavy tax penalty upon the industries of those states which do not have state unemployment compensation acts.[12] The speed with which these statutes had to be enacted to avoid the penalty, coupled with the activity of the Social Security Board at Washington in framing a model act and assisting in the legislative effort in the different states, fully explains the uniformity of phraseology that is encountered in state after state as these acts are examined. And the provision made for judicial review in these uniformly worded acts is the absolute minimum. The award may not be disturbed by the court if supported by any evidence, in the absence of fraud. Thus it will be noted that the scheme of the original Wisconsin Workmen's Compensation Act of 1911, which was based on the idea of voluntary acceptance and the creation of contractual relationship, has now been transplanted on a large scale into an act which is wholly compulsory. There can be little question of its constitutional validity, however, in view of the fact that the administrative determination in this instance is clearly "judicial" rather than "legislative" in its character.[13]

[11] See, for example, Plano Foundry Co. *vs.* Industrial Commission, 356 Ill. 186, 190 N.E. 255; Morgan *vs.* Butte Central M. & M. Co., 58 Mont. 633, 194 Pac. 496.

[12] Social Security Act, Title 42, U.S. Code, Sections 1101 to 1110, particularly Sections 1102 and 1103.

[13] Washington, Virginia & Maryland

On the other hand, there is a very respectable minority of 14 states in which review upon facts as well as law is permitted in the case of unemployment compensation.

Insurance

Commissioners of insurance exercise a very important administrative function in connection with the licensing of insurance companies and their agents, the approval of policy forms and sometimes of rates, and the examination and approval or disapproval of financial standing; yet the statutory provisions for review of their orders are much less definite and comprehensive than in any of the other administrative fields we have discussed. In practically every state we are able to find *some* insurance statute in which there is provision for judicial review; but it usually relates only to a small segment of the commissioner's activities. Such a provision, for instance, may relate to revocation of agents' licenses only, or to foreign casualty companies only, or to fraternal benefit societies only. It is seldom that the insurance laws of any state are found to contain a general and all-inclusive provision for review of the commissioner's determinations. On the specific matters in which review is provided, however, the statutes almost universally give a full hearing in the court upon the facts as well as the law.

Income Taxes

In those states which have a state income tax, thorough provision is practically always made for review of the whole record by a court upon appeal of the taxpayer, sometimes in an action for refund after paying the tax, and sometimes in a proceeding for abatement or other review before the tax is paid. In the recently enacted statutes of California and Maryland, however, and in Massachusetts, the review is limited to questions of law.

Other Subjects of Administrative Activity

In addition to the six subjects that we have singled out for special discussion, the statutes of the various states present an endless variety of administrative organizations for the regulation of all kinds of occupations and professions, running down the alphabet from abstracters to well drillers. Sometimes the most thorough and thoughtful provision for judicial review that is to be found in the statute books of a state will turn up in connection with a relatively obscure occupation. The information collected in the appendix to this report gives a fragmentary view of this field. Interesting variations of procedure sometimes occur, as, for example, in Montana, where a physician whose license is revoked may appeal to the district court of the county and have a trial before a jury of six physicians; or in Minnesota, where an employment bureau whose license is revoked may have a hearing in the district court before three expert referees appointed by the court. Outside of the learned professions, perhaps the occupation most widely regulated is that of real estate brokers, who in most of the regulating states (Delaware, Michigan, New Jersey and Wisconsin being notable exceptions) are accorded a full judicial review on questions of fact as well as of law.

An important recent development in administrative law is the enactment of labor relations laws during the past 12 months in Massachusetts, New York, Pennsylvania, Utah and Wisconsin, all modeled on the federal labor relations act known as the Wagner Act. These state laws confer upon a commission the power to determine

---

Coach Co. vs. National Labor Relations Board, 301 U.S. 142, 146, 57 Sup. Ct. 648.

the legitimacy of a labor union, the fairness of an employer's labor practices, and the propriety of his discharge of an employee. The boards have authority to order an employer to reinstate a discharged employee, with back pay, if his discharge is found to have been because of his union activity. All five of these acts expressly provide that the board shall not be bound by the rules of evidence and that its findings of fact, if supported by evidence, shall be conclusive.

If these labor relations acts, which constitute the most recent instance in which administrative procedure has entered a new field of human relations, are to be regarded as typical and representative of present legislative thought, then it must be concluded that the trend of today is toward the complete suppression of judicial review on questions of fact. It may well be, however, that this labor legislation should not be regarded as representative of a settled pattern for administrative enactments in general. This legislation was passed, as we all know, during a period of unusual labor unrest and at a time when a tremendous struggle between two great national labor organizations was throwing the whole industrial picture out of focus. The fact that the labor organizations were powerful enough to get these laws passed in the form they desired—including a minimum of judicial interference with the administrative process—does not necessarily mean that the same insistence and the same effective pressure will be applied to administrative enactments on other subjects.

To sum up, our study of the statutes of the different states has disclosed that except in matters affecting relations between employer and employee—*i. e.*, the workmen's compensation, unemployment compensation and labor relations acts—the preponderance of present practice in the administrative statutes is to grant a judicial review of the facts as well as the law. In every state, however, there are deviations from this practice, and in no state except New York can it be said that there is any unified method or system of review applicable to administrative tribunals as a group. And New York, which is the one state with a unified system, is also the one state which permits of practically no inquiry by the court into questions of fact.

Conclusions and Recommendations

We recommend that this committee be continued, and we suggest as the program for the coming year a continuance of the investigation with the following objectives:

A. The ascertainment of the facts with regard to existing methods of judicial review in the federal field, along the lines of the study which we have made this year in the states. This investigation should be so carried out as to avoid conflict with, or duplication of, the work of the association's special committee on administrative law.

B. The formulation and recommendation of a definite policy as to the extent to which judicial review of administrative determinations should go with respect to questions of fact, in order best to promote the administration of justice. This policy will not necessarily be uniform for all types of administrative activity, or as between the states and the federal government.

C. A consideration of the most desirable place of judicial review in the states: whether in a regular court of *nisi prius* jurisdiction, or in a court of appellate jurisdiction or of last resort; and if in a *nisi prius* court, whether it is best to concentrate the review in the courts of a single county or to scatter it throughout the state; or whether the creation of a new court of exclusive, state-wide jurisdiction in matters of administrative appeal would be desirable.

D. A consideration of the extent to which the standing of the administrative determination, when it reaches the courts for review, should be affected by (a) the admission and consideration of evidence by the administrative tribunal, which would not be deemed competent in a court of law or equity; and (b) the couching of the administrative determination in mere statements of ultimate conclusion, without detailed and specific findings of the facts on which the conclusion rests.

Respectfully submitted,
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APPENDIX B

APPENDIX B

SUMMARY OF CONCLUSION AND RECOMMENDATIONS OF THE COMMITTEE ON ADMINISTRATIVE AGENCIES AND TRIBUNALS REPORTED TO THE SECTION OF JUDICIAL ADMINISTRATION, 1939 [1]

To summarize what has gone before, this committee recommends:

1. That the method of judicial review of the determinations of state administrative tribunals should be prescribed in a single uniform statute containing the following features:

(a) That the reviewing court should be authorized to determine all questions of law, but that, except so far as a contrary rule may be constitutionally necessary in cases involving alleged confiscation of property or violation of other constitutional rights, the findings of fact made by the administrative tribunal should be subject to reversal only if unsupported by substantial evidence or clearly erroneous;

(b) That the review should be confined to the record made before the administrative tribunal, except as the court, for good cause, may permit the taking of additional testimony before the tribunal itself,

(c) That the review in all cases should be by a judge without a jury.

2. That every state administrative tribunal should have statutory authority to adopt regulations interpreting or giving particularity to the standards of any statute administered by it, and such regulations should have the force of law until repealed by the tribunal or held invalid by the courts.

3 That rules of procedure to the following effect should be made binding on all the state administrative tribunals:

(a) That *no information or evidence* (outside of matters contained in regulations duly promulgated, or matters of which the courts would take judicial notice) may be considered in a contested case except such as has been introduced and made a part of the record at a public hearing, and that if the tribunal wishes to avail itself of information or evidence in its possession or furnished by members of its own staff or others in addition to that produced at the hearing, such information or evidence must be submitted to all parties and they shall be afforded an opportunity to cross-examine the informant at a further hearing;

(b) That whenever a decision is to be made in a contested case by a person or persons who have not personally heard or read all of the evidence or agreed abstract thereof, a tentative draft of the decision, including proposed findings of fact, prepared by a member or examiner or other subordinate, shall first be submitted to all parties in interest, who shall have opportunity to except thereto and to argue their exceptions before the person or persons who are to decide the case;

(c) That the findings of fact of administrative tribunals be re-

[1] 64 A.B.A. Rep. at 431-434 (1939). The complete report of the committee is not included here since it concerned statutory provisions for review of federal administrative determinations and as such is not pertinent. Id. 407-430. This report being an informative report was received and filed and required no action by the American Bar Association, but the Section of Judicial Administration approved these recommendations as corrected. Id. at 404.

quired to state concisely, and without recitals of evidence or arguments, not only the decision reached upon the ultimate facts, but also the decision on controverted subsidiary facts on which the tribunal must necessarily reach a conclusion in order to decide the ultimate facts.

(d) That in administrative proceedings which are initiated by the tribunal itself, all parties must be furnished with a written specification of the issues which will be considered and determined, and opportunity shall be afforded them to present evidence and arguments upon those precise issues.

On the following matters discussed in this report, the committee makes no recommendation:

1. As to what particular courts in the several states should be the forum for the review of administrative determinations. This we deem to be merely a matter of local convenience.

2. As to the extent to which the rules of evidence which are used in the courts should be observed by administrative tribunals. Our reason for making no recommendation on this subject is that the situations arising are so diverse that no general rule or code of rules can be laid down.

The recommendations which we have made are all susceptible of concise statement in a single statute, and we have drafted a bill for such a proposed statute and suggest that consideration be given to the adoption of some such statute generally in the several states. Our draft is set out below. It is to be noted that this draft does not purport to set up a complete code of rules and regulations for procedure before administrative bodies. It covers only those procedural safeguards within the administrative process which we have discussed in this report as being essential, in our opinion, if the decision of the tribunal is to be accorded its due weight in the reviewing court. And to this we have added a draft of a simple five-paragraph statute for a uniform procedure in the reviewing court

. . . .

Respectfully submitted,
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APPENDIX C

A REPORT

ON TRAFFIC COURTS AND JUSTICES OF THE PEACE

AS APPROVED BY THE

AMERICAN BAR ASSOCIATION

AT THE

ANNUAL MEETING

IN

PHILADELPHIA, PENNSYLVANIA

DURING THE WEEK OF
SEPTEMBER 10, 1940

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FOREWORD

BY

ARTHUR T. VANDERBILT

CHAIRMAN OF NATIONAL COMMITTEE ON TRAFFIC LAW ENFORCEMENT

Lawyers, being devoted to case law and forever looking for controlling precedents, unconsciously tend to identify the judicial process with the intellectual operations of the minds of the judges of our great appellate courts. Much time and effort has therefore been given by them, and properly, to the study of the thought processes of our great jurists, such as Marshall and Story, Kent and Shaw, Holmes and Cardozo.

But to the mass of our fellow citizens the judicial process means not the lucubrations of some eminent jurist in a great court of last resort, but the appearance, voice, manner, actions, and environment of the presiding genius of our civil and criminal courts of first instance. (I had almost said our lowest courts, repeating our thoughtless colloquial phrase, but in the true administration of justice there is no higher and lower. Justice is not of different grades. The English characteristically emphasize this by sending the judges of their High Court of Justice on circuit into the rural counties to try both civil and criminal cases and, even more so, by having their Lord Chief Justice take his turn at presiding over criminal trials at the Old Bailey.) And what our fellow citizens see and hear—yes, and in some instances smell—and experience generally in our justice's courts, our police courts, and our traffic courts, they quite naturally tend to attribute to all courts.

That these contacts with our courts of first instance have all too often not made for respect for law (or respect for judges or lawyers) is not to be wondered at. In many states these courts have been completely neglected, while other courts, more intimately parts of the state-wide system of justice, were being modernized in an effort to meet the needs of the times. In some places they are in fact integral parts of the political, rather than the judicial, system. The result can spell only disaster in terms of public respect for law and for our forms of government.

* * * *

Traffic violations present peculiar problems which but emphasize the shortcomings of many of these local courts. While splendid work has been done, and outstanding records made in traffic courts here and there, such courts are the exception and not the rule, the example to be followed and not the average. When, therefore, the National Committee on Traffic Law Enforcement requested the cooperation of the National Conference of Judicial Councils in a nation-wide survey of traffic courts, its request was promptly complied with. On December 14, 1938, Chief Justice James W. McClendon, on behalf of the National Conference of Judicial Councils, issued the following statement:

> "The National Conference of Judicial Councils, in collaboration with the National Committee on Traffic Law Enforcement and the Automotive Safety Foundation, has begun a comprehensive study of the Nation's traffic courts and traffic court procedure. The purpose of this study is to establish standard procedures adequate and competent to deal with the judicial problems involved in present day traffic problems and to raise the general level of traffic court procedure in many areas.
>
> "Upon completion the procedure and practices developed out of the study will be recommended for approval by the National Conference of Judicial Councils, the American Bar Association, legislatures, local law making bodies, prosecutors and district attorneys, police departments and all others concerned.
>
> "The need for modernization of traffic court methods and procedure is emphasized, at the outset, when the somewhat archaic practices still in use in widespread parts of the country are compared with the modern techniques, now gaining such broad adoption, in the fields of traffic control, traffic law enforcement, state motor vehicle administration, modern methods of safety training by educators, highway modernization, police traffic enforcement techniques, and other related fields concerned with the traffic problems.
>
> "It is imperative that the courts move forward, in concert with all other elements directly involved, in solving both the urban and rural aspects of highway accident prevention.
>
> "Horse and buggy justice and traffic court procedures developed by the rule of thumb method are no longer adequate in coping with the ever increasing problem of dealing with the mass of traffic ordinance and statute violators."

* * * *

For well over a year and a half the study of the traffic courts has been in progress under the direction of George Warren, of the New

Jersey bar, who has devoted himself exclusively to the task. Mr. Warren has studied the traffic laws of the several states, as well as the laws governing the courts that enforce traffic laws. He has investigated the practices of traffic courts, covering problems of personnel, procedure, physical facilities, methods of deterrence, public and political relations. This was done not only by collecting all available materials, analyzing data on traffic law violations and by utilizing answers to questionnaires sent to attorneys-general, 1500 traffic court judges and over 12,000 justices of the peace, but by personal investigations and conferences by Mr. Warren in forty-four states. His research has been rigorous and thorough. For the most part, he has been covering ground never previously investigated, at least on a nation-wide basis. His findings and conclusions have been submitted to and have received the benefit of the criticism of the members of the subcommittee on courts of the National Committee on Traffic Law Enforcement and of its executive committee. Most of the members of these committees are men who have given years of time and thought to traffic law enforcement as judges, prosecutors and other public officials charged with the responsibility of traffic law enforcement, law school professors, automobile club officials and counsel, and executives of various bodies concerned with traffic safety. Mr. Warren's report, therefore, is submitted to the National Conference of Judicial Councils not only on the basis of his exhaustive research but buttressed also by the advice and criticism of men most experienced in the field of traffic law enforcement.

It is hoped that his report will commend itself to the favorable action of the National Conference of Judicial Councils and of the three Sections of the American Bar Association by which it is to be considered in joint session—the Section of Criminal Law, the Section of Judicial Administration, and the Junior Bar Conference—and, in due course, of the House of Delegates of the American Bar Association. It is also hoped that the report may stimulate further studies of the other phases of our courts of first instance to the end that improvement in the administration of justice in these important tribunals may aid in increasing respect for law, on which our process of government and our mode of living necessarily depend.

SUMMARY OF RECOMMENDATIONS

TRAFFIC COURTS AND PROSECUTORS

The Traffic Court System

TRAFFIC LAWS

1. Traffic laws with inherent defects should be revised and those which are unenforceable or unnecessary should be repealed.
2. Traffic statutes should be founded upon the "Uniform Vehicle Code" and the "Model Traffic Ordinances" with only regulations purely local in nature left to local ordinance. However, an exception should be made where this would result in ousting local courts from jurisdiction to try traffic violations.

TRAFFIC COURTS

3. All courts should treat traffic cases apart from their other business.
4. Special courts for traffic cases are necessary when the number of cases reach 7500 per year with a violations bureau in operation, and 15,000 cases per year when there is no bureau.
5. The ideal traffic court organization would be on a state basis with various district courts, and with circuits operating from each district.
6. Physical courtroom conditions should be improved as to facilities, arrangements, cleanliness, and appearance.
7. The taxing of courts costs as a separate penalty should be eliminated, and the fine assessed in one sum. If costs are included, they should be in a reasonable amount.

VIOLATIONS BUREAUS

8. Violations bureaus are to be used only when the number of traffic cases make it impossible for the court to properly dispose of them.
9. The basis for all violations bureaus should be a signed plea of guilty and waiver of trial.
10. Schedules of fines charged at the violations bureau are not to be alterable.
11. The bureau should handle the least hazardous violations and should deal with moving offenses only when they respond to treatment outside the courtroom. Major traffic law violations should never be handled in a violations bureau.
12. Assuming conformity with the recommended basis for violations bureau jurisdiction, the payment of fines by mail, properly safeguarded, is recommended.
13. Fines assessed at the violations bureau should be in average amounts used by the judge for the same offenses, and should be scaled higher for repeaters.

TRAFFIC JUDGES

14. Traffic judges should recognize the fact that a knowledge of traffic laws, traffic policing and engineering is necessary in addition to a legal background and should aim to obtain an understanding of these factors.
15. Traffic judges should not be selected by local authority or on a localized basis where appointment or election on a wider scale is possible.
16. The selection of alternates for traffic judges should be safeguarded.
17. Where more than one magistrate is available for the traffic bench,

it is recommended that one judge be assigned to that post permanently or for a long period, rather than the use of a system of rotation of judges.

18. Traffic judges should be under the supervision of a chief magistrate who should be given regulatory powers.

PROSECUTORS

19. It is recommended that the title "Prosecutor" be eliminated in favor of "Public Attorney" or "Public Solicitor" or a similar term.
20. "Prosecutors" should be assigned to traffic courts for aid in the disposition of cases.
21. Where the information on the ticket or complaint does not afford the prosecutor sufficient detail, the arresting officer should be required to furnish him with an additional report.
22. Prosecutors should not be used for the purpose of deciding whether a traffic violation should be brought to trial.

DEFENSE COUNSEL

23. Bar associations should interest themselves in ascertaining what the function of a lawyer in the traffic courts should be, and in encouraging the maintenance of that standard.

Traffic Court Procedure

PROCEDURE

24. Preliminary hearings in minor traffic cases should be eliminated.
25. Summonses and tickets should be returnable on particular days assigned to officers.
26. Where the volume of cases is large the time of appearance should be staggered according to the type of offense.
27. Complaints other than tickets are unnecessary and should not be used in traffic cases where the officer witnessed the violation.
28. Dockets should be kept by the court clerk's office and traffic cases should be kept in a separate docket.
29. Dockets should be in duplicate, the disposition to be marked on the original by the judge at the time of trial.
30. Each defendant should be treated as a single case regardless of the number of charges against him.
31. Appearances should be enforced by the service of warrants through the police department and by additional fines.
32. The traffic court judge should be made solely responsible for the granting and use of continuances.
33. Continuances should not be used for the purpose of allowing violators an opportunity to obtain the money needed for the fine. Instead, surrender of the offender's license until payment is made is recommended.

THE JURY

34. The use of juries in trials for summary or minor traffic offenses should be eliminated.

APPEALS

35. There is need for the study and revision of the appellate procedure available to persons convicted of traffic offenses.

