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INSTITUTE FOR GOVERNMENT RESEARCH

PRINCIPLES OF ADMINISTRATION

PRINCIPLES OF JUDICIAL ADMINISTRATION

BY

W. F. WILLOUGHBY

DIRECTOR, INSTITUTE FOR GOVERNMENT RESEARCH



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FOREWORD

A good many thousands of books will be published this year. One who has read this book in manuscript may well assert that of all the thousands this is the one necessitous book in the entire field of productive writing. Writers apparently search for new subjects or for old ones to be rewritten. And yet for a score of years at least, while hundreds of experts on government have been combing their fields for writing material, this book has been needed. When one thinks of the magnitude and the vital importance of judicial administration in a country in which the judiciary in many respects is the supreme arbiter of national trends, and thinks of the changes that have taken place in one lifetime, and the changes now imminent, he realizes the significance of the publication of the first book in this field. At least, he does if he belongs to the old-fashioned school, as opposed to the post-war " futilitarians," and clings to the idea that government is one of the elements of social environment that really counts.

The author has done well to write the introduction to this book, which needed to present an orderly scheme in a seemly and competent way. This having been done, the foreword becomes one of those delicious temptations to which one yields with a joy never equalled by those satisfactions which have to be earned and paid for in advance. A prefacer, under these conditions, may think, though he does not say—" Adieu, Conscience! "

But hold—there must be first one duty—that of introducing the author to his reader. If so, it is briefly discharged in view of the large place our author has made for himself in the bibliographies of government. One should mention, perhaps, his Introduction to the Study of the Government of Modern States and his Principles of Public Administration. The present volume, we understand, is complementary to the latter, pursuing the same intention and method into the region of judicial administration. And as Director of the Institute for Government Research, our author has fathered and god-fathered an imposing list of books and monographs.

But the author's preparation for this book has been far more than research and authorship. He began with a training for the law, an excellent start, especially in view of the fact that when he was a student there was really no teaching of the functions of government in our colleges, but only a conventional course, amounting merely to description of a certain academic scheme of government, hardly suggestive even of what was going on outside the schools. In a rather long career since graduation our author has combined study with actual administration. He has even created government offhand to meet imminent necessity. A training such as is denied under our rigid constitutions was afforded in our overseas dominions. For eight years Professor Willoughby was an organizer of government and administrator of virtually all its branches in Porto Rico, becoming finally Acting Governor (Gubernador Accidental). This creative and administrative experience gave a freedom and a flavor to his thinking. For two years he was political adviser in Peking. Later came opportunities to contrast our system with those of leading European nations. Naturally this training yielded opportunities for important activities during and after the War, when trained administrators found such titanic labors in deflating and organizing Washington departments. Since then incessant study and teaching, the stimulation of study by others, the rigorous discipline of writing and publishing, all served to lead up to this book.

When our author was a young graduate Baldwin's little book on the American Judiciary appeared, little more than an anatomical study. Since then until now, there has been no book professing to deal with the administration of justice. Naturally in a land having more square miles than any other advanced nation and more government per square mile than any other nation, advanced or primitive, the vacuum existing in respect to government as a function produced in time the large body of trained scholars whom we know as political scientists, constituting today a larger staff for teaching in the colleges than are maintained in any other department, whether language, science, literature, or what not.

It is not easy to explain the persistence of a vacuum in the field of judicial administration texts. It is natural, however, that no lawyer should have supplied this increasing need. Lawyers

work in a different field and their normal contacts with government are emphatically not scientific. Nor have we, as yet, a body of learned, retired lawyers devoting attention to scientific, philosophic or speculative consideration of justice and its machinery. That time will doubtless come.

But it is hard to understand the aloofness of political science researchers and writers. Perhaps, like the lawyers, they have had too many other things to study; perhaps the explanation lies in diffidence, realizing that this is a technical and dangerous field. Without explaining the mystery we may yet be thankful that at last a broad survey of the administration of justice has been completed. Only a few years ago it could not have been done without becoming a record of disappointments.