Traffic Court Administration

CONDUCT OF A TRAFFIC COURT

36. There is a general need for higher standards of decorum and courtroom procedure in traffic cases.

PUNISHING THE TRAFFIC VIOLATOR

37. Juvenile traffic violators should be treated by traffic courts except where a behavior problem is involved.

38. Rigid and set fines (as distinguished from flexible standards) for the various traffic violations are to be discouraged.
39. The utilization of effective methods other than fines and sentences for the punishment and treatment of traffic violators, should be encouraged.
40. The primary aim of the traffic court should be to impress defendants with the need for traffic law observance rather than to penalize.

THE FIX

41. Reduction of charges in traffic cases should be a judicial power and exercisable only by the judge.
42. Judges should hold police officer, prosecutor, or both, strictly accountable for deliberate attempts to weaken the case against the defendant.
43. Clerical procedure should be revised for the purpose of permitting audits, allocating responsibility and providing checks on the handling of cases before they are tried.

RECORDS

44. Traffic judges should be furnished with the traffic record of the defendant by the police department, to be used only after deciding guilt in the present case, for the purpose of assessing the punishment.
45. Drivers' records should be statewide for maximum effectiveness and made available through police departments to traffic courts throughout the state.
46. Traffic courts should keep daily cumulative records, broken-down by division into the common offenses, and published at least annually.

CONVICTION REPORTING

47. Bar associations and other interested groups should interest themselves, where necessary, in the problem of the failure of judges in traffic courts to report convictions as required by state law.

THE JUSTICE OF THE PEACE

THE JUSTICE OF THE PEACE COURT

48. The justice of the peace system is outmoded and its plan of organization ineffective for good traffic law enforcement. It is recommended that the justice of the peace should be replaced for the trial of traffic cases by a statewide system of regular courts with trained personnel functioning on a circuit basis from centrally located seats and under the supervision of a chief judge

QUALIFICATIONS AND SUPERVISION

49.* Minimum qualifications should be prescribed for candidates for the office of justice of the peace.
50. The basis governing the number and location of justices of the peace should be revised to allow the existence of a reasonable number of officers and an efficient distribution.
51. Adequate supervision should be provided, and regular inspections made of all functioning justice courts.

THE FEE SYSTEM AND SALARIES

52. The present fee system in use in most states as a method of remuneration for justices of the peace, should be abolished and replaced by a means of compen-

* Recommendations numbers 49 to 57 are subject to recommendation number 48.

sation not dependent in any manner upon the decision in the case.

53. Where practical, fair and adequate salaries should be given justices of the peace.

THE ADMINISTRATION OF JUSTICE IN THE JUSTICE COURT

54. Courtrooms should be furnished to justices in the various localities.

55. The choice or selection of a particular justice court by the arresting officer should not be permitted if the practical necessity therefor is removed.

56. The practice of taxing costs should be eliminated.

57. All justices should be furnished with, and required to keep, satisfactory dockets, financial and other records, and should be obliged to report to a county or state office at least monthly.

TRAFFIC COURTS AND PROSECUTORS

I. Introduction

Thinking men concede that the control of traffic is today one of the nation's greatest civic problems "greater than the problem of fire, for it annually takes more lives and destroys more property, greater than crime, for it involves all humanity. The strong, the weak, the rich and poor, the wise and the foolish, every man, woman, child or infant that walks or rides is a possible victim of traffic every minute he is upon the public roadway or street."[1] Three lines of attack—engineering, education and enforcement, commonly called the three "E's"—are essential to a balanced program for traffic safety, and combined with research, personnel training, organization, and legislation, have been applied with great effectiveness. Enforcement is founded on the police and the courts. This report deals with the courts.

The vital importance of enforcement is emphasized by traffic surveys and reports in all parts of the country, which indicates that traffic violations are involved in at least half of our traffic accidents[2] and that rigid enforcement decreases the accident rate.[3] How important the courts are to enforcement becomes apparent when it is considered that without conviction arrests have no significance. The police department is dependent for the success of its efforts on the courts.

The job of the traffic court is to apply effective deterrents to drivers who ignore the regulations made for their own and the general public safety. When, as is true of one study, it is shown that one driver of every five involved in an accident had a record of previous violations and that the conviction percentage does not reach 8%,[4] it is apparent that this job is being poorly done. There are two possible explanations of such a record—the obvious one, that the court is not doing its duty, and the less apparent one, that it is not being permitted to function properly. The latter cause may arise from a failure to apprehend or properly prosecute violators or may result from the attitude of the public. Without public good-will and support no system of law enforcement will be effective; courts become lenient and police departments reflect the general attitude.

However, the attitude toward traffic regulations is changing. More and more thoughtful persons, recognizing the seriousness of the accident situation and also the possibilities of effective enforcement, are urging such enforcement. Answers to 2000 questionnaires distributed in one city found 94% of the people favored strict enforcement of moving violations[5] and

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[1] Carl J. Rutland, in an address before the (Texas) Governor's Committee of 100.

[2] Paul M. Green, "Accidents Can Be Reduced," 50 Am. City 71 (Oct. 1935); John L. Towers, "Cooperation In Traffic Safety," an address before the Second Annual Southern Safety Conference, Jackson, Miss. (Feb. 1, 1940); Report, Conference on Street and Highway Safety (1930); Report, The Evanston, Ill., Bureau of Accident Prevention; Boston Traffic Survey (1936).

[3] Report on Highway Safety, Maine (1930); Report of Committee on Safety, New Jersey League of Municipalities; see also Traffic Surveys (W.P.A.) Grand Rapids, Mich., and South Bend, Ind.

[4] Syracuse, N. Y., Sept. 1929 to June 1931.

[5] Augusta, Ga.

a Gallup poll indicated from 80% to 90% of all the American people desired thorough enforcement of traffic laws.[6]

In many sections of the country the public has become dissatisfied with the administration of traffic law enforcement, as representing a system where only a small proportion of the wrongdoers "pay the piper." They have grown to "resent and ridicule an outrageous system of traffic law enforcement which violates almost every American principle of justice and equity." [7] The American people have always resented discrimination and are angered if forced to pay for a violation knowing others are immune. Treating the public fairly is more than its own reward, it is good enforcement policy.

Since traffic law enforcement is fundamentally for the public safety, the theory of an eye for an eye has no place therein. Punishment that smacks of official revenge for violating a law and the philosophy of enforcement for respect only, should be discarded. If a violation has no effect on public safety and convenience, as a practical matter it will be unenforceable and all efforts expended in that direction will do a great deal of harm. "The decisive test in traffic law enforcement is this: that the objective aimed at and the means proposed must appeal to the common sense of the public." [8]

Back of the enforcement problem lies a system of courts never designed nor intended for a problem thrust upon them by changing times in the form of an automobile era. Only through fundamental changes and redesign can permanent improvements be made. This study seeks to analyze present traffic court systems throughout the country with a view to indicating defects and necessary changes.

II. Traffic Courts

A. *Generally.* The traffic court is catalogued as an inferior court—a misleading classification. While it handles minor legal violations, the importance of its business is evidenced by the annual thirty-two thousand deaths, the one and a quarter million persons injured and the billions of dollars in damages represented by the cases tried there.[9] In addition it is a forum for more people than all our so-called higher courts.[10] When it is considered that only a small fraction of one per cent of traffic cases are appealed,[11] indicating that the only justice the vast majority of accused persons experience is in the lower court, the problem can be viewed in a proper perspective. "The traffic court problem becomes more vital every day, since every driver of an automobile is likely at any time to be summoned to explain a traffic violation. It is an issue of national importance, the solution of which will add materially to the happiness and security of nearly every citizen." [12]

Our traffic courts represent the major source of justice to the people of the United States as a whole. A study for forty-two cities of more than 100,000 inhabitants showed that, disregarding auto thefts and non-arrest traffic violations, 40% of all ar-

[6] Frank Gallup, in an address at the National Safety Council Annual Award Dinner, Wash. (1938).

[7] R. L. Burgess, "Can You Get a Square Deal in a Traffic Court?" Am. Mag. (Dec. 1932) at p. 11.

[8] Miller McClintock, San Francisco Traffic Survey (1937).

[9] See "Accident Facts" (National Safety Council Publication 1938 ed.).

[10] See quotation 84 Forum 34 (1930) from Chief Justice Charles Evans Hughes, "Upon the minor courts rests the burden of all our legal institutions. They cater to over 7,000,000 yearly."

[11] Lloyd W. Kennedy, "Local Politics *vs.* Prosecuting Attorney," 23 J. Am. Jud. Soc. 180 (Feb. 1940).

[12] T. Compere, "Befuddled Justice," 84 Forum 24 (J. 1930).

rests were for traffic violations.[13] One city's record showed nine out of every ten of its arrests were for traffic.[14] The study also indicated the general trend was towards an increase. Under such circumstances it is a serious matter when reports are made of automobile owners "hailed before tribunals for trivial violations of traffic rules herded like dumb cattle to a practically inevitable doom."[15] and when officials feel forced to state that, if innocent, they would hate to take a chance before the traffic judge.

Effective enforcement can hardly be possible where, with one hundred tickets issued for identical offenses, the ninety-seven defendants who admit their guilt pay a fine but the three who demand trial, while adjudged guilty, escape penalty; or where one of several judges sitting in traffic courts of the same municipality sentences thirty-five defendants who appeared before him on speeding charges to a day in jail, while his colleagues were only fining for the same offenses and remitting the fine in many instances; or where one of the judges who rotate on the traffic bench refuses to enforce a specific ordinance because he disagrees with it as a traffic regulation.[16] Yet if the traffic court fails, no effort, regardless of direction, suffices for the proper control of traffic. Without adequate backing by the courts, police officers lose interest in their work by virtue of its futility, and drivers, lacking the restraints imposed by proper enforcement, become menaces to themselves and society.

B. *Laws and the Traffic Court.* Before we turn to the traffic court itself, attention should be drawn to traffic laws. They are of fundamental importance, since the enforcement efforts must necessarily be founded on them. The survey has found many traffic laws to be archaic, poorly drafted, ambiguous, technical, and verbose. In addition they vary from city to city, from state to state, from city ordinance to its own state law, and important aspects are often not familiar to the driving public. A majority of drivers could be tripped up in any series of simple traffic-regulation questions. Five thousand questionnaires were distributed in one city and the 3056 returns indicated the number of traffic laws are confusing and drivers are not taught enough about them.[17] To these factors can be attributed some of the inefficiency of our traffic courts. Poorly drafted laws tend to make good traffic-judging either an impossibility or an extra-legal transaction.

Traffic statutes and ordinances should be revised where necessary. Founded on the recommended Uniform Vehicle Code and Model Traffic Ordinances they should be plain, simple and understandable by the widest segment of our population. There should be a blanket code for the entire state, leaving only regulations of purely local nature to local ordinance, except in states where for purposes of emphasis or local enforcement it may be desirable to repeat the state-law provisions in the ordinance. Where because of established court structure, exclusion of the state-law requirements from the local ordinance would bar the local courts from jurisdiction over traffic violations, it is advisable to withhold any change until the jurisdictional features of the court can be adapted thereto.

Traffic laws which are unnecessary or unenforceable should be repealed and those with inherent defects should be revised. A law habitually disobeyed is worse than useless. It instills a subtle contempt for law which, as a state of mind, cannot but be transferred to other statutes, especially of similar nature or on similar subject

[13] See study by the Aetna Insurance Company (1939).

[14] Salt Lake City, Utah.

[15] *Supra*, n. 7.

[16] C. Fifoot, "Amateur Justice" 136 Fortn. 304 (S. 1934).

[17] Atlanta, Ga.

matter, thereby creating a vicious attitude and making proper enforcement difficult if not impossible.

C. *The Courts Which Try Traffic Cases.* The term "Traffic Court" is a misnomer as generally applied. Only one city, so far as the study has proceeded, has a court set up for the trial of traffic cases only.[18] In every other instance they are handled by courts of general criminal jurisdiction which vary widely from state to state. Seventeen states rely mainly on justices of the peace.[19] In ten states justices of the peace have no jurisdiction over traffic.[20] The remaining states use the justice of the peace only when no other court is available, which is less than half the time. In many of the seventeen states which rely on the justice of the peace their use can be attributed to the lack of other available court systems, a lack caused by the factor of thinly distributed population. This is evidenced by the fact that of these states only four are east of the Mississippi River.

The ten states which do not use the justice of the peace are all located in the eastern part of the country. They have a single type of court with original traffic jurisdiction throughout the state. The judges are on a salary basis in proportion to the volume of business handled, and are usually—although not necessarily—lawyers. Such positions are part-time and are unsupervised. The judges are appointed by the Governor in some states, by judges of higher courts in others, and are elected in one instance.

This system affords the most satisfactory traffic court administration, although in most cases it still has some of the undesirable features of the justice of the peace system, such as the lack of professional qualifications for judges, lack of full jurisdiction, operation on a part-time basis, unsatisfactory locations and the absence of satisfactory courtrooms. The relatively satisfactory results are: *first,* elimination of the fee basis with its essential interest in outcome and incentive to prey; *second,* elimination of thousands of indiscriminately chosen men, all with authority to try traffic violations, although few have tried any considerable number or in an orderly manner; and *third,* the change from popular local selection to appointment by non-local authorities.

Originally there was justification for the fee system as a means of remunerating justices of the peace for what they did according to the labor involved. It worked comparatively well before the arrival of automobiles, when there was no way to foretell the number of cases a justice of the peace would handle, and the cases were sure to be few in number. There was also justification for the large number of judicial officials, because slow transportation made it essential that they be located with geographical frequency, and the state could not afford, nor would any but a few officers deserve, a salary. The development of travel with consequent regulations and violations has virtually eliminated both problems. The third change involved the method of selection. Popular local election worked much better when a town-meeting basis was used than it does today.

In the states which have neither eliminated the justice of the peace in traffic cases nor rely on them principally, the situation can be briefly summarized as follows: except where the police have found certain justices of the peace cooperative, the tendency is to use them only when no other court is conveniently available. In thirteen states traffic trials based on violations committed in the general area adjacent to the courts may be

[18] Danbury, Conn.

[19] Ariz., Colo., Kans., Mich., Miss., Mont., Nev., N. Mex., N. Y., N. Dak., Ohio, Ore., Tex., Utah, Wash., Wis., and Wyo.

[20] Conn., Fla., Ind., La., Me., Md., Mass., Neb., R. I., and Va.

tried in county courts, district courts or municipal courts when they are in session, despite the availability of the justices of the peace.[21] Thus traffic cases may be handled by six or seven different kinds of tribunal in one state,[22] but the results are usually more satisfactory than if tried by the justices of the peace.

The practice is often to use the county court except when the district court is sitting locally. Yet criticisms are made both by and of the district court, which is evidently the best choice available. The difficulties with such a system lie in its makeshift nature. These courts are not prepared to handle traffic cases. County and higher courts customarily handle fewer and weightier cases on a contest or trial basis. Their organization and procedure are adapted to that end and are much too cumbersome for traffic offenses. In many instances they sit infrequently and only for several weeks at one time or in a given place. As a result, when faced with traffic cases there is frequently a great deal of annoyance and it is not unusual for these cases to be either impatiently discharged or put at the end of the docket where they can only be reached at some indefinite future time. Such experiences are not limited to minor violations. Traffic cases are treated as a class and the judges and prosecutors in such courts may deem them too petty for consideration. These courts not being designed or equipped, or making any arrangements, to handle traffic causes, represent little or no procedural improvements over the justice of the peace.

The most satisfactory courts of traffic jurisdiction in the group which avoids the use of the justice of the peace, are the local tribunals in urban centers termed municipal courts and variously called Municipal, City, Police, Recorder, or Corporation Court. Eight states rely on courts of this class.[23] These are either states with a system of municipal courts in their cities and towns or such states where traffic laws are enforced mainly in the locale of such courts. The municipal courts are definitely superior to the county or district court. This can be attributed to the fact that the volume of business from traffic violations, dwarfing as it does any other source, has forced practical adjustment of procedure to fit their needs. Municipal courts are also used in every state for state traffic law violations within their jurisdictional limits and for local traffic ordinance violations. This type of court handles the bulk of the traffic cases throughout the county.

The survey has covered fifty-six cities with municipal courts in all parts of the United States. These were the most populous cities in the various states, since the number of traffic cases handled and the complexities and problems involved were generally found to be in direct proportion to the number of inhabitants. Of these cities, ten had municipal courts with several branches, one or more of which was devoted exclusively to traffic.[24] Eleven cities either set separate days for traffic cases or heard them during special hours.[25] Eleven more kept, or tried to keep, traffic cases apart from other business and hear them together.[26] One of the

[21] Ala., Ariz., Calif., Ill., Ind., Ky., Miss., N. H., N. Mex., N. Car., S. Dak., Tex., and Vt.

[22] Traffic cases in Alabama may be heard before courts variously called, County, Common Pleas, Inferior, Felonies and Misdemeanors, as well as Justice of the Peace courts.

[23] Ark., Calif., Conn., Minn., N. H., S. Car., Vt., and Wis.

[24] Chicago, Cincinnati, Cleveland, Columbus, Detroit, Los Angeles, New Orleans, New York City, Pittsburgh, and Syracuse.

[25] Akron, Birmingham, Buffalo, Dallas, Denver, Little Rock, Milwaukee, Minneapolis, Sacramento, Savannah, and Wichita.

[26] Austin, Boston, Evanston, Fort

cities had a court specially set up for traffic [27] and the remaining twenty-two [28] did not attempt to differentiate traffic cases, trying all cases as they came.

As has been indicated, municipal courts rank high in effectiveness among traffic courts. But this position is, in the main, purely comparative and should not be taken as indicative of municipal court excellence at traffic work. One reason is that these courts, even the ten municipal courts which deal exclusively with the trial of traffic cases, are not traffic courts. They are criminal sessions of the municipal courts devoted, although not necessarily adapted, to traffic cases. Traffic cases are handled through the same offices and follow the same general routine of other criminal offenses, and are decided by one of the judges assigned to criminal court. (It would be more accurate to term these and other tribunals to be discussed, courts of original traffic jurisdiction rather than traffic courts. For convenience, however, the latter term will be used to indicate all courts which handle traffic.)

It has been noted that in over 40% of the cities there is no separation or distinct treatment of cases arising out of traffic violations. Such segregation is deemed essential, for traffic cases differ in important aspects from other criminal business in the following particulars:

1. There is almost always a single issue involved without question of degree or technicality.
2. The judge is given no extraneous or impartial testimony to aid his decision, but must decide whether the defendant's story raises a reasonable doubt. This means in the majority of disputed cases, especially non-accident, that the judge must rely more on character and manner than on facts.
3. Except for some cases involving accidents, traffic violations do not necessitate long, complicated or drawn-out trials. This permits rapid adjudication and the disposal, properly, of a number of cases far beyond that possible in any other criminal field. It is, of course, incomprehensible that 700 to 1000 cases of any kind can be properly disposed of by one magistrate in one day but it is estimated up to 115 non-accident traffic cases can be handled by one efficient, trained traffic judge.[29] This is true only by virtue of the large percentage who plead guilty. Where a violations bureau is in effective use, thereby eliminating a number of the most simple cases—parking, for example—this figure must be revised downward, dependent on the number and type of offenses which are handled by the bureau. Accident cases probably cannot be properly disposed of more rapidly than eight per hour.[30] These figures are reached from a survey of business records in only a few courts, being those most closely approximating a special traffic court with judges experienced at that type of case.
4. By the very nature of traffic regulation, its mobility, size and identity of problems, treatment on a uniform basis

Worth, Hartford, Lincoln, Memphis, Miami, Philadelphia, St. Louis, and Seattle.

[27] *Supra*, n, 18.

[28] Albuquerque, Atlanta, Boise, Cheyenne, Dayton, Indianapolis, Jackson, Louisville, Nashville, New Haven, Oklahoma City, Omaha, Phœnix, Portland, Providence, Reno, Salem, St. Paul, Santa Fe, Spokane, Topeka, and Trenton.

[29] These figures allow approximately four minutes per case. Defendants who plead guilty normally consume one-quarter to one-half that time; those who plead not guilty about twice the time.

[30] Guilty pleas can be disposed of in approximately two minutes, contested cases in about twelve minutes.

is as important in traffic courts as in other aspects of traffic control. With the exception of a few states, that is the present policy and such a trend is apparent even in those few. This need for uniformity necessitates traffic court cooperation with the state motor vehicle administration and calls for procedures which allow information, vital for the state administration, to be readily available to the latter. For example, the nature of the charge, the cause of violation (if it relates to a physical condition of operator), the disposition, and, in accident cases, details of damage for purpose of financial responsibility laws. Then there is the need for enforcing administrative regulations: "lifting" licenses upon conviction of an offense carrying a mandatory suspension, or where a suspension is already in force; the marking of convictions on the back of the driver's license where required.

5 Cooperation with the local and state police in the maintenance of records of offenses, convictions and punishments, is important to such departments as well as most helpful to the court.

Both the fourth and fifth differences require clerical and judicial procedure unlike those used in any other court and call for a specialized organization of the court staff not possible in any but a special traffic court.

6. The traffic violator is a criminal in the sense that he infringes laws made for the benefit of all society, but in the case of minor violations he will not respond to the treatment usually afforded lawbreakers in other fields, such treatment leading to antagonism rather than cooperation and law observance in his case. This does not apply where drunken driving or hit-and-run are the charges.

For these reasons the methods employed in the ordinary criminal court will not be satisfactory in the traffic court. The complicated criminal procedure, with its many forms, its preliminary hearings, and the method of treatment accorded the defendants —even to accommodation—must be altered.

No single system of courts will be effective for all states. The variables are questions of distance, extent of the traffic problem, and character and type of offenders.

It is recommended that all courts treat traffic cases apart from their other business. Where the number of cases filtering through the violations bureau are so numerous as to clog the court and prevent proper adjudication of either traffic or the other cases, a special court for traffic is necessary. Depending on the scope and efficiency of the violations bureau, such a need may be present where the traffic court cases number above 7500 per year, and in any event, when the figure passes 15,000.[31] (In the latter instance even if no violations bureau is in use.) Where the traffic violations are not numerous enough for a separate court, it is suggested they be tried from a distinct docket and heard apart from other criminal violations as a separate session of court. Ideally, as many traffic cases as possible should be heard in a special court by an expert traffic judge.

D. *Availability of Traffic Courts.* The distance from scene of violation to the nearest traffic tribunal and the availability of such a court in the

[31] The former figure is based on thirty cases per day. This assumes that those prepared to admit their guilt of parking and other minor offenses have been disposed of before the court convenes. Where the majority of cases require only sentencing (for example where no cafeteria court scheme is in use) the number of cases that can be disposed of each day doubles.

sense of its sessions, are two obstacles in the present administration of traffic courts. Outside of the urban areas traffic cases are heard by any court which happens to be in the vicinity. The Justice of the Peace, the Recorder, the District Court, the County Court, the Superior Court are all traffic courts at various times. After hours, or when the court is elsewhere, the dispensing of justice must await its return to session. To residents of the state this means another trip to the locus of the violation or the posting of a bond. To non-residents the posting of a bond is almost always mandatory and, in order to avoid the loss thereof, a return trip is necessary As a practical matter this results, in a great many instances, in what has been termed "legalized blackmail," for the return trip would be more expensive than the forfeiture of the bond. A very respectable proportion of motorists caught in these circumstances subsequently learn about the effect of such economy on their licenses in the way of suspension or the application of financial responsibility requirements.

The problem is present to a lesser extent where the place of apprehension is forty or fifty miles from the nearest court. Since the driver is likely to be heading in another direction, the trip to and from the court is an unjustified hardship. This was not contemplated by, nor included in the penalty provisions and is inimical to the interests of safety by virtue of the usual effect on the violator. The problem is not an exceptional one. A number of states either contain less than one court with traffic jurisdiction per county, or else are so large that the distance from the edge of the county to its seat is considerable.

A traffic court system for widest practical use in most states might feasibly be based on a single court for the entire state, headed by a chief traffic judge and specifically designed for traffic cases. Under the chief judge would be a number of district traffic judges sitting in courts located strategically, through the various parts of the state, in relation to the volume of traffic cases. While the court's authority is to be statewide, assignments would be made to individual districts. Each traffic court district would contain a centrally located court. Operating from this base there would be subdistrict courts for rural areas, the number dependent on local traffic enforcement conditions, where the district judge would regularly sit on a specified day or days according to the need therefor. The total number of traffic judges would depend on the amount of business and any emergency could be met by a revision of judicial assignments. The chief judge would exercise a constant supervision and be responsible for the successful and efficient operation of the courts These courts would handle violations of both local and state traffic laws.

Populous cities would usually form a district in themselves with a full-time traffic judge. In districts with several cities each requiring several days per week of traffic court, two or more district judges would be necessary These courts would have exclusive jurisdiction over all traffic offenses on a statewide basis. Such a plan would have the advantage of being as mobile as the problem itself. If, for example, a new highway were constructed the court problem could be solved by, at most, a simple shift of cities. The same is true in the event of increases or decreases in the volume of cases.

A problem any system of traffic courts must face is the transient motorist who is arrested a long distance from a traffic court or after court hours. Under the American doctrine of innocence until otherwise proven, it would be inconsistent to punish accused violators by considerable inconvenience prior to trial. Furthermore, penalties imposed by law do not contemplate this expense

and loss of time, often including overnight waits and additional trips to and from courts, and these extra penalties do not tend to promote a proper attitude toward traffic regulations.

With the statewide traffic court system proposed, there would be no problem in forcing an appearance—any traffic court unit's process issuing out of all districts. Where there is considerable distance between residence and scene of arrest, this could be cared for either by arranging a convenient time for trial, by shifting the trial to a district traffic court near the place of residence, by permitting the accused to appear by counsel, or, under circumstances that would otherwise work a hardship, to plead his case by proper affidavits. Where the plea is guilty, under similar conditions, the defendant might be permitted to appear before his local district traffic judge for imposition of the penalty upon a full report from the arresting officers. No difficulties of uniformity would be present since the court would be unified in practice as well as organization. Drunken driving and hit-and-run cases would not be included in the above program since they are serious enough to warrant detention.

Non-residents could similarly be accommodated by convenient trial dates or permitted to appear by counsel or submit affidavits. The only additional factor is the problem of appearance, for the court's process would be ineffective to call before it a non-resident. Hence, in the event an immediate trial is impossible or most inconvenient, there should be provision for bonding the accused. The clerk of a district traffic court, the ranking police officer on duty, or other officials, could be authorized to accept bonds according to a schedule fixed by the chief traffic judge, to be returned if no fine is assessed, or the difference between the fine assessed and the bond after decision on the basis of affidavits, etc. In this manner every defendant would be heard.

Affidavits, when admitted, should be filled out on forms established by the traffic court, giving full details and being subject to comparison with the officer's sworn report, both instruments being duly verified. Use of such affidavits would give the defendant a feeling of having had a hearing instead of being virtually compelled to forfeit his bond.

The proposed system would eliminate the retention of fines by local authorities, which smacks of the fee system. Some other basis to avoid consequent local loss of revenue could be arrived at in terms of a percentage of total traffic court revenue. The system would provide centralization and adequate supervision and furnish specialized, available and impartial traffic courts—less subject to political interference and local pressures—which could dispense predictable and uniform justice in a dignified manner.

E. *Costs.* The matter of costs is a most important factor in traffic courts. Passing by the justice of the peace and the fee system (which will be dealt with later) the question resolves itself into one of costs charged by the various courts, which vary from nothing to $28.00.[32] In at least two states[33] no use is made of an entire system of courts for traffic cases because of this factor of costs, and in another state the legal fees are ignored.[34] In some instances theoretical costs are collected as a matter of form although they do not exist. For example, a sheriff's arrest fee is charged although the sheriff's office did not apprehend the violator, and

[32] Conn. $5., Colo. $8. up, Ill. up to $21., Me. $4 up, Neb. $1.60 (recently reduced from $4.60), N. J. up to $22., N. Car. up to $28., S. Car. none, Vt. $7. up, Cleveland $4.60, Dayton $8.60, Indianapolis $10., Milwaukee $3.35 plus $2.50 per witness, Philadelphia $2.25.

[33] Ala., Fla.

[34] R. I.

a fee of $5.00 for the prosecutor is collected although no appearance before him is needed. Obviously, enforcement of minor but important violations will lag where the incidental costs are so high that the totals collected from offenders, even with minimum fines, will be disproportionate to the offenses.

F. *Physical Facilities and Clerical Aid.* One of the most serious charges against courts handling traffic cases, their disreputable and unpleasant physical atmosphere which creates an unfavorable impression for all court systems, was verified by the field study. Of over sixty courtrooms inspected, less than 10% met reasonable minimum standards. Faults ran from lack of dignified appearance to dirt and odors. The physical arrangement of traffic courtrooms was found in most cases to be inconvenient for the purpose of trying traffic cases with minimum confusion and maximum effectiveness. In only one or two, for example, were the witness stands used as located. In nine of the cities conditions were disgraceful; crude arrangements, unpainted and dirty interiors, air dank and odors prevalent.[35]

Twelve courtrooms, in addition to the nine above, although decently kept, lacked proper physical facilities.[36] In several instances the seating capacity was so inadequate that from fifty to more than one hundred fifty defendants and witnesses were forced to stand until that number of cases were disposed of. Only five courts (less than 8%) had traffic boards for the purpose of reconstructing the accidents to clarify and check evidence as given by the witnesses. "Guilty or innocent, a person is likely to receive more physical discomfort in a city traffic court than he will from going to jail for a day."[37]

III. Violations Bureaus

The violations bureau, or cafeteria court[38] as it is commonly called, has a definite and beneficial place in the field of traffic law enforcement. The theory of the violations bureau is the establishment of an efficient, business-like system for the disposition of the most minor, numerous and least dangerous offenses in instances where the regular court is overwhelmed to the extent that all parties suffer from an impossibility of properly attending to their cause. Under such circumstances it is advisable to dispose of such cases, where guilt is admitted or which do not merit the judge's attention, without unduly burdening the court, police department, prosecutor, or other defendants. Efficient violations bureaus handle as high as 80% of the offenders.[39] This results in more time per court case. Use of such bureaus is to be weighed against the purpose of the traffic court —to enforce the traffic law effectively and promote safety——and when utilization of this device does not or will not promote these ends a violations bureau is out of place; an additional judge or court is called for.

Like any instrument the violations bureau is subject to abuse when not used for the purpose for which it was designed. There are two grave misconceptions about these bureaus. The

[35] Albuquerque, Atlanta, Boston, Little Rock, Nashville, New York City, Philadelphia, and Providence.

[36] Boston, Chicago, Cincinnati, Cleveland, Dallas, Dayton, Denver, Detroit, Indianapolis, Portland, San Francisco, and Spokane.

[37] Elmer Thompson, see T. Compere, "Telling It To The Judge" 84 Forum 79 (Aug. 1930) at p. 84.

[38] Included under these headings are a number of arrangements which are neither called nor officially recognized as cafeteria courts but which actually do the work of a violations bureau.

[39] "Traffic Courts and Violations Bureaus," Public Safety Series No. 22 at p. 5. Published by the Natl. Safety Council. This was substantiated by the records in Memphis, Miami, Los Angeles, and New Orleans.

worst mistake is the failure to recognize the bureau as a part of the court. For example, in twenty-one cities the bureau was under the police department and entirely outside the court,[40] and practically all other cities have put the bureau under the court clerk. Very few instances were observed where the traffic judge had personal supervision over the cafeteria court, yet each one exercises the power and authority of the traffic court judge in his stead. Theoretically, at least, he is as responsible for what goes on within the bureau as he is for proceedings in open court. The second error lies in the utilization of this system when the court is not in need thereof, usurping, in effect, the legal function. In addition to these faults it has been found that the procedure used by most violations bureaus is legally inadvisable.

In violations bureaus offenders are given an opportunity to admit their guilt and pay a fine without actually going to court. The only effective method is by written plea of guilty and a waiver of trial. This insures realization by the defendant that he admits and pleads guilty to the infraction of a law and has the additional advantage of being legally sound. But merely passing a stated amount across a counter cannot foster respect for traffic law, or technically (without statutory enactment) represent the equivalent of a conviction. It was found that only seven of forty-nine cafeteria courts used the plea of guilty and waiver of trial procedure.[41] In over forty instances the defendant merely said the equivalent of "how much," paid, received a receipt, and was off, while in one instance a plea of not guilty was entered and a "paper trial" given.[42] Too much emphasis cannot be placed on the fact that such a system means little to the violator, especially since the fines are relatively nominal and any friend can pay for the offender. Parking tickets are taken care of with the attitude of paying for a grocery purchase. There is no attempt to make violators of various types of parking regulations understand the importance of those regulations, or to impress them with the judicial procedure and discourage future infractions. To put it briefly, violations bureaus in a majority of the cities visited seemed to exist mainly for revenue purposes and appeared to be considered in that light by the motoring public.

Procedure in the various cafeteria courts is fundamentally the same. The violator is permitted a certain length of time ranging from 24 hours to 7 days, officially, in which to appear in person (or by proxy) for the purpose of paying a sum fixed by the court for the particular violation committed. Where the business done reaches large proportions the bookkeeping and recording become involved but the process remains basically the same.

In using a system of mail payments it is necessary to make provisions for checking of violator records, the signing of a plea and waiver, and the machinery for marking the conviction on the back of the violator's license when that is required by state law.

Assuming a bureau to be based on the proper theory of plea and waiver and to be procedurally sound, we come to the vital function—penalization. It is in this department that existing violations bureaus are administratively weak. And, assuming a proper system and procedure, herein lies the real test of whether cafeteria courts, or a particular bureau, are effective in not only lightening the burden of the

[40] Albuquerque, Atlanta, Boise, Cheyenne, Cleveland, Denver, Jackson, Luna, Little Rock, Memphis, Miami, Nashville, New Haven, Oklahoma City, Portland, Reno, St. Louis, Salem, Seattle, Spokane, and Trenton.

[41] Cincinnati, Dallas, Lincoln, Louisville, Minneapolis, St. Louis, and Syracuse.

[42] Milwaukee.

traffic court, but in furthering the ends of traffic law enforcement.

Fundamentally, the assessing of fines or fixing of bonds is a judicial act. From the outset then, it must be insisted that the amounts are to be fixed by the court and not left to the discretion of clerks or officials never qualified or intended as judicial officers. As a practical matter no other arrangement would work well. There is only one situation where a clerk's discretion might be advisable and that arises where the ticket was given for a mechanical defect which has been rectified. Yet in seventeen different violations bureaus the fines were alterable in amount at the discretion of the clerk or desk sergeant [43] In these cities it was common to save up five or six tags and obtain a bargain rate. Four instances were found where the "schedule" of amounts was unwritten.[44]

The only reason for a varied fine is extenuating circumstances. If a defendant believes he has any such claim his case does not belong in a violations bureau, but should be sent to the judge for consideration. In several cities such cases were not sent to court but were taken up with the judge by the bureau head.[45] Such a method is subject to grave abuse.

There is a serious question as to what offenses should be handled by the violations bureau. Starting with the premise that no bureau should exist except where the court of traffic jurisdiction would otherwise be unable to dispose properly of all the cases before it, we assume it will be conceded that non-moving, less dangerous violations should form the original jurisdiction. Overtime parking is the best example. Major violations warranting a court appearance should under no circumstances be treated in a cafeteria court. Between these two groups it is difficult to distinguish offenses properly within the violations bureau jurisdiction from those which would not respond to such treatment. Much depends on the local court situation and public reaction. The exact line must be left to local discretion. It is also recommended that any offense be removable from the bureau when it appears such treatment is not being effective.

Having set the general range of violations bureau offenses, the next consideration is the schedule of fines or forfeits. The average trend is towards moderate sums. In some few jurisdictions the bureau fines exceed those meted out in court.[46] This tends to defeat the very end to which the bureau was established. But usually court costs are deducted and often the fine is decidedly less than that assessed by the court for similar offenses. The lower scale in the bureau is dictated by a desire to have defendants avail themselves of it. Such inducement is unnecessary, however, for the convenience of the bureau and the possibility of avoiding the tribulations of court trials are powerful incentives. On the other hand, the convenience of the bureau in contrast with the inconvenience of a court trial and the uncertainty of its outcome may induce an innocent defendant to plead guilty instead of asserting his defense. This possibility should be carefully avoided as undesirable and poor enforcement practice. It is, therefore, recommended that violations bureau fines should average the same as those assessed in court under similar conditions.

Under certain circumstances, enumerated above, the minor offender

[43] Austin, Buffalo, Chattanooga, Hartford, Jackson, Minneapolis, Nashville, Norfolk, Portland, St. Louis, St. Paul, Salem, San Francisco, Seattle, Spokane, and Wichita.

[44] Buffalo, Nashville, Jackson, and Wichita.

[45] Hartford and Seattle are two of the cities where this is done.

[46] Boise, Detroit, Milwaukee, Minneapolis, Norfolk, Phœnix, Portland, Sacramento, St. Paul, and Trenton.

may well be given as opportunity to admit his guilt and have his punishment conveniently administered. But cases are altered when the offender becomes a repeater. The most innocuous offense is admittedly overtime parking. Yet even here the repeating violator should be treated with increasing severity, if for no other reason than the psychological attitude he will otherwise acquire toward first that and then other offenses. The repeater should not be allowed to feel that he is simply making an occasional payment for a privilege not accorded his fellow citizens. This line of action is increasingly important in the case of moving violations. Nevertheless, eighteen cities do not penalize repeaters of any kind as such.[47] At these bureaus each offense has a fine which remains the same regardless of the number of times committed by the same person. Four cities treat all but parking violators with more severity after the first offense.[48] In three bureaus the penalties are not increased although increases were provided for by law.[49]

One of the gravest problems faced by cafeteria courts is compelling appearances. The effectiveness of these bureaus is ruined by the common knowledge that nothing is done if you fail to appear, or no additional penalty attaches to being late or brought in by a warrant. Some bureaus telephone defendants and others send warning postcards. All bureaus wait from two to ten days past the legal deadline given to a violator for reporting to the bureau, before taking any action. In some cities less than one-half of the tickets returnable to the cafeteria court come in. A definite correlation exists between the penalization for service of a warrant and the percentage of dodgers. Where lateness or service of a warrant increases the fine, the number of missing violators is relatively small. Where no attempt is made to serve warrants or penalize offenders for failure to *appear, the problem of* non-appearance is usually acute. It is as poor policy for courts to tolerate neglect of their process with reference to violations bureau as it is in any other respect. The obvious effect of this type of inaction is a public apathy toward traffic laws. A violator who fails to appear at the violations bureau or in court, at the proper time, may well be reported to the state motor vehicle department for possible suspension of driving privilege.

Violations bureaus can be a material aid to high standards of traffic court administration, but if utilized without regard to their proper function or made into mere revenue devices they are detrimental to law enforcement in general, and traffic law enforcement in particular.

IV. Traffic Judges

The judge occupying a traffic bench has a post which differs from other criminal benches in numerous particulars. *First,* his docket is made up largely of persons essentially noncriminal, and who do not regard their offenses as falling properly within the criminal classification; *second,* the laws he administers were passed primarily to promote public safety and convenience rather than protect property, thus necessitating a different approach; *third,* the judge has comparatively little occasion for the interpretation and application of complex laws; *fourth,* there are few legal standards, binding precedents, checks on judicial discretion or analogies to draw from, the defendant has having few guarantees; *fifth,* in more than

[47] Atlanta, Austin, Birmingham, Cleveland, Dallas, Denver, Detroit, Fort Worth, Hartford, Lima, Louisville, Minneapolis, New Orleans, Oklahoma City, Phœnix, Portland, San Francisco, and Trenton.