Lèt not the reader be deceived by quoted criticisms of the courts and their procedure in the early chapters, for the general tone is distinctly optimistic. So many changes, good and bad, have come into our political structure in the past two decades that it is not difficult to presume that powerful new forces will soon bring about beneficent changes. Without attempting to name these forces here, it may be suggested that the present volume becomes the latest factor. It should be read by lawyers, for reasons which we will submit later, and it certainly will be a source of knowledge for all of the thousands of college students taking the present most popular study, including all those who consciously prepare for legal study. No modern legal author can say, as did Blackstone, that he writes to inform youth because every young gentleman should know the laws of his country. No individual American can pretend to know the laws of his country. But, on the other hand, no young gentleman should presume to consider himself educated in government or law who does not know the history, the functions, the relations and the trends of judicial administration.

Nor can our law schools much longer ignore their obligation to inform their students concerning the kind of a legal world that they are shortly to enter. In fact some law schools are now beginning, but in a hesitant manner, to discharge this obligation. Consider for a moment, you lawyer reader, what a different situation we would have reached by this time if twenty years ago our law schools had begun to give required courses in the administration

of justice. As it is they have successfully concealed a large share of the things the young lawyer most needs to know, and which he cannot learn in decisions, digests, statutes or textbooks. One excuse has been that there is no source-book, but that excuse now vanishes. It is a national loss that our law schools have clung to Blackstone's conception, rather than to his spirit, for under like circumstances he would doubtless have taught " functionally." As it is, the public or political aspect of judicial administration has been left to volunteers, to such pioneers as Wigmore, Pound, Root, Taft, Hughes and others.

This book deserves commendation for including the large and growing government functions lying just outside the immediate field of judicial administration. We mean not only the older branches of the executive department, embracing the attorney general's office and that of local prosecutors, but rather the recently created border-line bodies, some of them receptacles for the overflow from the courts. Among these are the Interstate Commerce Commission, the Court of Customs Appeals, the Board of Tax Appeals, the Federal Trade Commission, and their numerous cousins in state government. Few lawyers even now realize to what an extent the courts have been deprived (or relieved) of functions which they acquired in the last century. Unlike other nations, and particularly France and modern England, we allowed a great deal of administrative function to find a home in the judiciary. For nearly twenty years a reverse movement has been in progress. Even in the states the trend has been sharp and swift. A handbook for Illinois lawyers is now in preparation telling them the steps to be taken in representing clients in *forty different tribunals.*

Not only this, but the speculation in this volume on further reduction in court dependence is instructive. " The time . . . has come when serious consideration must be given to the question of the extent to which it is feasible to relieve the courts of the great burden of acting as agencies for the application of public law to specific cases." We resist the temptation to quote at length.

One is led to wonder how it was that our courts acquired duties so much more extensive than those of other nations. Some reasons are of the surface. There was a ceaseless increase in population with a disproportionately greater increase in government activities,

while the executive departments remained unorganized and irresponsible. Sovereignty obeys the law that it shall seek expertness and responsibility. All through the last century the courts were relatively expert and responsible. They had an essential method, involving the ascertainment of facts under scrupulous rules and the rendering of decisions after exhaustive debate and deliberation. This accounts mainly for their ascendency in our system. They are still incalculably more responsible and expert than legislatures, their most obvious defect being inability to operate with reasonable promptness. But in fifteen years executive departments have been reorganized in the more populous states, tending toward responsibility, and enabling them to compete with the courts for sovereign power. Their departments and borderline creations often have a *personnel* and a *procedure* better than courts of justice. The courts have been smothered with litigation, in both trial and appellate branches. Delay has begotten delay, for congested dockets are an open invitation to every rascal to defy his creditors and entrench himself for several years behind judicial process and procedure. And so the trend of a century was reversed. Doubtless this is for the ultimate best. A present interesting trend is for power to desert the unreconstructed legislatures and take refuge in the judicial department—meaning the power to regulate judicial procedure. Just now this power appears to be waiting only for the courts to create an organization which will conserve and utilize this power. Things tend to get done, but when there is no understanding of the times, no expert criticism, no planning and no united effort, *new evils creep in while the old evils are* being exorcized.