[48] Chicago, Miami, New Haven and Syracuse.

[49] Fort Worth, Minneapolis and San Francisco.

90% of traffic cases the court has no independent evidence to weigh and probably no impartial witness to hear; *sixth,* the fines involved are generally so small, the questions so basically factual and appeals so complex and expensive that to all intents and purposes the traffic court is the forum of both first and last resort.

For these reasons the methods employed on the usual criminal bench will not promote the ends desired of a traffic court. A traffic judge must have more than just a legal background. A knowledge of traffic policing and engineering, and an understanding of the safety field, must go with his psychological and legal training. Judges sitting on the traffic bench must point their attention toward familiarizing themselves with these aspects of the traffic law enforcement problem. It is extremely important for the proper man to be on this bench, for he wields the power of a despot.

Of fifty cities, twenty-two elected the judges who sat in traffic courts,[50] while in twenty-eight they were appointed.[51] In two instances a nonpartisan ballot was used with good effect as evidenced by local opinion and results.[52] But the small number using this device precluded positive proof of benefit. Appointments were of two types, by local officials and by state authority. The latter was used in only five places but was generally more effective.[53] Terms varied from an indefinite tenure to ten years, with four- and six-year terms predominating. Those cities with longer terms were generally better satisfied than other cities. Tenure in appointive offices was usually indefinite.

Based on personnel, popular and official reaction and results, the study indicated elective judges were freer from interference than those appointed by local authority but not as free as appointees of the governor and district judges. This latter deduction was not universally true, and it should be recognized that in some cases where the appointment was by the governor or a district judge the choice was actually local and was merely approved in a routine way by the state officer.[54] In elections the non-partisan ballot was most effective, followed by county balloting. Precinct, or city, voting seemed least desirable, and where, for example, there were several jurisdictions within a county or city, election of all judges on a county-wide or city-wide basis would appear preferable to election of one traffic judge from each jurisdiction.

It is difficult to generalize along these lines because local political conditions are a most important factor. In cases of election the consensus of opinion seemed to be that it was necessary to get away from local election of judges. On the question of appointive offices it would appear that executive appointment is effective in rural states, but where city politics enter appointment by a higher court judge is more desirable. A significant fact was that in several cities with appointive judges the desire for elective officials was expressed, and in a number of cases where elections were used the feeling among inter-

[50] Atlanta, Bismarck, Buffalo, Cincinnati, Cleveland, Columbus, Detroit, Lincoln, Little Rock, Louisville, Memphis, Milwaukee, Minneapolis, Nashville, Philadelphia, Plainfield, Raleigh, St. Paul, San Francisco, Santa Fé, Spokane, and Syracuse.

[51] Augusta, Austin, Birmingham, Boston, Boise, Cheyenne, Columbia, Concord, Dallas, Denver, Fort Worth, Hartford, Indianapolis, Jackson, Miami, Montpelier, New Haven, New Orleans, Phœnix, Pittsburgh, Portland, Providence, Sacramento, St. Louis, Seattle, Topeka, Trenton, and Wichita.

[52] Lincoln and Milwaukee.

[53] Augusta, Concord, Hartford, Indianapolis, and Montpelier.

[54] Under many of our state political setups, local appointments are turned over to local machines as patronage although nominally made by the governor.

ested persons favored appointment. This seems to indicate that neither method is better than the circumstances will allow its administration to be.

A common weakness in the traffic court judiciary system was the failure to provide for adequate alternates or substitutes who sat on the traffic bench in the absence of the regular judge. A great deal cannot be expected of a system permitting the judge to appoint his substitute whenever he needs one; or where the clerk or deputy clerk automatically becomes judge *pro tem.*; or where a city official may supersede the judge whenever he feels so inclined. It is essential that the caliber of the man on the bench be consistently high.

The logic behind specialization applies to the traffic court. A special judge would acquire expertness in the handling and disposition of these cases. In other courts the type of cases is so varied and the number of any one type so few and irregular that a judge for a single type is impractical. Our present judicial system already provides for the separation of our criminal and civil courts. It is now contended that traffic cases should be separated from other criminal cases. They involve distinctly different subject matter and a sufficient volume of business to make such a plan practicable in a great many courts with original jurisdiction over traffic cases.

Where an adequate volume is present, it is recommended that one judge be permanently assigned to traffic court. In over 85% of approximately forty-five cities having more than one judge in the court with traffic jurisdiction, a system of rotation was used on the traffic bench. In no single instance was the result satisfactory. The worst effect was apparent when the length of each sitting was one month and each judge sat on the traffic bench several times a year. Two major arguments were advanced in favor of this system: *first,* the convenience of the judge; *second,* elimination of possibilities of pressure. The first objection is more a question of interest than anything else. Sitting on a traffic bench is undoubtedly the hardest type of judicial work, and the most monotonous, but judges who spend more time and try a larger number of cases than nine out of ten colleagues in other cities find it interesting, and there are several instances of requests to be permanently assigned to the traffic court. As for the second reason, the possible benefits arising therefrom are counter-balanced by trading in favors and the division of responsibility. In addition, there is a decided tendency towards increased continuances in order to have cases tried before one or another of the judges. Comparison of traffic case disposition for the period a permanently assigned judge presided and during his vacation, and study of the records of the judges who rotate for the respective terms indicates startling differences in enforcement, especially in penalization.

There are other factors, however, which detract from the desirability of sitting on the traffic bench. To an uninterested judge, one not vitally concerned with safety and with the problems of the minor court, the traffic bench is a most boring, tedious and arduous job. From the judicial viewpoint there is a practically complete absence of legal theorizing. In addition, that bench is considered the lowest post in any municipal court. It carries less dignity, prestige, and where a separate court, lower salary. These are all remediable in a practical manner.

The necessity for legal training in a traffic judge is obvious. He must be able to interpret and apply the traffic law; he must be able to safeguard individual right, sift admissible evidence, honor legal prerogatives, and otherwise conduct a court of law. But in addition, the traffic judge of the future must be able to evaluate and utilize accident statistics,

the principles of selective enforcement, the enforcement index, spot maps, and a host of other traffic engineering and law enforcement data. Safety will be his work, judging his means; and a knowledge of traffic policing and traffic engineering engrafted on a legal foundation will be his tools. His purpose will be not merely to enforce regulations as such, but rather to administer the law so that the man or woman leaving his court will not continue consciously to break traffic laws.

V. Prosecutors

The prosecutor is a vital cog in criminal courts. That less than 50% of the forty-four states and only a third of the fifty-eight cities use prosecutors in the trial of traffic cases would seem to indicate a fairly general tacit acknowledgment of differences between traffic and other criminal cases. A serious questioning of the desirability of prosecutors in traffic cases other than reckless driving, drunken driving and hit-and-run charges was encountered. The opinion was often expressed that the activities of a prosecutor tended toward complication rather than clarification. It has been found, however, that the prosecutor can be uniformly helpful in all traffic cases provided he appreciates the non-criminal aspects of the majority of them.

The benefits derived from the presence of a prosecutor will flow to the court, the police department and the public. For the court the prosecutor can segregate the traffic cases and separate the lengthy, more serious ones from those which will take but a few minutes. He can ascertain, by calling the defendants a few minutes before the judge's arrival, those who wish to plead guilty, and, at the same time, determine which defendants and officers are not in court so that the machinery to obtain their presence can be started without delay, and the cases so marked to save futile calls. He can relieve the court of supervision over warrants and appeals. And a prosecutor with a proper conception of his traffic court job will also control and present the evidence on both sides thereby eliminating the need for the judge to act either as prosecutor or defense attorney, and permit the court to concentrate upon his real task of deciding the issue.

For the police department an efficient prosecutor will see that the cases of men on the night shift are heard first in their respective class so that they can be relieved from duty after having been up all night. He can indicate the fault in, or need for, certain types of testimony. Most important, he will dispel the impression that the officer is attempting to persecute the defendant, with its obvious effect on the accused as a member of the general public

For the public a prosecutor in traffic court will mean expedition both generally and in individual cases. Defendants whose case requires a few minutes will not find it necessary to wait hours, while several accident and drunken driving charges are tried. Too, if the prosecutor has a proper conception of his post, it will mean relief from much of the tension aroused in the average person by a courtroom, and a guaranty that the defendant will be heard and understood regardless of nervousness, poor speech, or inexpertness.

Traffic court prosecutors are faced with serious practical difficulties Fundamentally these are founded on the tremendous number of cases coming before the traffic court. It is impossible for any prosecutor to familiarize himself with even one hundred cases a day; yet in large cities a normal docket holds three and four times that many. Since most of the cases can be handled in rote form and require no information other than is given on the ticket, we can assume the prosecutor, in arranging the order of the cases on the docket, will eliminate these. There remain the cases

where the charge does not indicate the details of the offense, those cases wherein witnesses will testify, and others with unusual aspects. Examples of the first class are reckless driving and hit-and-run cases; accidents belong to both the first and second types; witnesses may be found involved in any of the charges; and extraordinary circumstances are not limited to any particular offense.

Some of these problems may not be apparent from the docket and unless brought to the prosecutor's attention will necessarily take him by surprise at the trial. On the other hand, even knowing witnesses are to be called will not enable the prosecutor to prepare for the examination The answer lies in cooperation by the police department. In all cases that come under the above classification the officer should make a detailed report of the conditions, circumstances, peculiarities, and any additional data having an important bearing on the violation. This would include names and addresses of witnesses, their position in relation to the violator and his offense, admissions and remarks of the defendant, and other pertinent detail

In order to function properly the traffic court prosecutors must appreciate the difference between the usual traffic violator and the average criminal, and understand the purpose of the traffic court. This cannot be done if he lives up to his title. To prosecute implies a one-sided endeavor. Yet the purpose and duty of the traffic court "prosecutor" is not merely to convict. Instead, in absence of counsel, he should be as much interested in protecting the accused as he is in obtaining the evidence against them. The end desired by a traffic court is cooperativeness and understanding. This would be defeated by cowing the defendants, taking advantage of their nervousness, or otherwise arousing their resentment. If the prosecutor saw that both sides presented their evidence in a minimum of time and that neither side took any unfair or illegal advantage, his function would be fulfilled. The purpose of his office should be to obtain a succinct and clear presentation of the facts so that the judge can act upon them without having the additional burden of extracting such information. His duty is NOT the conviction of defendants. Under these circumstances it is suggested the title "Prosecutor" be dropped in favor of "Public Attorney" or "Solicitor." This would also have the effect of counteracting, at least partially, the unfavorable public conception of that office.

Prosecutors were found assigned to courts with traffic jurisdiction in twenty-two states.[55] In over half of these they were either not used in traffic cases or appeared only in the most serious cases and jury trials.[56] Nineteen cities had prosecutors assigned to courts with original traffic jurisdiction,[57] but in seven cases they either ignored that part of the court's business which dealt with traffic or handled only the more serious cases.[58] Two cities of over 250,000 population [59] and three with over 500,000 people [60] had no such officer in their traffic courts, although the number of traffic cases handled was in proportion to their size.

Prosecutors usually occupied appointive posts. In eleven of the nine-

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[55] Ala., Ariz., Ark., Colo., Conn., Ga., Ill., Ind., Kans., La., Me., Mich., Minn., Miss., Neb., N. H., N. Y., Ore., Pa., Vt., Wis., and Wyo.

[56] Colo., Ga., Kans., Me., Minn., Miss., N. H., N. Y., Ore., Wis., and Wyo.

[57] Albuquerque, Cheyenne, Cleveland, Denver, Hartford, Indianapolis, Little Rock, Louisville, New Haven, New Orleans, Philadelphia, Phœnix, Portland, Providence, Reno, St. Paul, San Francisco, Syracuse, and Wichita.

[58] Albuquerque, Boise, Cheyenne, New Orleans, New York, Reno and Trenton.

[59] Atlanta and Memphis.

[60] Chicago, Pittsburgh, and New York.

teen cities the prosecutor's office had one or more assistants. In these cities the assignment to traffic court cases was, unfortunately, considered the least important post. Generally, the prosecutor's office was heavily involved in politics and was often considered a stepping stone to higher political office. Hence the average term in office was short.

A very important aspect of the prosecutor's work is his pretrial function. In eleven of the twenty-two states [61] and twelve of the nineteen cities [62] the prosecutor has absolute discretion whether a traffic violator should be brought to trial. In four of the states and three of the cities it was exercised in serious cases only.[63] Three other cities held preliminary hearings by the prosecutor,[64] one for all traffic cases, another for serious cases, and the third for accident cases only. In the remaining cases the prosecutor merely issued, or refused to issue, complaints. Six additional states and cities treated this power as a mere formality.[65] Approximately 20% of the jurisdictions wherein prosecutors passed on complaints felt the prosecutor was not cooperative.

The pretrial function has been carried over from regular criminal cases where arrests on view are rare and cases are usually founded on circumstantial evidence. This necessitates investigation for the purpose of ascertaining whether the evidence warrants the charge. But in traffic cases practically all apprehensions are made on the scene of the violation leaving the only question one of the weight of evidence, which is for the judge to pass upon. A weeding out of cases before trial might be helpful to a busy court, but such a process is so subject to abuse that it must be classified as dangerous. In view of this, and the dissatisfaction expressed, the use of the prosecutor in a pretrial capacity is not recommended. If there appears to be a need for checking the propriety of arrests, it is suggested that a solution through the police department would be a more effective and desirable method.

VI. Defense Counsel

Defendants in traffic cases are usually not represented by counsel. Except for isolated instances, attorneys appear only in three types of traffic cases; the more serious (especially those which imperil the driver's license); jury trials; and accident cases which are to form the basis of civil actions. All three add up to a minor percentage of traffic cases. The practical reason is that relatively few cases are serious enough to warrant their retainer or appearance. In a large number of the traffic cases where lawyers represent the defendant they are retained for the purpose of finding and directing pressures on police, prosecutor and judge. Relying on acquaintance, professional contact and the "unimportance of the violation," the attorney often succeeds in having charges lowered. This is one type of the activity denoted as "fixing." Because of a general unfamiliarity with the problem the average attorney does not appreciate the effect of such endeavors. This situation will respond to a program designed to interest bar associations and to point out the problem traffic law enforcement represents in the courts today. Officials of at least one city credit such a campaign with bringing about cooperation to the extent that attorneys induce their clients to plead

[61] Calif., Idaho, Ind., Kans., Me., Minn., N. Mex., Okla., Vt., Wash., and Wyo.

[62] Atlanta, Cincinnati, Cleveland, Dayton, Detroit, Lincoln, Los Angeles, Minneapolis, Portland, Providence, Sacramento, and Topeka.

[63] Calif., Me., Wash., and Wyo. Detroit, Los Angeles, and Minneapolis.

[64] Cleveland, Portland, and Seattle.

[65] Calif., Idaho, and Kans. Minneapolis, Portland and Sacramento.

guilty when convinced of that fact by investigation.[66]

Due to his infrequent appearance in this court the defense counsel attempts to argue his case on a civil basis. Contributory negligence, the last clear chance doctrine and the fact that the parties involved have reached agreement as to the payment of damages, are his usual arguments in accident cases; while the claim that there was no wrongful intent or no harm done, or that the violation is common, is often made under pleas of not guilty in non-accident cases. The defense lawyer generally fails to recognize the criminal aspect of a traffic violation and perceive that the only question is whether his client committed such a violation. His own arguments often admit this guilt.

This misdirection of energy, which tends to prejudice the interests of the defendant, reduces the attorney's usefulness in defending clients against unproved charges and establishing extenuating circumstances. Occasional speeches by traffic judges at bar meetings would do much toward clarifying erroneous conceptions in this field.

VII. Procedure

A. *Generally.* Procedure can be defined as those steps by means of which cases are brought to trial and decided. With the exception of indictment, as many steps are involved in the trial of minor traffic cases as in cases dealing with major crimes. The procedure used for criminal cases lacks the elasticity necessary to adapt it for efficient use in the handling of traffic cases. Many of the steps are designed to safeguard civil rights and protect the innocent defendant to an extent unnecessary for the lesser offenses comprising the bulk of traffic cases. In addition, they were never designed for the task of handling over 15,000,000 cases of one type. Since the average traffic violation does not present the complexities of the usual criminal case, it is possible to eliminate details, technicalities, and procedures intended for more involved situations. Efficiency is desirable not only because an innocent person has the right to clear himself of a charge quickly, but also on the theory that prompt conviction of a guilty person is one of the most effective deterrents.

B. *Ticket, Summons and Arrest.* There are three means commonly used to obtain the presence of a traffic violator in court: tickets, summonses, and summary arrests. Popular usage confuses the terms ticket and summons. Whereas the first is an order from the police department, the second is issued by the court, but in practice they are not distinguished. Summary arrest indicates an immediate custody resulting either in the posting of bail or incarceration.

All of the fifty-eight cities used tickets or summonses or both to some extent in traffic cases. In three cities the use of tickets and summonses was limited to parking offenses.[67] Thirteen cities used them for minor moving violations such as improper turns and lesser speeding charges, as well as parking.[68] The remaining jurisdictions (42 cities) utilized tickets and summonses for all offenses except drunken driving and hit-and-run cases, except where the violator was not a resident of the state.

Among forty-one state highway patrols thirty-two used the ticket or summons for residents,[69] six relied on

[66] St. Louis.

[67] Boston, Columbus, and Evanston.

[68] Dallas, Detroit, Lincoln, Los Angeles, Memphis, New Haven, New Orleans, Oklahoma City, Phœnix, Pittsburgh, Providence, Topeka, and Trenton.

[69] Ala., Ark., Calif., Colo., Conn., Fla., Ga., Ind., Ky., La., Me., Mass., Mich., Minn., Miss., Mont., Neb., N. H., N. Y., N. Car., N. Dak., Okla., Ore., R. I., S. Car., S. Dak., Tenn., Tex., Utah, Vt., Wash., and Wyo.

summary arrests alone,[70] two used verbal summons[71] and one issued tickets by mail.[72] Of the thirty-two state patrols using tickets and summonses, twenty limited the use to minor offenses.[73] Here again all jurisdictions used summary arrest for drunken driving, hit-and-run and nonresidents. In four of the states the use of summonses was not supported by the law.[74]

No general conclusions can be drawn as to the effectiveness of these divers methods. They are dependent in each locality upon the type of citizen and manner of administration. Theoretically, it would appear that summary arrest is the most effective but least efficient means—most effective from the point of view of dispatch, deterrence, and the elimination of steps in enforcement but inefficient in that it would entail the absence of large numbers of officers from their policing duties, would inconvenience the accused, and would prevent regular docketing and planning and organizing court procedure.[75]

C. *Return Day.* Tickets and summonses can be divided into two classes, those which set a day for trial, and those which provide either for presentation at a violations bureau or for a hearing prior to trial. Practically all state forces plus such cities as are without a violations bureau use the former type. Most cities and the few states which hold preliminary hearings use the latter.

The preliminary hearing is a part of general criminal procedure. All persons accused of crimes are privileged to hear the charges against them. They are, therefore, brought before a judge, the accusation is read and, if they wish to plead not guilty, a day is set for their trial allowing them time to prepare their defense. Such procedure is not needed in minor traffic cases. The type of summons which sets the date of actual trial is more suited for all traffic offenses except hit-and-run cases and drunken driving, these being sufficiently serious and involved to be treated as major crimes. In all other cases the extra trip to court inconveniences, without helping, the defendants, and necessitates double the amount of work, time, and trouble for the clerk, the police, and the court.

Except in the case of serious offenses such as the two named above, it is recommended that tickets and summonses be made returnable on the date of trial, and that no second appearance be required. This should also be done where violations bureaus are in use. Under present conditions, in all but a few cities, the defendant desiring to plead not guilty must first appear at the bureau and announce his intention. A day is then set for trial. In the few exceptional cases the date of trial is put on the ticket. The ticket reads, "defendant has within forty-eight hours of the time set out above to plead guilty and pay a scheduled fine at the Violations Bureau. Otherwise the defendant is to appear in court on the date set forth." A duplicate ticket is then left in the bureau until forty-eight hours before trial at which time it is transferred to the Clerk's office. This system simplifies procedure and serves the defendant's convenience as well.

The question now arises as to when the trial should take place. In theory an immediate trial is the most desirable on the grounds that swiftness and certainty of punishment are effective deterrents, that delay tends to allow slips and that testimony will be fresher. As a practical matter other considerations outweigh these arguments: for example, the need for the

[70] Idaho, Ill., Nev., N. J., N. Mex., and Pa.

[71] N. H. and R. I.

[72] Okla.

[73] Ala., Ark., Colo., Conn., Ga., Ind., La., Me., Mich., Miss., Neb., Nev., N. H., N. Y., Okla., Ore., S. Car., S. Dak., Tex., Wash., and Wyo.

[74] N. Y., N. Car., Okla., and R. I.

[75] For explanation see, *C. Return Day.*

officer to appear in court and remain off the street each time he apprehends a violator, the uncertain state of the court docket, and the convenience of the defendant and officer. A system of assigning each officer one court day per week (or as many as circumstances warrant) has proved helpful to both the court and police department, and convenient for the violator. There has been no noticeably bad effect so long as the officer's court days are frequent enough to assure fairly prompt trials. In eight states this is the only feasible procedure since their law provides for at least five days between apprehension and trial.[76] Eight cities in other states, and the state police in three additional states, have chosen this method.[77] In four states immediate trials are required by law, which system is reported to be troublesome in action.[78]

D. *Complaints.* Another carry-over from general criminal procedure to traffic is the use of complaints. These were instituted for the purpose of acquainting defendants with the charge against them. There appears to be no need for such a document in most traffic offenses except where the officer was not present at the scene. In the great majority of cases the tickets or summonses give adequate details. However, complaints are required by law in some jurisdictions in all criminal cases, in which instances their application to minor traffic offenses is mandatory.

Twenty states and fifteen cities of the forty-four states and fifty-eight cities studied were found using complaints in traffic cases. These are variously called complaints (70 states, 8 cities), affidavits (2 cities), warrants (4 states, 3 cities), and informations (2 states, 2 cities).[79] Technically, affidavits are only in support of complaints and a warrant is an order for physical apprehension, but the terms are used in the sense of complaints. Of this group four states and six cities did not follow the legal requirements for complaints.[80] In a number of cities and states they were made out just before trial or only when a warrant was desired or the offense was very serious. In all cases but one the form used was merely a fill-in type with places for the name of the defendant, the offense or section of statute violated, the location and time of apprehension, and the signature and oath of the arresting officer. The rest of the complaint contained mimeographed or printed matter in rote form, many favoring the ancient legal verbiage. The one exception had a separate printed complaint for each offense, which merely had to be dated and signed. It was found that complaints were often rubber-stamped instead of signed or issued by a clerk instead of a prosecutor or district attorney. In several instances an officer other than the arresting officer affixed his signature. The procedure in such jurisdictions was of dubious legality. Except for requirements of state law these documents apparently serve no useful purpose.

It is believed a ticket made in the form of a complaint would satisfy legal requirements and eliminate the

[76] Calif., Colo., Ind., La., Mich., Pa., Tex., and Utah.

[77] Atlanta, Cincinnati, Denver, Louisville, Pittsburgh, Portland, Salt Lake City, and St. Louis. Ill., N. H., and Wash.

[78] Conn., Ky., Me., and Tenn.

[79] *Complaints:* Ark., Calif., Ill., Kans., La., Mass., N. Car., Okla., Ore., N. Dak., S. Dak., Utah, Wash., and Wyo. Denver, Detroit, Los Angeles, Milwaukee, New Orleans, Providence, San Francisco, and Topeka.

Affidavits: Cleveland and Miami.

Warrants: Mich., R. I., Vt., and Wis. Burlington, Memphis, and Montpelier.

Information: N. Y. and Pa. Philadelphia and Pittsburgh.

[80] Ark., Calif., Kans., and Ore. Cleveland, Memphis, Milwaukee, New Orleans, Pittsburgh, and Providence.

clerical and procedural complexities resulting from officers reporting to an office for the purpose of making out a document which had to be filed and handled several times merely as a formality. Complaints are not used for any purpose that could not be met by the ticket, and their use often results in discharges on technicalities such as having an erroneous section number or wrong date, or being unacknowledged or unsigned.

E. *Dockets.* A court docket has two functions. One may be likened to a schedule, and is of great assistance to the court in eliminating loss of time. The other is that of an official record, the importance of which is obvious.

In the various cities studied, dockets were handled by four different offices. In some they were prepared by the police departments from arrest reports. This method allowed the court clerk to call defendants by name, but otherwise lacked the benefits which accrue from a schedule, since the police department is not in a position to coordinate court activities.

A second method was utilization of the violations bureau. All defendants were required to report there, and if guilt was denied or the offense was not within the jurisdiction of the bureau, a day for court trial was set. This called for two appearances of the defendant and two separate dockets—one for violations bureau offenses and the other for violations for which court appearances were required.

A third method was to require the defendant to appear in court to plead to the charge, a trial date being set if a plea of not guilty was entered. This also necessitated two appearances by the defendant and a second handling through all stages of every case in which the plea was not guilty.

The fourth and preferred method was to clear the cases through the office of the court clerk. He could then regulate the number of cases coming up on any particular day and separate them according to their nature. For example, a court may well handle one hundred parking cases in the time needed to dispose of a few accident cases. When the schedule for a particular day became crowded officers could be instructed to use the next available day. This would assure an efficient trial system.

The benefits of separate dockets for traffic cases, and the need therefor, have already been discussed. Wherever there are a dozen or more traffic cases daily, treating them apart from other criminal cases will prove beneficial to the court, the police and the public. Where traffic cases are numerous certain refinements will be helpful. Minor violations should be heard first, then the major offenses, and finally accident cases. Such a procedure will permit the staggering of appearance hours. If, for example, it is found that minor violations take up two-fifths of the court day, major violations one-fifth, and accident cases the remaining two-fifths, officers in issuing tickets for minor offenses can set 9 A M as the time of appearance; for more serious violations 11 A.M., and for offenders involved in an accident 2 P.M. Not only will such a course benefit the public, but it will minimize the crowding of courtrooms and avoid undesirable reaction on the part of citizens who have to wait several hours, or even return another day. Good law enforcement is founded upon respect.

It has been stated that the docket also acts as a record Dockets used for this purpose vary from an original only, to quadruplicate copies. In some instances one copy is marked by the judges, in others all are filled in by clerks. Their form runs from single line entries to half pages per case, and from treating each defendant as one case to entering each offense, although several are charged to one defendant, as a separate case.

Since the docket represents the record of the court it is suggested it should be comprised of an original

and one copy. More than one copy seems unnecessary. The original should be the official one, to be used in case of discrepancy, and it should be a single line entry with docket number, defendant's name, officer's name, charge in brief, and room for the disposition. The disposition on the original should be filled in by the judge. The copy should contain details of license number, place of violation, description, etc., under the same docket number, and there the disposition should be filled in by the clerk. Neither copy nor original ought to be in the form of entries containing useless wording with spaces for details to be filled in, and necessarily requiring a half page per case.

It is strongly recommended that each defendant be treated as a unit when more than one charge is filed against him. Not only does this favor simplicity and efficiency but it prevents the false conclusions possible when each charge is treated separately. Where the judge finds a defendant charged with four offenses guilty of only one offense, under the system of treating each charge as a separate case the record will be one conviction and three acquittals although no defendant is freed.

F. *Non-Appearance* One of the most serious and trying problems encountered by traffic courts is that of non-appearances. No parallel situation is found outside the traffic court. This is probably due to the difference in subject matter and the relatively infrequent use of process. Commands for appearance from other types of courts are not of frequent enough occurrence to be regarded with the contempt bred by familiarity. By the same token the small number of persons who do disobey summonses from other courts can readily be severely penalized, this in turn discouraging defiance. In traffic courts and violations bureaus, however, according to the figures available, one violator in ten fails to obey a summons.[81]

Non-appearances involve a great deal of extra clerical work, but this is incidental to the problem they represent for law enforcement in general. Communities where violators ignore their tickets or summonses can have no respect for traffic law in particular and law enforcing agencies in general.

The problem of non-appearance was found with varying degrees of acuteness in eighteen cities of the fifty-eight.[82] The percentage frequently rose with population, but that it was not attributable solely thereto was evidenced by the fact that some of the largest cities in the various parts of the country were not among those with non-appearance problems. Of the eighteen cities, eight did not assess any extra punishment for failure to appear at the given time.[83] Half of this number made little or no effort to enforce traffic process. Two of the remaining cities attributed their difficulties to false addresses on licenses and to transients. Four cities found their situation definitely improved when an extra $5.00 charge was levied for failure to appear on the proper day.[84]

The only successful method of meeting this problem is by standing back of every summons or ticket to the greatest possible degree. Mere service of warrant without assessment of extra penalty is not effective, nor

[81] Only about one in five cities had such data available. Compared to estimates in the remaining cities, this figure is conservative.

[82] Austin, Birmingham, Brooklyn, Cincinnati, Cleveland, Detroit, Hartford, Louisville, Miami, New Orleans, Pittsburgh, Portland, Providence, St. Paul, Salt Lake City, San Francisco, Syracuse, and Trenton.

[83] Austin, Brooklyn, Detroit, Hartford, Miami, Salt Lake City, San Francisco, Seattle and Trenton.

[84] Atlanta, Chicago, Providence and St. Paul.

do postcards, telephoning, or letters of warning, clear up the situation. Warrants must be promptly issued and served and the defendant assessed a substantial extra fine (at least $5.00) for his disobedience. Nothing can breed contempt or ruin law enforcement more quickly than failure to penalize non-appearances. The use of license suspension for non-appearance has already been mentioned. Another interesting development is permitting the posting of drivers' licenses as guarantee for appearance, giving a temporary receipt with which the accused is permitted to drive until the date of appearance stamped thereon is past. This has proved effective in one state but the use is too limited for conclusions.

The only practical method of service of warrants is through the police department. Unless officers are assigned to the traffic court for this purpose the court has no means for making the necessary personal service. Police departments recognize this as their problem for the reason above, as well as because they issued the process, and because the success of their efforts depends on respect for the law. In every city which enforced appearances by the issuance of warrants they were served by the police department.

G. *Continuances.* Continuances are another deterrent to effective enforcement. The court docket is disrupted on both the present and continued day, and each postponement entails an inordinate amount of clerical effort if sufficient checks are to be furnished for the proper disposition of the case. So far as enforcement is concerned only non-appearances are more harmful than abused continuances. Innocent or guilty the defendant may find repeated trips to court expensive to his business or work, and this will be reflected in his attitude towards law enforcement. It has been found that one continuance will usually, and two almost certainly, result in failure of witnesses to appear when needed; that in minor cases the evidence is staled and all concerned are exasperated; and that in serious cases delay greatly increases the likelihood of acquittal. Moreover, repeated continuances can be a most effective manner of "fixing." In ten cities this problem has assumed serious proportions.[85] Of these, six felt their entire enforcement program was imperiled thereby.[86]

Only the judge can control continuances and therefore his is the responsibility, although continuances are often granted at the requests of police and attorneys. Each plea for a continuance is addressed to the court's discretion. Where attendance is impossible, or the inconvenience of being present outweighs the other considerations, the policy of most judges is to grant the plea. It is only where postponements are freely granted that a problem arises.

A practical use of continuances has appeared in several states where statutes require that defendants be kept in custody until their fines are paid.[87] The need for this varies with the financial status of violators but in certain areas it is always present to a serious extent. Rather than commit to jail defendants unable to raise the fines assessed for less serious offenses, or use the unsatisfactory substitute of remitting the penalty and allowing violators to go unpunished, many courts have adopted a policy of continuing cases to give the defendant time in which to pay the fine. This works unsatisfactorily, causing a great deal of clerical detail and follow-up procedure and resulting in numerous defaults. To avoid such a situation the legislatures of two states have enacted laws providing for installment

[85] Austin, Columbus, Denver, Indianapolis, Louisville, Milwaukee, Minneapolis, New Haven, New Orleans, and Pittsburgh.

[86] Austin, Denver, Louisville, Minneapolis, New Orleans, and Pittsburgh.

[87] Calif., Conn., Neb., and Wis.

payments of fines.[88] Installment payments have proven less satisfactory than continuances. They involve considerably more clerical detail than continuances and are apparently a less effective collection threat. One of these states has since adopted a policy of keeping violators in jail until 4 P.M. and considering the fine paid.[89]

To jail an offender for inability to pay a fine eliminates all possibility of his being able to earn the money and would result, if used to any appreciable degree, in a public reaction harmful to traffic law enforcement Since continuances and installment payments are unsuccessful it is suggested the violator, where he cannot pay, be given an option of the alternative time in jail or of surrendering his license until the fine is satisfied, allowing a reasonable time therefor. If the fine is not forthcoming the license can be suspended, or a recommendation made to that effect to the Motor Vehicle Administrator. In exceptional cases probation against future violations could be used instead of suspension.

VIII. The Jury in Traffic Cases

The jury is an institution so firmly embedded in our jurisprudence that its general utility is often taken for granted, and it is occasionally used in cases for which it is not well fitted Most traffic cases fall into this class Jury trials are far too cumbersome for application to minor offenses for they prevent any semblance of speedy trial, cause incalculable trouble and expense, are responsible for a great deal of extra procedure, and if generally used in such cases, would flood courts of record. In addition, in most traffic cases they are unnecessary for the protection of the accused, and are otherwise ineffective in this type of case, inasmuch as the jurors, being untrained and therefore unable to diagnose the causes, usually base their verdicts on an evaluation of the effects of the violations.

Juries are usually requested, in traffic cases, either for the purpose of delay or to obtain sympathetic treatment. The latter is possible by virtue of the number of jurors who drive cars and who therefore find it easy to visualize themselves in the driver's seat on the particular occasion. This results in the conception of the violation as "unfortunate" rather than blameworthy, and when it is pointed out that the defendant did not deliberately act as charged, the verdict is generally favorable. This conclusion is borne out by the conviction figures for jury trials in traffic cases.

In twenty-two states and eleven cities sufficient jury trials were requested by traffic offenders to create a problem.[90] Seven of these jurisdictions had little trouble with verdicts but felt the procedure was cumbersome.[91] Two of the seven attributed their satisfaction with results to high type jurors. In the remaining cities and states acquittals ran up to 90%. Five states could get practically no convictions in these cases and thirteen cities and states met with success only where personal injury or severe property damage had resulted from the violation. At least five other jurisdictions had had the same experience and resorted to charging lower offenses or accepting pleas of guilty to a lesser violation.[92] In addition, many cities brought charges under their local ordinance to avoid the right to demand a jury. The major

[88] Calif. and Ore. (Portland).

[89] Ore. (Portland).

[90] Ariz., Calif., Conn., Fla., Ga., Ill., Ind., Kans., La., Mass., Mich., Minn., Mo., Neb., N. Car., Ohio, Okla., Ore., S Car., Texas, Vt., and Wis. Boston, Cincinnati, Dayton, Fort Worth, Lincoln, Los Angeles, New Orleans, Phœnix, Portland, St. Louis, and Wichita.

[91] Ill., Ind., La , Mich., Miss., Okla., and Wis.

[92] Fla. and Minn. Dallas, New Orleans, and St. Louis.

difficulty was in the inability to obtain convictions for drunken driving. Two reasons were given for this condition: *first,* that most jurors both drove and drank, *second,* that sympathetic considerations on the part of jurors were stimulated by too severe penalties.

Grand jurors and coroners' juries play a negligible part in the trial of traffic cases. The same objections apply to these as were put forth for the petit jury. Even in homicide cases the typical attitude is that nothing can be gained from punishing the defendant; that he did not mean to kill the deceased and will always have him on his conscience, and that nothing can bring the poor fellow back Acquittals by coroners' juries are so common, it was found that district attorneys often prosecute the driver involved without regard to their verdict.

IX. Appeals

Only a minute percentage of traffic cases are appealed. The figure is under one-half of one per cent,[93] without including violations bureau disposition which, being a choice by the defendants, are never appealed from and would therefore make the percentage even lower On the basis of the present traffic court situation the number of appeals is surprisingly low. A comparison of the usual traffic penalty with the cost, trouble, and technical difficulties involved in appeals furnishes the reason. The appellate procedure does not conform to the need in traffic cases any more than the other aspects of criminal procedure previously discussed do.

As would be expected appeals are based almost exclusively on serious charges, practically every case involving the suspension or revocation of a license. The percentage of affirmances is disturbingly low. This is partly due to the difficulties of proving guilt beyond a reasonable doubt in traffic cases (the usual lack of witnesses, etc.) but to a greater extent the trouble lies in the attitude of the higher courts. It has been indicated that minor courts and local prosecutors felt traffic cases were petty; state prosecutors and higher courts in many jurisdictions feel even more strongly along the same lines. Because of this feeling that they are unimportant, a large proportion of appealed traffic cases die a natural, undecided death. In one state over 1500 traffic appeals had been pending for years,[94] and at least two cities adopted a policy of leniency to prevent appeals on which they feared no action could be obtained.[95]

The very small number of appeals and the low percentage of affirmations on appeals in traffic cases indicate a need for study and revision of the appellate procedure involved. It is very probable that this situation results from defects in such procedure.

X. The Conduct of a Traffic Court

The manner of a traffic court judge and the conduct of his court must measure up to the highest possible standards Besides general principles, there are several reasons, peculiar to traffic courts, why such should be the case: *first,* the defendants being above the average have higher standards to be met; *second,* in a vast number of cases this is the only court they will experience and their idea of the entire judicial system may well be founded on the impression received here; *third,* the aim of a traffic court is to impress defendants with the importance of, and need for, traffic law observance; and *fourth,* it is very important in traffic courts that the conduct should be of a high caliber so that attempts of "fixers" will not be invited or condoned.

[93] 660 appeals of 432,190 cases, under 2/10 of 1%, was reported by the American Automobile Club Enforcement Study (1934).

[94] Texas (Fort Worth).

[95] Louisville and Seattle.

Under no circumstances should there be grounds for referring to traffic courts as dispensers of "amateur justice."[96] This applies as much to activity in the courtroom as to the behavior of the judge. One or more of the following were observed in over one-third of the traffic courts visited:

(a) There was a disregard of courtroom decorum by the clerical staff,
(b) Various unofficial persons were on hand and around the bench,
(c) A great deal of noise and confusion were common,
(d) There were frequent interruptions while cases were being tried,
(e) Oaths were administered in mumbled tones and were often inaudible,
(f) Defendants were treated impolitely by court attaches, and
(g) There was a general and obvious air of considering the business at hand unimportant.

These had an apparent effect on the defendants, witnesses and other people in court. Unfavorable reactions were manifested in courtrooms of this type by the expression and behavior of the audience. This was even more visible in instances where the court began an hour late, and where the judge showed an obvious anxiety to be through, speaking abruptly and cutting off defendants before they had an opportunity to give their story. Nor was it uncommon practice for a judge in a traffic court to hold conversations on the bench during the progress of a trial either with someone who came into the courtroom to see him, or over a telephone placed at his elbow, or to converse with prosecutors and attorneys, or to conduct the trials in whispers, fostering an impression of secretiveness and conspiracy.