We like the emphasis which this book places on civil litigation. The numerous friends of law enforcement have overlooked the fact that their statutory reforms are conditioned by the personnel and the organization, or lack of responsible organization, in the courts. They will not attain their ends until the curse of the politically bossed police court is removed. They too need judicial rule-making power for their ends. They can do no better than to join forces with the more patient reformers of judicial organization and judicial selection. There is much to be done before we have achieved adequate organization with qualified judges in every branch and a bar whose pride has a foundation in fact.

We cannot say that it is the lawyer's first duty to concern himself with the political problems of administering justice. His first duty is to advise his clients wisely and endeavor to protect their lawful interests. But unless he makes a study of the larger aspects of the situation he deprives himself of the best indoor sport. It brings him no direct monetary returns, any more than do bridge, poker or what else he enjoys, but it brings unadulterated satisfactions.

So, at the risk of repetition, we say that it is fortunate for the lawyer that this first inclusive survey of his field is from the pen of an expert in government as a whole, one who can describe and explain it with Olympian detachment, enriching his text with speculations outside the practitioner's accustomed realm of thinking, whose illustrative instances are pertinent and who offers numerous stimulating suggestions.

HERBERT HARLEY.

PREFACE

Jurisprudence, as a subject of study, may be divided into two fields: (1) that having to do with law as law, its nature, its purpose, the manner in which it has come into existence, its substantive character, and especially the principles underlying its main concepts as expressed in different legal systems that have held sway in the past or are now in force; and (2) that having to do with the application or enforcement of the law as it exists in modern society.

The present study falls wholly within the second field. With legal philosophy it has nothing to do. Neither does it concern itself with the character of the substantive law as it interests the legislator, the judge, and the practicing attorney. It has to do with historical jurisprudence only in so far as it is necessary to trace the rise and evolution of existing legal institutions and practices through which the law is now administered in the United States.

Stated affirmatively, the present volume has for its aim to subject the whole problem of the administration of justice, as it confronts the United States, to critical examination for the purpose of making known the nature of this problem and the means by which it can best be met. The preparation of this study has been undertaken in the belief that there is no valid reason why the judicial work of a government should not be performed with the same efficiency, economy, and dispatch that is demanded of the conduct of legislative and administrative affairs, and that, as a practical problem, many of the principles and practices having for their purpose to ensure a proper performance of these latter activities find an equal application in the field of judicial administration. The study is thus one falling as definitely within the field of public administration as that of one dealing with the conduct of affairs by the administrative branch. It seeks to determine those principles of organization and procedure that should be followed if an efficient administration of this great branch of government is to be secured; to describe, with such fullness as limitations of space permit, existing conditions in the United States; to indicate wherein such conditions are unsatisfactory; and to suggest the lines along which it is believed action should be taken to improve conditions.

In criticizing existing conditions and suggesting the action that should be taken to improve them, primary effort has been directed toward making known the best thought of those members of the bench and bar who have given special attention to the reform of our judicial organization and procedure and the conclusions reached by special commissions and committees on judicial reform, but in certain cases, the author has not hesitated to propose suggestions of his own. In general, however, the chief claim that the present work has as a contribution to the cause of judicial reform is that it seeks to bring together within the compass of a single volume the criticism and suggestions of those most qualified to speak on the subject and to present them in a systematic and coördinated form. In doing this, the policy has been pursued of presenting the observations of the authorities drawn upon, as largely as practicable, in their own words. Liberal use is thus made of quoted matter.

As this volume is intended for students of political science, as well as for members of the legal profession interested in legal reform, there is included a description of the legal institutions and practices of the country and of their origin and workings that would not be necessary were an appeal made only to the legal fraternity.

Throughout, the method of treatment is that of considering the subject from the problem standpoint. Emphasis is laid upon the analytical method. To state this in another way, the effort has been made to resolve the great problem of judicial administration into its constituent elements, to determine the fundamental principles that should govern in handling the conditions to be met, to describe the action that has been taken, to point out wherein this action has failed to conform to the principles that should be observed and therefore has given unsatisfactory results, and, finally, to indicate the steps that should be taken to correct these mistakes and to point out the extent to which these steps have been taken in one or the other of our commonwealths.