Some of the traffic courts studied were impressive by the efficiency with which they were conducted. Every attache had the air of knowing his job and doing it. The clerk called the cases. When the defendant came forward the judge imformed him of his rights and he was then asked whether he pleaded guilty or not guilty in a tone of voice he could understand. The swearing in of defendant, officer, and witnesses was done seriously. Following this the state was directed to present its evidence, the defendant being offered an opportunity to cross-examine. After the state's case was in the defendant was given opportunity to testify, and he was politely but firmly questioned. As the final step a decision was rendered together with a brief reason.

At no time was anyone able to gather an impression that the judge was distracted or uninterested, or that anyone else was in command. In such courts even the convicted defendant could not hold any feeling other than that he had failed to convince the judge who, upon giving him every chance, had made an honest decision on the facts. The reaction of the defendant that he never had a chance was avoided and his attitude was that "it did sound bad" for him. Without having heard of Socrates' four judicial attributes persons in the courtroom felt the judge had heard courteously, answered wisely, considered soberly, and decided impartially.

In several instances judges spoke with regret concerning the discarded practice of wearing a judicial robe. Not only did they feel the robe would add dignity and atmosphere to the court, but they thought it would be invaluable in distinguishing the judge from the man who might have talked gardens over their mutual fence with the defendant now charged with speeding. Courts in the habit of wearing robes seem to gain in stature thereby.

[96] The title of an article dealing with traffic courts in "Fortnightly." *Supra*, n. 16.

XI. Punishing the Traffic Violator

A. *Generally.* The traffic offender not only differs from the average criminal court defendant in character, but also with respect to his state of mind. Whereas the usual criminal is aware that he outrages the social code and violates property rights, the traffic offender generally fails to appreciate either the meaning or significance of his act. For this reason the function of a traffic court is not so much to punish as it is to deal with the defendant in a manner which will cause the reaction of having learned a lesson. To have violators leave the court feeling sheepish and cooperative indicates the best possible administration for traffic law enforcement. This does not mean traffic laws are not to be enforced or traffic violators treated as non-criminal, but simply that punishment should not be considered an end in itself.

B. *Juvenile Violators.* Juveniles from seventeen to twenty years old figure prominently among traffic law violators, particularly in cases involving excessive speed. In most states the exclusive jurisdiction over minors resides in the Juvenile Court. While this court is properly equipped to handle minors the procedure is slow and too cumbersome for petty offenses. Cities with relatively few youthful traffic violators have used the Juvenile Court with satisfactory results, but jurisdictions where they are numerous found the traffic court more effective and use it despite statutory provisions. In at least two cities this was done with the acquiescence of the Juvenile Court.[97]

Many traffic court judges have adopted special methods of dealing with minors. They require the presence of a parent in court and impress upon them the dangers involved in the situation. A parental penalty is often requested in lieu of court action and, in addition, the judges suggest restricting the use of the family car. The judges also insist on the offender's being made to earn an equivalent of the fine where one is paid by the parent. By virtue of such expedients, and because of their familiarity with the violations, many traffic courts are notably successful in their treatment of minor offenders.

It is therefore suggested that jurisdiction over juveniles committing minor traffic offenses be transferred to traffic courts, together with proper authority for the above and similar practices. Their facilities for handling such violators, plus a thorough understanding of the offenses, when added to successful techniques outweigh the specialized knowledge of the juvenile courts. However, those offenses which involve a behavior problem as well as a traffic violation should remain within the jurisdiction of juvenile courts. Minors charged with reckless driving, drunken driving, hitting and running or three or more lesser offenses within a year, present problems predominantly juvenile. In such cases the specialized technique for handling minors outweighs the expertness in traffic problems. For this reason traffic court judges should be given authority to transfer what minor offenders they consider juvenile problems to the juvenile court.

C. *Treatment of First Offenders.* Opinion among traffic court judges was divided into two schools on the question of the treatment of first offenders. About half felt leniency should be shown and the remaining thought the policy of "going easy" on first offenders was poor practice. The stand that first offenders are to be treated harshly is obviously undesirable where the cause of the violation was either ignorance of the regulation or absence of a proper perspective as to the importance of the statute. Strict treatment in these cases would outrage the personal sense of justice and make an enemy for traffic law enforcement. On the other hand, one who knowingly endangers

[97] Chicago and Los Angeles.

life or property, to take an extreme example, should not be dealt with leniently because he had no previous record. A compromise on this basis would appear to be the most satisfactory solution.

D. *Standardization of Penalties.* Turning from a consideration of the juvenile and first offender, the problem of standards of punishment for traffic violators in general presents itself. Penalties for similar offenses vary seriously from city to city and from time to time in the same city. The latter situation is intensified by the use of rotating judges on the traffic bench. As an illustration of this, reference has already been made to the newspaper report of one judge who jailed thirty-five defendants for speeding while his colleagues were assessing small fines for identical speeds.[98] A uniform, supervised, statewide system of traffic courts would minimize punishment irregularities. Local and state meetings of judges who sit in traffic courts, held for the purpose of discussing these problems would prove very beneficial under present conditions.

Attempts have been made, in one or two large cities, to specify the fine to be charged for each offense, allowing discretion in extraordinary cases only. This system is recommended for violations bureaus, but only as a necessary and lesser evil and because the low fines involved modify the effects of rigidity. Specific fines for use in traffic courts proper cannot be approved. Justice requires flexibility. A fixed-fine schedule would not be satisfactory either as a deterrent to violations or from the viewpoint of public relations, since it would consider neither the circumstances nor the offender. Traveling at the rate of 40 miles per hour in violation of the law on a suburban, sparsely populated street does not deserve the same penalty as speeding 40 miles per hour on a crowded street in midcity, where children are playing. Nor is $15 an equal fine, in the sense that fines are levied for deterrent effect, for both the $25-a-week clerk and the $20,000-a-year executive. In certain cases a nominal fine may be required, in others a large fine may be needed, for effectiveness, although the charges were the same.

Not to be confused with the above scheme, judicial agreement on the best average punishment and other treatment for the various traffic offenses, to be used as measuring sticks, are desirable. These would theoretically fit the particular offenses when they are committed under normal conditions by the ordinary type of violator, and would form the basis for assessing punishment. A large-scale study for the purpose of evaluating deterrent effects of the various penalties and treatments to be based on repetition of offenses, would be most helpful in efficiently setting such standards.

E. *License Suspension and Revocation.* The nature of motor vehicle regulation provides the use of a penalty more effective, in large numbers of cases, than fines or jail sentences. This is the suspension or revocation of drivers' licenses. There is some question as to the effectiveness of suspension of licenses from the viewpoint of enforcing suspensions or apprehending those who disobey them, but neither this nor the details of administrative procedure come within the scope of this study.

Barring the habitual violator from the privilege of operating an auto interferes with his habits and causes him great inconvenience. He is thereby reminded daily of the offense with the desired results. A questionnaire study of penalties effective for curing violators brought 5,817 votes for suspension of licenses whereas fines, which were second, received 1,606 votes. The drivers' license law recommended as part of the Uniform Vehicle Code, and most of the state license laws, require the state adminis-

[98] *Supra*, n. 12.

trator to revoke a license upon conviction for specified serious offenses, such as drunken driving; in such cases a new license may not be granted for at least a year. For certain lesser offenses, or for a generally bad record, the administrator may suspend the license for a longer or shorter time, the driver being entitled to a hearing and having the right of appeal to a court. Any court may recommend to the administrator that the license of a certain driver be suspended. In at least thirteen states authority to suspend or revoke is given to the judges themselves.[99]

On the whole, judicial use of this power was badly neglected even to ignoring statutory provisions in mandatory cases. In some few states it was also abused by improper use of reinstatements. The results where judges have authority to suspend and revoke licenses have been unsatisfactory compared with its general effectiveness as exercised by motor vehicle administrators. The motor vehicle administrator has several advantages which permit much more effective utilization of this power. *First*, he obtains statewide reports of convictions and has each driver's record; *second*, being centrally located, he is less subject to pressure; *third*, he has facilities for study of the violator outside the courtroom; *fourth*, he can act at once to take the dangerous driver off the road, whereas the conviction may not occur for months or longer; and *fifth*, he is able to adopt uniform policies. On the other hand, suspending or revoking a license necessarily includes a determination of unfitness to hold the same, which is essentially a judicial process. Most motor vehicle administrators can be criticized from the judicial angle in their exercise of the power of license suspension and revocation, even though the general results are good. Recognized legal safeguards in this matter are desirable for the protection of the citizen.

On the whole, it is thought the suspension and revocation of licenses should be a function of the motor vehicle administrator. However, provisions should be adopted to make judicial recommendation effective.

F. *"Extra-Legal" Punishments*

Fines and sentences and the traditional methods of criminal courts can be supplemented by punishments peculiarly suited to the driver. Treatment of juveniles and the suspension and revocation of licenses, have been discussed. But there are other means which have been devised by various traffic judges as expedient, and in answer to practical necessity. These are not provided for by statutes but their effectiveness is undoubted. For convenience they will be referred to as "extra-legal" practices.

The most important extra-legal penalty is the "Violator's School." This takes the form of required attendance at a specified number of classes conducted variously by the police department, board of education, local safety council or traffic court. The subject matter is traffic laws, driving practices, and accident causes and prevention. At the end of the course an examination is usually given. When the court is notified that the offender has passed, his case is closed.

The success of a violator's school depends on the way it is operated and on the manner in which it is used by the court. To permit desultory attendance or send to the school a type of violator on whom it will have no effect makes it worthless. Utilizing the school simply because of the offender's financial difficulties is poor practice, nor should its use be limited to a substitute for fines. The general types of offenders for whom the school is most effective are:

1. Violators who lack mechanical driving skill.

[99] Calif., Ill., Ky., Me., Neb., Nev., N. J., N. Y., Okla., S. Dak. (restrain from driving), Texas, Wash., and Wyo.

2. Those who are ignorant of important traffic regulations.
3. Drivers who show an inability to meet traffic situations (clinic treatment).
4. Offenders holding erroneous attitudes toward safety and who appear to be amenable to educative methods.
5. Violators on whom a fine would be an undue hardship, or whose fine would be paid by another, or whose family would suffer as a consequence, and who, at the same time, need a better appreciation of the traffic problem.

While the violator's schools are subject to abuse in operation as well as use, they have been proven effective by the experience of at least five cities.

Other extra-legal punishments which have been successfully used are

(a) Suspension of the penalty provided the defendant repair or junk his car when its condition was the cause of the violation or otherwise constituted a menace to safety;
(b) Taking physical possession of the driver's license for a determined period in instances where suspension was not provided for by law and the inconvenience of not being able to drive appeared to be the proper means to impress the lesson on the offender;
(c) Imposing a visit to the accident ward of the municipal hospital where a violator did not seem to appreciate what the accident he barely avoided would have meant;
(d) Permitting useful labor around the court where punishment was desirable and payment of a fine was an undue hardship, impossible, or otherwise ineffective;
(e) Probation, with the threat of punishment for both violations in case of future offense;
(f) Assigning copy work from appropriate traffic articles;
(g) Decreeing a ten-second stop for the person who habitually ignores a stop-sign because he meets it daily;
(h) Enforcing a particularly slow speed for the driver who thoughtlessly dashes when he turns into his own street;
(i) Deferring sentences until convenient for the violator in proper cases;
(j) Restricting a defendant whose license is essential to the support of his family to driving during business hours.

The application of such measures as have been shown to be effective and desirable is recommended

XII. The Fix

A *Generally.* "Fixing," as applied to traffic violations, means the use of influence to escape normal legal procedure in dealing with such violations. Over half the jurisdictions studied, both city and state, were subject to a serious leakage in their enforcement as a result of fixing activities. It is singly the most pernicious influence and detrimental practice in the field of traffic law enforcement The driving habits of the man who knows he has nothing to fear when violating the law, and the state of mind of the offender who pays for his violations knowing others get away with the same offense, are destructive of both traffic law enforcement and public safety.

The fix can be traced directly to the assertion of privilege or power by members of the public. The most common route used is political pressure. There appear to be three methods of attacking the general problem: *first*, through the selection and tenure of office of public officials; *second*, by education which will enable the people who ask for such favors to appreciate the consequences; and *third*, by directing public indignation against such practice. Many officials, however much they might prefer to refuse

such requests, are likely to grant them so long as their posts depend to any extent on the good will of those making the requests.

B. *Cancellation of Tickets and Summonses.* Sources of the fix prior to the time a ticket, summons, or arrest becomes matter of record are problems for police discipline and policy. After the case is entered it becomes the business of the traffic court (or violations bureau) and any disturbance of that status falls within the purview of the court. It follows that dismissal of a charge even by a police or other official dealing with traffic is an encroachment upon the jurisdiction of the court. The best reason advanced for allowing officials the power to cancel process was the occasional existence of extenuating circumstances, but they are advisedly matters for judicial discretion. At the same time such power in the hands of the police officials, municipal and governmental officers, or prosecutors and court attaches, is easily subject to grave abuse. Therefore, it is recommended that the power to dismiss charges be limited solely to the judge.

C. *Deletion or Change of Records.* The deletion or change of records is a common method of fixing. These are strictly a matter of clerical detail and can be eliminated by simplification of routine procedure and the introduction of checks. A great many clerical offices attached to the court with traffic jurisdiction have expanded with the increase in business, but their organization has never been revised to meet the needs of this new type of work. As a result the system in use tends to be somewhat confused. For example, several employees will each perform a number of tasks instead of each person being assigned to one process. In practice this means that even if it were discovered that certain tickets were never filed, or, having been filed, were subsequently removed, or erasures and changes made in the name, address, license number, or offense, responsibility could not be traced to any individual. In many instances such manipulations are found purely by accident, for only an original is used, or if copies exist, they go through the same process and hands as the original and could be treated in the same manner. This type of fix is relatively easy to prevent. It calls for revamping the office system so that it will include separation of functions to allocate responsibility, different routings of duplicate papers so that both cannot be in the hands of one person at one time, an independent audit and a check of the final entry with the original.

D. *Continuances.* Continuances are a favorite form of fixing, being simple to arrange and free from possible criminal repercussions. One type of improper continuance is merely helpful to the violator, but the indefinite continuance is a complete fix. In the latter the case is pigeonholed and forgotten. The misuse of continuances may be without the knowledge of the judge. He may have inherited a system whereby his clerk takes care of requests without troubling him, or he could have personally granted a postponement for a valid reason yet find no witnesses in court on the new date and never discover that the officer or witnesses had not been notified. We have already placed the responsibility for the abuse of continuances at the door of the judge. It is his province alone to allow postponement, and noting those cases with no disposition marked in his docket is a simple check. This puts the issue squarely up to the bench.

E. *Reduction of Charges.* A reduction of charges prior to trial performs a favor yet does not sear the conscience of the responsible official for the defendant remains liable to some punishment. Activities along these lines are common. Many jurisdictions defend the reduction of charges for the purpose of permitting the offense to come within the ordinance so that

the fine accrues to the city, or to avoid jury trials, or to obtain a plea of guilty of the lesser offense. It is suggested that the first two usages mentioned are improper evasions of the law. If the present system appears unfit for local conditions, the remedy is legislation, not subterfuge. The third cannot be sanctioned, for it is the judge's (or jury's) province to determine the degree of guilt. It was found that reduction of charges was also used to eliminate the possibility of heavy fines and sentences, license suspensions or revocations, and the application of financial responsibility provisions. Therefore, to allow this right under even the defended practices is to open the way to abuse. It is recommended that reduction of charges be permitted only with the approval of the judge in each case. This retains the use but places the responsibility in the most secure place.

F. *Weak Prosecution.* The most subtle means of fixing is weak prosecution. The testimony of the officer or the efforts of the prosecutor are easily directed in the interest of acquittal. To the experienced judge this is fairly obvious in most cases and the cure lies entirely in his reaction.

G. *From the Bench.* The type of fix which cannot be eliminated except by change of political system or personnel is that emanating from the bench. There is no practical method for preventing unwarranted use of discharges, continuances, suspending of sentences, small fines, remitting of fines or costs, probation, or the violators' school, inasmuch as each of these has a wide legitimate and desirable use.

A chief magistrate, armed with supervisory power and the authority to enforce such regulations as are necessary, would be a valuable safeguard against abuses. He could bring individual judges to task or require the endorsement of reasons for discharges, continuances, or unusual penalizations. This would be a check but not a cure. Public interest and wide publicity have been extremely helpful in remedying bad situations in some cities, but they are temporary by nature.

H. *Where the Fixer Does Not Exist.* In many jurisdictions the fix is present to a very minor extent, if at all. Such cities usually possess favorable courtroom conditions, open hearings, excellent audits, frequent publicity, fairly sustained public interest, good supervision of detail, fixed responsibility, and a high quality of personnel. All these factors play important roles in an effective administration of traffic law.

XIII Records

Traffic courts deal with two types of records. One is used by them but kept by the police, the other is the record of traffic violations disposed of by the court.

A *Violator Records.* Criminal courts handling serious offenses are often equipped with a probation department, composed of trained investigators, for the purpose of determining what punishment would be most effective in a particular case. Such thoroughness is neither necessary nor possible in traffic cases, but it is essential for the judge to be acquainted with the record of the defendant as a driver in order to determine the most effective penalty. Whether the defendant has previously violated traffic laws, whether his offenses have been petty or serious, and how deterring other penalties have been, are paramount considerations if the punishment in the present case is to be effective.

Violators' records should be statewide for maximum effectiveness. An individual driver may obey his local ordinances but not those of other cities, or may be tempted by the open highway. Local record systems, by their very nature, cannot include offenses committed outside the city

limits. But assuming that the record is kept by the state highway patrol or motor vehicle administrator, it is still necessary to work out a practical method for the distribution to traffic courts of individual records when they are needed. Under present conditions traffic judges are given such data from either local or state sources in less than five per cent of the cases, although records are available twenty per cent of the time if the judge calls for them.[100] The only effective manner of dealing with these records is through the police department who have possession of them and can easily furnish them to the court. This is successfully done in a number of jurisdictions.[101]

Ten of the states studied have laws requiring the marking of convictions for traffic offenses on the back of the violator's license.[102] This would seem to afford a simple mechanism for furnishing traffic judges with drivers' records. However, it has not proven effective. In seven of the states the courts in general do not follow the legal requirements, thereby rendering the system useless.[103] Two arguments advanced against the use of this plan are that it prejudices the officer who stops a driver, and that it results in administrative difficulties; namely, giving fictitious names or addresses in obtaining licenses and applying for a new license when the old one has had convictions marked on it.

A purely legal question arises concerning the use of driver records. Under the law of evidence such data are not admissible during the trial of an accused violator. The reason is practical and the rule sound. Because a person has previously been guilty of speeding does not mean he was speeding at the time in question, and the knowledge of past convictions may sway the judge's decision. Unfortunately, in the majority of instances where traffic courts are given the defendant's previous record, it is put before them and read by them during the trial. The proper procedure is to decide the question of guilt in the instant case first and, if the decision is guilty, to refer to the driver's record before fixing the penalty.

B. *Court Business Records.* Traffic court records as related to pending cases have been discussed under the heading of dockets. The records to be treated at this point are summarizations of the activities of the traffic court. There are three purposes of these documents: *first*, an inventory of business; *second*, an evaluation of effectiveness; and *third*, a report to the public.

It is as important for the traffic court to check the number of cases handled, the fines levied and collected, the sentences imposed and served, the cases undisposed of, and the cases appealed, as it is for any business to take stock, check sales, etc. The underlying purpose is efficiency, which the court owes to the public just as much as the business owes it to its stockholders.

To carry the analogy one step further, every business periodically determines the profit and losses of its various divisions and analyzes the reasons therefor. In the same manner the traffic court should break down the cases handled into their various classes, together with the dispositions in each case. This would enable the judge to check his record and to review his activity. It would permit him to compare the severity of dispositions with the relative importance of the various violations in accidents; or the relation of his penalization to the frequency of various violations; or to test his effectiveness in any

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[100] These percentages are based on all cities and states studied.