Of the need for a study of this kind there can be no question. Of the several branches of government, none has received so little attention at the hands of students of political science as the judicial branch; yet none is of greater importance to the individual or more in need of critical examination. Though constituting the primary function of government, there is probably no single thing that our

governments do with less efficiency and economy than the administration of the law. Both our system of courts and their methods of procedure are almost universally recognized as unsatisfactory. In their practical operations our courts are expensive both to the government and to litigants. They perform their work with great dilatoriness, and miscarriages of justice are frequent. So long has this unsatisfactory condition of affairs existed that an attitude of mind has obtained that these evils are inherent in the nature of the task to be performed; that anything like the same promptness and efficiency in the conduct of business of the courts such as is demanded of the administrative branch, is impossible. With this position the writer has no sympathy. He sees no reason why the same standards of efficiency should not be demanded of judicial officers and institutions that is required of administrative officers and services. To him the judicial branch offers problems of pure administration analogous to those obtaining in the administrative branch. Both have to do with definite problems of organization, personnel, and procedure.

In large part responsibility for existing unsatisfactory conditions is due to the fact that consideration of the judicial branch has been confined almost wholly to the legal profession, the members of which are not primarily interested in matters of administrative organization and technique, or fitted by their training and studies to handle such matters in a competent manner. Though valuable studies have been made of particular phases of judicial organization and procedure, such as the tenure and method of selection of judges, the unification of the system of courts, etc., the present is the first attempt to consider in a systematic manner the whole subject of the organization and conduct of the judicial branch from the purely administrative standpoint and to apply to it the same criteria to which the other branches of government are subjected. As a first effort in this field this volume suffers from all the handicaps arising where guide posts are lacking and organized material is wanting. It is hoped, however, that its preparation will serve at least to make clearer the importance of the inquiry and to stimulate further efforts in a field which has been too long neglected.

It would be improper to close this preface without a few words to indicate the indebtedness of the author to the student of juris-

prudence who has kindly consented to write a foreword to this volume. It is hardly an exaggeration to say that but for the pioneer labor of Professor Herbert Harley in the field of judicial reform in the United States this volume could not have been written. Others have ably discussed certain phases of the administration of the law. Professor Harley has taken the whole domain of judicial administration as his field. This field he has exploited, not merely by writing, but by unceasing efforts, to secure practical action. More important still, he has converted what were disconnected efforts into an organized movement. To him is due the whole credit for the creation of the American Judicature Society, the securing of its financial support and its administration during its fruitful life of fifteen years. He was first to point out the need for a unified criminal court and has led the movement for a unified judiciary in the states generally, the creation of judicial councils, the conferring of adequate rule-making powers upon the courts, and other reforms which are steadily gaining the approval of students of judicial administration in the United States.

W. F. WILLOUGHBY.

CONTENTS

CHAPTER		PAGE
	FOREWORD. By Herbert Harley	v
	PREFACE	xi
	PART I. PREVENTION	
I.	INTRODUCTION	3
	Present Unsatisfactory System of Judicial Administration in the United States	3
	Distinction between Substantive Law and Adjective Law.	8
	Joint Responsibility of the Administrative and the Judicial Branches	8
	Administrative Responsibility	9
	Judicial Responsibility	10
	Centralization versus Decentralization of the Administration of the Law	11
	General Summary	12
II.	PREVENTION OF CRIME AND LITIGATION	13
	Elimination of Incentives to Crime	13
	Deterrence of Crime	13
	Segregation of Criminals	14
	Elimination of Causes of Litigation	15
	Improvement of Contract Forms	15
	Improvement in Statement of the Law	16
III.	ADMINISTRATIVE ADJUDICATION	18
	Excessive Use in the Past of Courts for the Settlement of Controversies	18
	Modification of the Problem through Changed Conditions.	19
	Modern Movement for Increase in Administrative Adjudication	21
	Administrative Determination of Tax Obligations	21
	Administrative Enforcement of License and Permit Systems	23
	Administrative Enforcement of Proper Trade Practices..	24
	Administrative Enforcement of Workmen's Compensation Acts	26
	Administrative Enforcement of Public Utility Laws	28
	Proposed Administrative Adjudication of Personal Damage Cases	30
	Administrative Enforcement of Payment of Wages Due..	33
	Administrative Enforcement of Blue Sky Laws	37
	Administrative Enforcement of Small Loans Laws	37
	Development of Administrative Adjudication in England.	38
	General Summary	39

CHAPTER PAGE

IV. CONCILIATION 40
Distinction between Conciliation and Arbitration..... 40
Necessity for Legal Establishment of Conciliation..... 40
Advantages of Conciliation 42
Conciliation Systems of Norway and Denmark..... 42
Conciliation in the United States..... 45
Conciliation Branch: Cleveland Municipal Court..... 45
Conciliation Court: Minneapolis Municipal Court..... 46
Conciliation Procedure: Municipal Court of New York City 48
Conciliation: North Dakota..... 50
Conciliation Branch: Des Moines Municipal Court..... 51
The Present Situation..... 51

V. ARBITRATION 53
Advantages of Arbitration..... 53
Requirements of a Successful Arbitration System..... 55
Arbitration in Great Britain..... 58
Arbitration in the United States..... 64
New York Arbitration Act..... 64
New Jersey, Oregon, Massachusetts, and California Arbitration Acts 65
Uniform Arbitration Act for the States..... 66
United States Arbitration Act, 1925..... 66
Right to Provide for Arbitration of Future Disputes.... 69
Trade Associations Arbitration Tribunals..... 71
Arbitration in Government Contracting..... 75
Industrial Conciliation and Arbitration..... 76
Arbitration of International Commercial Controversies... 77

VI. DECLARATORY JUDGMENTS 80
The Declaratory Judgment in England..... 80
Movement for Adoption of the Declaratory Judgment in the United States..... 82

VII. ADVISORY OPINIONS 85
Advisory Opinions in England and Canada..... 85
Advisory Opinions in the United States..... 86

PART II. ENFORCEMENT

VIII. THE FUNCTION OF THE EXECUTIVE IN THE ADMINISTRATION OF THE LAW..... 91
Enforcement of Law According to Its Character..... 92
Enforcement of Public Law..... 93
Enforcement of Criminal Law..... 93
Enforcement of Private Law..... 95
Affirmative Duty of the State in Respect to Enforcement of Private Law..... 96
Free Administration of Justice..... 99
State Indemnity for Errors of Criminal Justice..... 100
Compensation for Wrongful Accusation and Arrest..... 101
Compensation for Improper Action by the Trial Judge... 102
Compensation for Wrongful Trial Followed by Acquittal. 102
Compensation for Wrongful Conviction and Punishment. 103

CHAPTER PAGE

IX. Duty of Chief Executive to See that the Law Is Duly Enforced 105
Enforcement of Public Law 105
Enforcement of Criminal Law 107
Enforcement of Private Law 112
Emergency Action by the Chief Executive 113
Use of the Military Forces 113

X. Department of Justice and Office of Attorney General 115
Limited Functions of Attorney General in the States 115
Federal Department of Justice 118
Need for Departments of Justice in the States 119
Department of Justice in Porto Rico 121
Need for Centralization of Law Enforcement in the States 122
Proposal for a Department of Justice in England 124

XI. Office of Prosecuting Attorney 127
Importance of the Office 127
Broad Powers of the Office 129
Legal Status of the Office 130
Evil of Right of Prosecuting Attorney to Engage in Private Practice 131
Evils of the Fee System 132
Lack of Coördination between Office and Police 132
Lack of Business Methods and Especially of Proper Records 135
Remedial Action 138

XII. Police 142
Office of Sheriff 142
Rise of the Modern Police Force 144
Political Authority 145
System of Local Police 146
System of State Controlled Local Police 146
State Rural Constabulary 149
State General Constabulary 150
Status of the Police 151
Internal Organization of Police Service 152
Recruitment and Promotion of Personnel 157
Police Records and Statistics 158
Bureaus of Identification 159
Specialization in the Police Function 161
The Question of a National Police Force 162

XIII. Office of Coroner 163
Origin and Functions 163
Proposed Abolition 165
Office of Medical Examiner: Massachusetts and New York 169

XIV. The Grand Jury 174
Historical Origin 174
Reception of the Grand Jury System by the United States 175
Function and Operation 176
Evaluation of Merits 180