[101] Austin, Chicago, Cincinnati, Cleveland, Dallas, Miami, St. Louis, and San Francisco.

[102] Ark., Ariz., Ga., Idaho, Ky., Me., Miss., Neb., Ore., N. Y.

[103] Ark., Ariz., Idaho, Ky., Miss., Neb., and Ore.

other fashion. This type of record is also of tremendous importance to police administration of traffic law and to other safety efforts.

The need for a public court report is obvious. The court is responsible to the public and should firmly adhere to a policy of publication for its own protection and in the performance of its duty. This report might be summarized as to offenses, but should be detailed as to items on disposition and finance.

Traffic courts have been found badly lacking in the type of records treated above. Their condition varied from no compilations of any sort, to inadequate and poorly broken-down compilations. A few courts with fair records took no steps towards making them public. It was found courts did not have available figures of the traffic cases handled in over seventy per cent of the jurisdictions studied. This was largely a result of the failure to treat traffic cases separately, but that was by no means the sole cause. A few courts used a cumulative system based on daily totals of the various types of cases handled and their disposition. This was found to be extremely practical and produced excellent records. It is recommended that reports based on the figures and disposition of the common violations, together with pertinent financial data be made obligatory, and that these be regularly published in summarized form. The method of compilation would depend on the particular clerical system.

XIV. Conviction Reporting

Traffic courts in 50% of the states were rated poor in their compliance with statutory requirements that all convictions for traffic violations be reported to a specified state authority. Less than 25% were marked good. In states requiring the marking of convictions on the back of drivers' licenses, the percentages were even lower.

The need for traffic conviction reports in the issuance, renewal, and supervision of licenses is apparent, and it would appear proper for traffic courts to cooperate voluntarily. However, the facts indicate they frequently ignore legal provisions to that effect. State authorities have endeavored to improve this situation with slow success. It is felt that bar associations could very successfully supplement the efforts of state authorities where it seemed necessary.

THE JUSTICE OF THE PEACE

I. Introduction

The justice of the peace is one of the major problems in the field of the administration of justice. Inherited from the English judiciary the office was intended to provide a ready means for the settlement of petty complaints without the delay, inconvenience, and hardships attendant upon suit in the county court. But the justice of the peace system in general has proved unsatisfactory and unresponsive to changing conditions. Its ineffectiveness as a system of courts can be traced to two factors: *first,* in adopting the justice court from England the colonists neglected to take with it the safeguards there provided; *second,* the change from rural to urban civilization [1] found it poorly fitted to meet the new requirements.

A. *The Transplanting of the Justice of the Peace.* There were two safeguards placed around the justice of the peace office in England which were never utilized here. The first deals with selection and qualifications. Blackstone explained the procedure as follows: "Touching the number and qualifications of these justices, it was ordained by statute 18 Edw. III c.22, that two or three, *of the best reputation in each county,* shall be assigned to be keepers of the peace. . . . . And as to their qualifications, the statute just cited directs them to be of the *best reputation, and most worthy men in the county, and the statutes 13 Rich. II c.7, orders them to be of the most sufficient knights, esquires, and gentlemen.* And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and *contemptible, it was enacted by* statute 18 Hen. VI. c.11, that no justice should be put in commission if had not lands to the value of 20 pounds per annum and, the rate of money being greatly altered since that time, it is now enacted by statute 5 Geo. II c.18 that every justice, except as is therein excepted, shall have 100 pounds per annum clear of all deductions." [2] Compare with this our usage under which there are no requirements as to fitness for the post except that the candidate be of age. The consequence of so loose a method of selecting the officers has been a major factor in the present disrepute which is attached to the functioning of the justice of the peace as an institution.

The second safeguard we neglected to transplant with the office is supervision. Sir William Holdsworth gives a vivid description of the machinery by which the justices were supervised in Britain: "The manner in which the Privy Council, and also the provincial councils of Wales, and the North, supervised the work of the justices of the peace, both in town and country, and the manner in which the Star Chamber and the provincial

[1] See the Fourth Annual Report, Judicial Council of Indiana (1939) at p. 45. "Today the justice of the peace is primarily a judicial officer. Operating in an entirely different environment his major task as an administrative officer is gone, his judicial duties changed by a switch in population from rural to urban communities."

Indiana population	1880	1930
Per cent rural	80.5	44.5
Per cent urban	19.5	55.5

[2] Blackstone's Commentaries Cooley Edition. See the Fourth Annual Report cited above at p. 12.

councils dealt with their sins of omission and commission, made the justices efficient instruments of the local government of a modern state."[3] An investigation of over forty states brought to light the fact that in only two of them do governmental agencies exercise the slightest supervision over justices of the peace. A questionnaire was sent to all the Attorney-Generals, requesting information as to agencies with supervision over the justice of the peace.[4] Of the thirty-seven who replied,[5] thirty-six stated their office had no such jurisdiction.[6] In only four cases was action ever taken on complaints for misconduct by justices.[7] Thirty-two of the thirty-seven Attorney-Generals stated *no* agency had supervisory power over justices of the peace in their states.[8] A county office was named as supervisor by the other five Attorney-Generals (subsequent study found these ineffective).[9] In a few instances the state law appeared to require *neither* records *nor* accounting.[10]

An attempt to obtain the names and addresses of the justices of the peace in the thirty-nine states where they have jurisdiction over traffic violations resulted in practical confirmation of these replies. The Secretary of State, Department of Motor Vehicles or Highway, State Highway Patrols, State Auditors, State Librarians and, where necessary, the clerks of each county in the state, were communicated with, as well as various private sources. Strenuous efforts were rewarded with twenty-four complete and thirteen incomplete lists.[11] No source could be found or suggested which was able to furnish such information in the other two states. Ten of the lists (nine complete, one incomplete) were obtained from private persons such as publishers and typists.[12] In other words, only fifteen states possessed complete lists of the commissioned justices of the peace, and some of these were obsolete. The central government of the overwhelming majority of states did not know what men were occupying this judicial office!

The other major factor in the obsolescence of the justice of the peace system came as a result of the progress we have made in our mode of living and the change in our governmental structure. Combined, these developments have eliminated the need which the office was created to fill. The necessity for such localized tribunals arose from a scattered and rural civilization which could not afford established, convenient, and regular judicial machinery, plus the lack of adequate transportation facilities which made it impractical to invoke the principle of a centralized system of judicial administration. Because communities were so small they could not afford a regular judge, and so scattered that one judge could not

[3] "Some Makers of English Law." Cambridge University Press (1938) at p. 83.

[4] The Council of State Governments undertook the printing and distribution of this questionnaire.

[5] Ala., Calif., Colo., Conn., Del., Fla., Ill., Ind., Kans., Ky., La., Me., Md., Mich., Miss., Mo., Mont., Nev., N. H., N. J., N. Mex., N. Y., N. Car., Ohio, Okla., Ore., Pa., S. Car., S. Dak., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., and Wyo

[6] The only claim of jurisdiction came from Maryland.

[7] Kans., Me., Mich., and Pa.

[8] All states mentioned in note 5 except Ala., Ill., Ind., Kans., and Utah.

[9] None of the counties had either the facilities or the personnel necessary.

[10] Me., N. H., and W. Va.

[11] *Complete Lists:* Ala., Ariz., Calif., Colo., Del., Ga., Idaho, Ia., Kans., Ky., Mich., Miss., Mont., Nev., N. J., N. Mex., N. Y., Ohio, Ore., S. Car., Tenn., Tex., Utah, and Vt.

Incomplete lists: Ark., Ill., Ind., Minn., Mo., N. Car., N. Dak., Okla., Pa., S. Dak., W. Va., Wis., and Wyo.

[12] Ala., Idaho, Ky., Mich., N. Mex., N. Y., Pa., Tenn., Tex., and Wis.

tend to any number of them, and because transportation was so slow that even a centrally located court for any locality was hard to reach, it was essential to create a convenient substitute for a stable court system. This was the justice of the peace. Trends in modern population with their swing from rural to urban life have eliminated the first reason, the invention and development of the automobile has overcome the second. The great increase in judicial work, with the consequent increasing importance of local tribunals, has made it essential that a trained judiciary be established to administer to these needs. The justice of the peace plan does not satisfy these requirements.

B. *The Justice of the Peace Office and Its Personnel.* The problems that come before the bench present some of the most difficult tests of intelligence in dealing with human nature to be met in everyday life. No individual would find a wide field to choose from were he asked to pick a person to judge a cause impartially. In arbitration schemes the representatives of the two sides choose the third arbitrator. This is a practical procedure necessitated by virtue of the difficulties encountered when the parties attempt to choose one judge satisfactory to both sides. Yet absolutely no care is exercised in the selection of justices of the peace. Almost anyone, regardless of ability, fitness or availability, can and does become a justice, and is set up to pass in judgment on his fellow men—with foreseeable results.

The thirty-nine states in which justices of the peace possess jurisdiction over traffic cases have approximately 45,000 such officers. The division is most unequal ranging from 40 in one state to 7500 in another.[13] In order to obtain a comprehensive picture of this group, interviews, investigation and study in these states was supplemented by questionnaires sent to 12,858 justices in the thirty-seven states where this office has jurisdiction over traffic cases and from which lists could be obtained. The 2160 replies, representing 17%,[14] were analyzed and evaluated along with the result of field study and interviews. No attempt is made to treat the answers as conclusive, but rather they are held to be merely evidential.

The average age of the justices who responded to the questionnaire was found to be fifty-eight years. The range was from twenty-one to ninety, with over 20% falling between the ages of seventy and ninety. This would indicate that the large majority of justices are well past the prime of life and that a substantial number are very old men. About half these answers stated they were farmers, real estate and insurance men, lawyers, and storekeepers. The remaining replies to that question named all the common occupations, from the proverbial butcher and baker, through miners, barbers and shoemakers, to carpenters and paperhangers. Scarcely any occupation missed representation. As compared to other data collected, the proportion of lawyers is too high. This may be explained by the fact that the probable percentage of replies from lawyers in that post would be much higher than from laborers, for example.

Only a very small number of justices spend a major part of their time in that position. When asked to check whether they are on a fee basis or

[13] Del. and Pa., represent the extremes.

[14] In every state where a justice of the peace organization was found, the approval of that group was obtained for the questionnaire. Where there was no organization the approval of the most prominent justices was gotten wherever possible. These facts were mentioned in the letter of transmittal.

It is felt that the answers are not typically representative of the justices. Logically the answers would come from the more responsible officers.

are paid a salary, the answers were inconsistent. In thirty of the thirty-seven states some answers fell in the fee column, and some stated they were salaried. The major part of this apparent disagreement was accurate, for in a number of states where justices are paid by fees, limited localities are exceptions and pay one or more of the local justices a salary. In *thirty-four states the fee system* is basic while five states rely mostly on salaries.[15] In none of these five states could the general salaries be termed a livelihood although in each case some busy communities pay much better than the rest of the state. While in the salary states about half the answers replied a major part of their income was derived from their office, on the whole only 12% of the justices derive a major portion of their income from their office,[16] about 9% derive one-half, about 11% less than half, and 66% a minor part. In answer to a hypothetical question the justices from every state but one indicated a preference for a salary basis. The totals were 540 for fee basis, 1403 for salary, others indicating no preference. When asked for their reasons, almost all answers of those preferring salaries fell under the headings: dependability of income, increased revenue, and the elimination of prejudice and of suspicion. A majority of those who preferred fees felt it was the only practical method.

The next series of questions, eleven in number, were designed to indicate the knowledge of simple and basic legal aspects of the office of justice of the peace. The results indicated conclusively that the majority of justices of the peace are not legally trained and are unfamiliar with the laws they administer. Over 20% of those answering did not possess copies of *the traffic laws. When asked to* state, "What traffic offenses are beyond your jurisdiction?" the justices in each state differed so radically and widely that in tabulating the answers far less consistency was indicated in this simple question of jurisdiction—a matter of law—than was shown on matters of policy—a question of opinion. In every state a number of justices declared they could handle all traffic offenses. In no state is this absolutely true. Replies showed a substantial agreement in only two of the thirty-seven states. Similar disagreement occurred in answers to questions pertaining to: (1) the right to try defendants when a plea of not guilty has been made; (2) the power to imprison; (3) the authority to suspend or revoke licenses; (4) the maximum fine permitted by law; (5) the right to suspend sentences. Only nine of the thirty-seven states could agree on the right to try a traffic violator upon a plea of not guilty. Justices in two of the thirty-seven states agreed that they could suspend or revoke licenses, the answers from each of the other states being both yes and no, varying substantially.

A considerable variation was found in answer to a question concerning maximum fines. The replies ranged from "I don't know" in thirteen cases to "None" in two instances. Ten justices thought they could only fine $1.00, one $1.50, four $2.00, six $3.00, etc. The estimates varied from $1.00 to $5,000 in the same states. Practically all states had answers from $10.00 to $1 000. The answers to this question would indicate that the majority of justices answering had a

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[15] *Fee states:* Ala., Ark., Del., Ga., Idaho, Ill., Ind., Ia., Kans., Ky., Mich., Minn., Miss., Mo., Mont., N. H., N. J., N. Mex., N. Y., N. Car., N. Dak., Ohio, Okla, Ore., Pa., S. Dak., Tenn., Tex., Utah, Vt., Wash., W. Va., Wis., and Wyo.

Salary states: Ariz., Calif., Colo., Nev., and S. Car.

[16] This percentage is probably larger than the true figure, if that could be obtained, for there would normally be a direct relationship between the revenue derived and the tendency to answer the questionnaire.

most inaccurate conception of the legal limits of their jurisdiction. When it came to the question on power to suspend sentences, about 60% of the justices felt they could. A number stated they did so in spite of the law. But here, again, were a great variety of answers from justices governed by the same laws. In only one state were there no conflicting answers. From this information it is apparent that the justices are unable to familiarize themselves with the rules and laws governing their office and the offenses they try.

To a lesser extent the same condition existed in answers to the question whether it was necessary to report convictions. About 10% felt they did not have to, and in only six states was there uniformity of answer, although as a rule the majority of answers were consistent. Over 15% of the justices thought they did not have to make a financial report and those who believed they did could not agree on the proper person to send it to. Ten per cent did not feel their records had to be given to their successors.

Certain obvious conclusions may be drawn from the above:

1. The office of justice of the peace is unsupervised. The very men who fill the office are frequently unknown to the central authorities and in only rare instances does any public officer, state or local, interest himself in the manner in which these officers discharge their duties.

2. The fee system is used in the overwhelming majority of states, although the salary basis is definitely preferred. A very small number of justices derive more than a minor part of their income from that office.

3. One-fifth of the officers do not possess copies of the laws they enforce and there is hopeless confusion as to the jurisdictional limits of the office. This is true as to subject matter, penalties, and even to the right to try traffic cases.

4. The justices are often not familiar with the requirements that they report motor vehicle convictions and file financial returns. When they were aware of this, they were often uncertain of the proper office to which the reports were to be sent.

The results of the questionnaire agreed with the conclusions reached from field study in thirty-six of the states where the justice court had jurisdiction over traffic cases.

The field study also indicated that administration of the office was better as the local conditions tended away from ruralism, both in personnel, availability, and results. It was found that a very small percentage of justices handled traffic cases—not more than 10% in all.[17] In the majority of states few justices did any appreciable amount of judicial work, and of these only a limited number handled traffic violations.

In twenty-four states, definite conclusions could be reached as to the state-wide administration of justices of the peace in traffic cases.[18] These were states where records of activities were available from sources like state auditors, motor vehicle departments, or state highway patrols. Of these twenty-four states, seventeen had, in general, a poor personnel and a serious lack of qualifications within the ranks of their justices. This is not to say convictions were lacking—just the opposite was true—but the administration was often highly irregular, and poorly done, unimpressive, and incompetent. Two states had fair results in the more thickly populated areas, not quite large enough to afford a judge and where the justice

[17] Justices handling fewer than ten motor vehicle cases per year were not included in arriving at this figure.

[18] Ala., Calif., Colo., Ill., Ind., Kans., Ky., Mich., Minn., Miss., Nev., N. Car., N. Dak., Okla., Ore., Pa., S. Car., S. Dak., Tenn., Tex., Utah, Wash., W. Va., and Wyo.

was an important court.[19] In one state the justices were quite satisfactory as a whole.[20] The remaining four jurisdictions had good, bad, and indifferent administration in various localities. This is an obviously unsatisfactory status for traffic law enforcement or any other type of law court.

Two problems now present themselves: *first*, why is this so; *second*, what can be done about it? In discussing these problems it should be understood that there are a considerable number of justices who do a splendid job and who are eminently qualified for the position. They have the pride of their English prototype Unfortunately, such men form but a very small proportion of those holding the office.

II. The Justice of the Peace and the State

A. *Qualification*. In a general way the first question has already been dealt with. It pertains to numbers, qualifications, supervision, and an archaic system. As a rule, justices are not chosen because they are able to do a good job in deciding cases. A large number of men are elected and qualify who never desire to decide a case. They act as officers of the local government and titular political heads. In almost all states men were elected who failed to take the necessary oath of office and post the required bond. In about one-third of the states the number of these ran to large percentages; sometimes as high as 50%. This does not seem to prevent a surplus of justices, for most of those who do qualify are inactive. The chief reason lies in our growth of population and urban tendencies which have made obsolete the ratio of justices to the number of inhabitants as set by statute a half century ago or more. Thus, when five thousand people occupy a wide area, a justice might be essential to administer to them, but it does not follow that when 120,000 live in the same area forty-four justices are needed. Reports from motor vehicle departments and state highway police units indicate three-quarters of the elected justices never hear a traffic case. The justices themselves have indicated they recognize this to be a fact, often suggesting in answering the questionnaire that their number be reduced.

The most important aspect of the justice of peace problem is the question of qualifications. As previously stated, except for age minimums, no requirements are necessary for a person to run for, or be elected to the office. This is true of character, morals, education, ability and personality. Since, in practice, candidates do not have to present themselves to the people or campaign against opponents, the elections are "blind" so far as the voters are concerned. Indeed, it is not unusual to find cases where the justice of the peace elected never ran of his own knowledge. One incumbent wrote in, "I was elected to this office in 1928, inexperienced, and nominated at the local caucus, by some of my friends merely as a prank, a supposed joke upon me during my absence." A number of instances have been reported where domestic and farm animals bearing human names were elected. There is an even more significant aspect of this problem, assuming all the qualifications named above are met, it is still unfair to expect a farmer, merchant or businessman to understand the administration of law.[21] It is this, even more than character qualifications, that makes the justices of the peace unable to properly conduct

[19] Calif. and Wash.
[20] S. Car.

[21] See the address of Dean Roscoe Pound before the Judicial Section of the American Bar Assoc. 1926—quoted F. L. Windolph, "Country Justice," 147 Atl. 451 (Apr. 1931).

their offices. They do not know, are in no position to learn, and lack the facilities to look up, the law. This is an absolute obstacle to the proper administration of the office. Without knowledge of the law, a proper enforcement of its provisions cannot be expected.