CHAPTER PAGE

Restriction, Modification, or Abolition 186
General Summary 190
The Grand Jury as a Political Institution 193

XV. The Accusatorial and Inquisitorial Systems of Criminal Enforcement 195
The Accusatorial System of English Speaking Countries. 195
The Inquisitorial System of France and Other Latin Countries 203
Comparison of the Two Systems 206

PART III. JUDICIAL ORGANIZATION

XVI. The Judicial Function 211
Courts as Bodies to Investigate and Ascertain Facts 212
Courts as Bodies to Apply the Law to Ascertained Facts. 214
Courts as Bodies to Determine and Construe Law 215
Courts as Bodies to Prevent Infractions of Law and Violation of Rights 218
Courts as Bodies to Advise the Legislature and the Executive Branch in Respect to Legal Matters 220
Courts as Administrative Agencies 220
Courts as Bodies to Administer Property 221
Courts as Bodies to Enforce Their Decisions 222
Courts as Bodies to Determine Rules of Procedure 226

XVII. Classes of Courts 227
Administrative and Judicial Courts 227
Civil and Criminal Courts 231
Common Law and Equity Courts 233
Other Distinctions 237

XVIII. System of Courts in the United States 239
System of Federal Courts 239
District Courts 240
United States Commissioners 240
Circuit Courts of Appeal 241
Supreme Court 241
Special Courts 242
System of State Courts 243
Petty Courts: Justices of the Peace, Police Magistrates, and Police Courts 243
Courts of Intermediate Grade: County Courts and Municipal Courts 245
Courts of General, Original, Trial Jurisdiction 246
Intermediate Courts of Appeal 246
Supreme Courts 246
Special Courts 247
Characterization of the Dual System of Federal and State Courts 247

XIX. Unification of the System of State Courts 254
Advantages of Unification 255
Movement for Unification 262

CHAPTER PAGE

XX. JUDICIAL COUNCILS 264
Wisconsin Board of Circuit Judges 264
Judicial Council: Massachusetts 266
Judicial Council: Ohio 268
Judicial Council: Oregon 269
Judicial Council: North Carolina 270
Judicial Council: Washington 271
Judicial Council: California 271
Judicial Council: North Dakota 272
Judicial Council: Connecticut 273
Judicial Council: Rhode Island 273
Judicial Council: Kansas 273
Judicial Council: Virginia 274
District Judicial Councils: Texas 275
Proposed Judicial Council: Missouri 275
Judicial Conference: United States 275
Judicial Council: England 279
General Comment 280

XXI. UNIFIED MUNICIPAL COURTS 281
Municipal Court of Chicago 282
Recorders Court of Detroit 290
Municipal Court of New York City 291
Proposed Municipal Criminal Court: Baltimore 297
Municipal Court of Cleveland 298
Other Municipal Courts 299
General Summary 299

XXII. ABOLITION OF JUSTICE OF THE PEACE COURTS 302

XXIII. SMALL CLAIMS COURTS 307
Need for Special Provision for Handling Small Claims 307
Small Claims Procedure: England 309
Movement for Establishment of Small Claims Courts in the United States 310
Small Debtors' Courts: Kansas 311
Conciliation Branch: Cleveland Municipal Court 311
Small Claims Department: District Court for Multnomah County, Oregon 313
Court of Small Claims: Chicago Municipal Court 314
Conciliation, Small Claims, and Legal Aid Divisions: Philadelphia Municipal Court 314
Small Claims Court: Spokane 314
Small Claims Courts: Massachusetts 315
Small Claims Acts: California, South Dakota, Nevada, Idaho, and Iowa 316
General Summary 316

XXIV. JUVENILE AND DOMESTIC RELATIONS COURTS 320
Rise and Development of Juvenile Courts 320
Rise and Development of Domestic Relations Courts 324
Desirability of Consolidating Juvenile and Domestic Relations Courts 330
Fundamental Features of Juvenile and Domestic Relations Courts 333

CHAPTER PAGE

XXV. Business Administration of Courts 338
The Chief Justice as Business Manager 339
The Office of Clerk of the Court 340
System of Administrative Records and Reports 342
Judicial Statistics 345