About 80% of the justices who replied to the questionnaires, when asked, "What suggestions would you make concerning the position and qualifications of justices of the peace?" stated they would demand qualifications and set out minimum requirements. The suggestions ran from 8th grade to law school diplomas. Intelligence tests and moral examinations were favorite suggestions. A number were frank enough to admit their own lack of training, explaining they felt incompetent to act as judges. Others wrote questions of their own, asking to be answered. Recently the president of a local justice of peace association, in his annual address, urged that a bill be introduced in the legislature specifying who could run for the office.[22]

B. *Supervision.* The lack of supervisory safeguards has previously been discussed. This is one of the fundamental reasons for the unsatisfactory working of the office. It is common for state offices not to possess the names and addresses of justices, and it was found that ten jurisdictions had justices elected and functioning who lived in neighboring states.[23] The results of such laxity have created a troublesome problem for state authorities. In nine states the justice of the peace cannot try traffic cases at all.[24] In nine more such jurisdiction is taken away from justice courts wherever a recorder's, police, or municipal court exists.[25] The movement is definitely towards permanent courts and away from justice courts. Thirteen states which have not enacted laws similar to those referred to achieve parallel results by using courts with concurrent jurisdiction in preference to justice courts wherever possible. That is to say, all cases are brought to municipal, county, or state courts where they are available and possess jurisdiction over the offense.[26]

Frequently this is not possible legally and, confronted with the practical necessity of the situation, the enforcement officers of twelve states make a practice of selecting the justice courts before whom their cases are brought. Thus, thirty-one states have found it necessary to formulate a plan by which it is possible to avoid the justice of the peace court under some, if not all, circumstances.[27] This trend has gone even further. For example, some of the above states have also limited the jurisdiction of justice courts to misdemeanors, or to offenses which do not carry a jail sentence, or a fine over a moderate amount. Others have taken away authority to do anything but bind over the defendant. In the latter case, since binding over merely augments costs and increases the trouble without any benefit to either party, for bail can be posted at the trial court also, justices are not used except where time or distance makes the trial court practically unavailable. This trend is the result of general experience. It cannot be attributed to the unscrupulous justices for, although most in the public eye, this type of justice is undoubtedly in the minority. It has been caused, in the main, by the inefficiency, lack of quali-

[22] Burlington County Unit, New Jersey Magistrate and Constable Assoc.

[23] Minn., Miss., N. Mex., N. Y., N. Car., N. Dak., Ohio, Tenn., Tex., and Wis.

[24] Conn., Fla., La., Md., Me., Mass., Neb., R. I., and Va.

[25] Ala., Calif., Ga., Ill., Ind., N. J., Ohio, Tenn., and Wis.

[26] Ariz., Ky., Miss., N. H., N. Mex., N. Car., S. Dak., Tex., and Vt. Also Ala., Calif., Ill., and Ind. in sections of the state and in instances where the special laws do not apply.

[27] *Supra*, notes 24, 25, and 26.

fications or ability, and the absence of facilities in the justice court.

A feeling of bitter resentment has been shown and vigorous protests made by justices in jurisdictions where officers choose among the local justices.[28] There is a sound argument against this practice in localities where this activity is pointed toward the use of courts which will do as the officer desires, and in such states where the law requires the use of the nearest justice court On the other hand the police can scarcely be blamed for refusing to use a particularly poor court, or a justice who insists on hearing cases in his barn or fields, or who forces them to appear as arrester, prosecutor, witness and judge and thus creates a poor impression in the mind of the defendant. It is true, however, that such procedure allows the officer to wield undue influence. In at least four states the justices used by the highway patrol mete out sentences according to the officers' dictates, even to consulting with them before trial. A substantial number (about 10%) of the questionnaires from many other states set forth a general policy of "cooperation" or "backing up" of the officer. The cure may be as bad as the ailment.

Very few states possess an agency which has any responsibility for the supervision of justices of the peace. Pennsylvania and New York have the only large-scale operations of this type. Four other states maintain a desultory supervision without traveling auditors or checking facilities, simply auditing the reports sent in.[29] In the latter cases the justices are not checked if they fail to report. Occasionally a local subdivision or a state agency to whom the law assigns a part of the fines bestirs itself. It invariably finds investigations most profitable, but such effort is sporadic and soon subsides. Whatever supervision now exists is actuated solely by financial motives. No regular and planned supervision of the judicial activity in justice courts has been found in any state. If such supervision were undertaken, it is safe to assume that our present justice of the peace system would be subject to serious modification.

C. *The Fee System and Salaries.* The small number of justices who earn their livelihood through official work have been mentioned. It should be stated that this figure of 12% is probably too high, since the inactive justices were least likely to answer the questionnaire. Whatever the exact percentage the figure would be much smaller were the cases divided among the several justices in any given locality. In each locality possessing a number of justices an arrangement is usually found whereby one or two do the judicial business—and, normally, all the business does not suffice to keep that one or two more than partly occupied.[30] Consider the situation in a town of 3349 residents covering less than forty square miles in area and having fifteen justices. In this particular town an average of forty-one cases was heard each year from 1934 to 1938, three-quarters of them motor vehicle violations.[31] Another city with under 4000 inhabitants had twenty-one justices.[32] Similar conditions exist generally in most states. Taking the one hundred and six most active officers in an entire state, it was found that each of them averaged six motor vehicle cases per year.[33] In a survey covering six

[28] This condition exists in Ala., Colo., Ind., Kans., Mich., Minn., Mont., N. Y., Okla., Ore., S. Car., and Tenn., and probably other states. It should be noted that such practices violate the state law in a number of cases.

[29] Colo., Miss., N. Car., and Tenn.

[30] Thus, of six justices one will handle civil cases, another criminal, and the others become inactive.

[31] Mansfield, Conn.

[32] Pierre, S. Dak.

[33] Ark.

counties of another state, 279 of 290 justices had not heard a single case.[34]

The second page of the questionnaire was designed to allow a brief enumeration of the number, type and disposition of motor vehicle cases handled in 1938. Thirteen hundred justices reported 55,523 cases, an average of 43 cases per justice per year. The revenue derived from this source by the great majority of justices would obviously be very small It is unfair to expect any justice to maintain a court and attend it regularly for anything like this number of cases, or to acquire special training for the post. By virtue of the slight income from his office, the justice must generally be gainfully employed elsewhere. Whatever cases come his way means a little extra money, and he occasionally takes time off from his plow or his work bench, when called upon to hear a case. The field. the store, the office, the living room or any other place the justice happens to be becomes his court. Where he has no other source of income, it is to be expected that he may seek possible revenue from his office even if it means mulcting strangers. But assuming honesty and conscientiousness, a laborer or a farmer cannot discard his life habits and assume judicial dignity nor suddenly acquire the knowledge necessary to furnish a proper trial. He must, therefore, rely on guesswork, depend on the officer, or stage a bluff. Small wonder the justice of the peace court is in ill repute.

The most frequent criticism of the justice of the peace is directed at the fee system. Theoretically a fee represents a schedule of costs and is the means of remuneration of the officer. Actually, there is little connection between the fee and real cost of trial, but it does take the place of a salary. As a mode of compensation it may take either of two forms, the usual one whereby a fee attaches to the various items as, for example, so much per appearance, etc., and a less common procedure whereby the justice gets so much per case or trial. Fees are collected from the defendant. A few state laws provide for payment by the county or state where there is an acquittal but as a practical matter (except in one state), if the justice does not obtain his fees from the defendant he remains unpaid. This results in the justice having an interest in the outcome of the trial and gives rise to bitter criticism on the ground that no person should be trusted to decide impartially a cause wherein he stands to gain through a particular holding. A decision of the Supreme Court of the United States deciding that a magistrate with a direct financial interest in the assessment of a fine could not lawfully try an accused person caused a great stir and was hailed as the death sentence of the fee system, but its applicability has not been tested.[35]

The assessed costs in the various states range from $1.00 to $15.00. Except in states where they are computed per case, fees vary from section to section and even within the same county. In one state four different sets of costs existed. One of the lesser objections to fees is that they bear no relation to the fine, being the same whether the fine is $1.00 or $500.00. Where reports are available the figures indicate that the amount of costs collected in most justice courts was as large as the fines turned in. Complaints periodically appear concerning the illegal overcharges made by certain justices. A recent newspaper editorial headed "Squire Issue Up Again" was founded on an indignant complaint that citizens were being "mulcted of hundreds of thousands of dollars annually by over-

[34] Fourth Annual Report, Judicial Council of Michigan (1934) Appendix II.

[35] Toomey *vs.* The State of Ohio, 273 U.S. 510, 47 Sup. Ct. 437 (1927).

charging justices of the peace in disposing of motor vehicle cases." [36]

Just as often it is "discovered" that justices are prone to encourage, extend and continue suits with an eye to increased revenue. In 1938 the Allegheny County, Pa., Grand Juror's Association presented a formal resolution which read: "An examination of the records of cases passed upon by grand juries will prove that an unsuspecting public pays an enormous tax for something about which they know but little, and have no way of knowing; unless they serve on a grand jury. One paramount view each grand juror learns from his experience is that justices of the peace and aldermen have, in the past, and *are still* daily advising criminal litigation *holding persons* to await the action of the grand jury for crimes on evidence that discloses not even civil liability, for the mere purpose of *collecting fees and costs.*"

Despite this, and notwithstanding isolated cases of huge earnings such as $2,800.00 in one month "in season" and $4,553.00 in thirteen months from one "traffic light," justices of the peace in over 90% of the cases do not find fees lucrative. The viciousness of the fee system does not arise from the possibilities it offers for unscrupulous revenue, but from the psychological attitude it engenders; namely, a conscious or unconscious prejudice where the testimony is at best evenly balanced. Such a frame of mind eliminates the constitutional safeguard which requires that no reasonable doubt exist before a person is convicted of a crime. It falls most heavily upon the accused who, having pleaded not guilty, is most likely to be innocent.

The use of salaries for justice of the peace has been a successful expedient to minimize the disadvantages of the system. Communities too small to possess a regular court, yet large enough to require the presence of a judicial officer, and where, by virtue of this, the justice is an important part of community life, have found salaried men most satisfactory. Unfortunately, this scheme is impractical for all justices of the peace and in no state is the payment of salaries related to the need for good traffic law administration, but is controlled by the necessity for a town court. The salary basis, although working well in a *small number of localities* where the salaries are fairly large, lessens the interest of the remaining justices, to whose courts come most of the traffic violations for, except in an occasional town and village where civil and criminal business warrants a fair salary, $10.00 to $25.00 per month is the normal compensation. The figures start at $10.00 per year. This rate of payment does not tend to improve the personnel of the office. California was one of the last states to change from fees to salaries. Although this was the result of an enlightened reform movement, 25% of the justices still earn less than $300.00 per year and 64% receive under $900.00 per year. The very number of justices prevents any practical scheme for making them salaried officers. On the issue of salaries it is submitted that payment by fees is an integral part of the theory behind the justice system, and the discovery of the need for salaries constitutes a recognition of the failure of this system as applied to our present civilization.[37]

The notoriously high percentage of convictions for traffic law violations in justice courts is popularly attributed to the fee system. While we have therein the major factor, several vital, contributing causes should not be overlooked; namely, the lack of

[36] Published in "The Trenton Times," Trenton, N. J. (April 17, 1940).

[37] For the justice of the peace system is but a substitute for a regular court with salaried judge. Where the latter exists the reason for the former fails.

necessary training, the transient nature of traffic violators in the justice court, and the element of police pressure. Without a background of study and experience it is impossible to understand the legal problems involved in the proof of a case. As a result, the untrained justice is prone to decide the case before him on the theory that the defendant would not be there had he not violated a law. If the justice feels uncertain of guilt he "goes easy" on the accused. That the driver is usually a transient to whom the justice is neither obligated nor responsible, and whom he will, in all likelihood, never see again also has a bearing when the decision is based on guesswork, and as a stranger the accused seems to be doubly open to suspicion. Moreover, the justice is also acquainted with the officer and is usually unable to disassociate the legal requirements of proof from the personal honesty of the trooper. Finally, he knows that no cases will be brought before him if the results in his court do not satisfy the arresting force.

III. The Justice Court in Action

A. *The Administration of Justice in the Justice Court.* One writer specified 99.2% as the probable percentage of guilty verdicts in justice courts of his state.[38] Compared with questionnaire results that estimate is high. Of the 55,523 motor vehicle cases reported by justices who answered the questionnaire, no conviction figures were given for 9,136 cases. In the remaining cases (46,387) 37,484 were convicted, to which figure must be added 4,945 cases of bonds posted and bonds forfeited. These convictions totaled just over 90%. This figure is also somewhat lower than the percentages in the relatively few jurisdictions where complete figures for justice courts could be obtained. In this connection it is significant that over 40% of the returned questionnaires did not have the required data filled in. The likelihood that the returns were sent in by our better justices must again be allowed for in the result.

A great deal has been written on the penalties meted out by justices' courts. This material has emphasized the apparent lack of correlation between the offense and the fine and has resulted in the condemnation of justice of the peace courts. It has already been shown that scientific penalization is most difficult even for trained and qualified judges. There is nothing amazing about poor results obtained from a situation where men without preparation or capacity, and haphazardly chosen, are placed in positions requiring several kinds of ability. Men are apprenticed for years in the trades and for the legal profession but are not even tested for a position as justice of the peace. It would be as logical to permit a farmer with no experience to drive an automobile as to allow him to pass on legal questions and to conduct trials. It is submitted that it is unfair to place the brunt of criticism on the individual justices. They are usually doing the best of which they are capable. The system which placed them in a post for which they are ill-fitted deserves the censure.

Innumerable examples of poor judicial administration have been found. In many instances they verge on the comic but usually the consequences are too serious for levity. Passing over the sad lack of uniformity of penalties in even the same communities, a condition we have found present to a lesser extent elsewhere, it was found from an examination of reports of cases handled in justice courts in the various states, that a large percentage of justices ignore legal provisions. In one state where the minimum fine prescribed by law for drunken driving was $50.00 and 90 days,

[38] Kent Sagendorph, "Jack Rabbit Justice," Country Home Magazine (July, 1939).

over a hundred fines of $5.00 and costs and no jail sentence were found. Other states reported similar experiences. The motor vehicle departments in practically all states periodically receive notices from justice courts of license suspensions for offenses neither subject to such penalization nor within the jurisdiction of these courts. Selecting a few reports from a large number of typically bad verdicts, it is found that one justice fined a driver $2.00 and costs for an improper turn which was the result of an accident injuring a passenger. In another state a motorist who crashed into an approaching car, injuring a woman holding an infant that miraculously escaped injury, was punished with a $2.00 fine and $1.00 costs. In a third state recorded fines ran from fifty cents for a seventy-five-mile per hour violation, to $100.00 for a rectified license violation. One busy justice made it a practice to fine all persons $10.00 for all offenses, another had a standard fine of $7.50 and costs. On the questionnaire in answer to a request for "your general policy," one justice wrote, "My average fines are as follows: Drunken Driving $200 and 6 months, Reckless Driving $150 and 6 months, Speeding $100 and 4 months. If the fine is paid I usually suspend one-half the jail sentence. I also suspend all licenses for a period of one year for drunken or reckless driving." A large number answered that their general policy was leniency to first offenders, evidently without appreciation of the fact that they have no way of knowing which defendants are not first offenders. These are everyday verdicts in justice courts. In addition, justices are prone to bargain in a most non-judicial manner. They will often accept whatever sum the driver has on his person in lieu of the fine assessed, deducting the difference from the fine proper as opposed to the costs, or they will reduce charges and fines to obtain a plea of guilty. This type of administration has an injurious effect on the public attitude towards our judicial system and on traffic law enforcement in particular.

The office of justice of the peace is a public official post and unquestionably carries a responsibility to the community. The lack of supervision has already been treated. The difficulties involved in supervising this office are apparent from its structure. Both states which make a sustained effort in this direction have large departments with numerous clerks, traveling auditors, publication and filing divisions. Even then it is believed that the results do not represent a thorough check on even the financial status of the occupants of this office. As a practical matter it would be impossible to attempt a supervision of the judicial function of the justice of the peace. This would be true even if every justice were known and communicated with. Of the 2160 replies to the questionnaire, 41% were unable to furnish data pertaining to the number of traffic cases they handled and the disposition thereof. An additional 14% were either unable to fill out this part of the questionnaire or gave so little information that their replies were worthless. Subtracting the 9% who stated they had heard no traffic cases, only 36% of the justices were able to furnish such information. This is confirmed by wholesale reports of no dockets, illegible records, and improper accounts from the states as a whole. Only a judicial administration of the poorest type could possibly exist under such circumstances.

The justice of the peace system was founded for the convenience of the public and in order that courts might be near at hand in cases of minor emergencies. Modern developments have minimized both problems. It was found that, with the exception of a few states of extremely large areas and small populations, county, district, or municipal courts are generally within easy reach. It has been noted

that as a practical matter thirty-one states rely on courts other than the justice of the peace. The large majority of justices try so few cases and receive so little revenue from their office that they make no effort to keep regular hours and are consequently less available than the above-named courts. A number of state highway patrols reported difficulty in locating justices to try motor vehicle violations at the time of apprehension. The one unquestioned advantage of the justice court is the possibility of reaching them during hours when no regular court is in session

One of the worst features attaching to justice courts as a whole is their lack of physical facilities for trial of cases. This covers not only the absence of courtrooms but of any decent substitute. An investigation of courtroom facilities in thirteen states [39] disclosed that two states furnished courtrooms and in one state it was believed that the problem was not acute,[40] while in ten states the general condition of justice courts varied from "poor" to "disgraceful." Trials were frequently held on public roads, in the general store, on farms, or other informal places. Such backgrounds are not conducive to respect for either the result of the trial or the judicial process.

B. *The Present Problem.* The problem which presents itself is what can be done to improve the justice of the peace system. From this survey the answer appears to be that the necessary changes would be difficult to administer and, even if successful would take away the characteristics of that system. It must be recognized that, fundamentally, the justice court is an archaic institution which it would be more practical to replace than to revise. In fact, were a modernization effected, only the name would remain. The idea of substitution of a modern judicial tribunal for the justice of the peace is neither radical nor novel. In 1923 a New York state legislative committee reported, "The vigorous nature of the testimony adduced at the hearings, together with the striking degree of unanimity which was displayed, convinced the committee that the office of justice of the peace has almost outlived its usefulness in the State of New York." [41] And in describing the abolition of the eighteen justice courts in Atlanta, W. T. Waters reports a member of the Bar Association Committee as saying, "Any other method would have been like killing mosquitoes one at a time." [42]

Three obstacles must be overcome before a practical and efficient substitute for the justice of the peace can be accepted First comes the problem of the constitutional provisions in the various states, which, in a large number of cases, probably bar necessary changes. Depending upon the wording and construction, a constitutional amendment may, or may not, be required. The second impediment is their position, in a number of states, as part of the local government. However, it would be a simple matter to substitute aldermen, township commissioners, or trustees, elected in the same manner, to undertake these duties previously administered by justices. The third obstacle is a serious barrier. In states with large geographical area and limited population, in states still predominantly rural, and in various sections of other states, there exists a definite need for a local court where the business does not warrant a regular judge. A tribunal must be made available for the

[39] Ala., Ariz., Calif., Colo., Ind., Mich., Minn., Miss., N. Car., Ore., S. Car., Tex., and Utah.

[40] Calif. and Colo. furnish courtrooms, and in Ariz. they are fairly satisfactory.

[41] Report of the Special Joint Legislative Committee on Taxation and Retrenchment. New York (1922-3).

[42] "Atlanta's New Municipal Court," 78 Cent. L. J. 149 (1919).

drunks, the Saturday night brawls, and for offenses which do not involve an automobile and hence a ready means of transportation

So far as motor vehicle violations are concerned, it is believed that the plan of state-wide traffic courts with regular circuits, and with provisions for deciding cases on proper affidavits, as set out in the first section of this report, is a necessary substitute for traffic law enforcement as administered in the justice court. So far as civil and other criminal jurisdiction is concerned a plan of courts, modified to suit the desired end, could be worked out along simular lines. As Professor Sunderland has well stated, "The administration of justice is not properly a city (or local) function, but an obligation of the state, and jurisdictional barriers around incorporated cities, with the resulting inequitable discrepancies between urban and rural justice, are out of place in a modern commonwealth." [43]

[43] "The Efficiency of Justice Courts in Michigan" (1934)

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