PART IV. JUDICIAL PERSONNEL

XXVI. An Independent Judiciary 353
Need for an Independent Judiciary 353
Means for Securing an Independent Judiciary 357
Exemption of Judges from Civil Liability 357
Guaranteed Compensation of Judges 359
Safeguards Against Arbitrary Dismissal 359
Other Safeguards 359

XXVII. Methods of Selection of Judges 361
Popular Election 361
Election by Legislature 364
Appointment by the Head of Judicial Branch 364
Appointment by Chief Executive 366
Present Conditions in the United States 366
Methods of Improving System of Selection by Popular Vote 372
Selection through Promotion 381
Judicial Office as a Profession 381

XXVIII. Tenure of Office of Judges 384

XXIX. Method of Removal of Judges 388
Impeachment 388
Joint Address of Two Houses of the Legislature 389
Comparison of the Two Methods 390
Failure of Impeachment to Meet All Requirements 392
Abolition of Courts as a Means of Removal of Judges 395
Recall of Judges 398
General Summary 399

XXX. The Bar 399
Fundamental Requirements 399
Movement for a Legally Organized Bar 400
Training for the Bar 405
Code of Legal Ethics 409

PART V. PROCEDURE

XXXI. Some General Considerations 413

XXXII. Legal Basis and Controlling Force of Rules 420
Constitutional Determination 420
Legislative Determination 421
Argument for Judicial Determination 421
Movement in the United States for Vesting Rule-Making Powers in the Courts 432
Federal Judiciary 432
Movement to Abolish Controlling Force of Rules 437

CHAPTER PAGE

XXXIII. PREPARATION OF THE CASE 440
Single Form of Action 440
Simplified Pleading 444
Abolition of the Demurrer 445
Segregation of Simple from Complicated Cases 446
Disclosure and Discovery of Facts Prior to Trial 446
Discovery where Defense is Insanity or an Alibi 449
Office of Master 451

XXXIV. THE TRIAL: RÔLE OF THE JUDGE 455

XXXV. THE TRIAL: PRODUCTION OF EVIDENCE 468
Complexity of Existing Rules 468
Admissibility of Testimony of Interested Parties 471
Hearsay Evidence 472
Non-Compulsion of Accused to Testify 473
Status of Witnesses 477
Expert Testimony 479

XXXVI. THE PETTY JURY 482
Historical Origin of the Petty Jury 482
Adoption of the Jury System in the United States 487
Adaptation of the Petty Jury System to Modern Conditions 488
Retention or Abolition of the Petty Jury in Civil Cases ... 489
Retention or Abolition of the Petty Jury in Criminal Cases 502
Modification of the Petty Jury System 503
Size of the Petty Jury 503
Unanimity Requirement 505
Method of Selection of Jury 509

XXXVII. THE QUESTION OF APPEALS 513
Need for Review 513
Existing Unsatisfactory Conditions in the United States .. 513
Subject Matter of Appeal 516
Appeal on Matters of Fact 516
Appeal on Matters of Procedure 517
Appeal on Matters of Substantive Law 521
Review as a Right or a Privilege to be Granted 521
Evils of the Double Appeal 524
Right of Subordinate Courts to Secure Instruction on Points of Law from a Superior Court 527
Appeal to Lie Only after Trial of All Issues Involved 528
Nature of the Action on Appeals 529
Appeal in a Unitary Court 532

XXXVIII. THE SENTENCE 533
Character of Sentence 534
Capital Punishment 534
Corporal Punishment 536
Imprisonment 536
Fines 537
Sterilization 537

CHAPTER PAGE

Habitual Offender Sentence 537
Discretion of Judges in Determining Character of the Sentence 538
Mitigation of Sentence 539
Suspended Sentence 539
Indeterminate Sentence 540
Probation System 541
Parole System 548
Remission or Modification of Sentences 550
Fixing of Sentence by an Administrative Board 551
Psychopathic Clinics 554
General Summary 558

XXXIX. Bail 561

PART VI. LEGAL AID

XL. Provision for Meeting Court Costs 569
General Improvement of Judicial System 570
Elimination of Court Costs 571
Provision for Meeting Miscellaneous Costs of Litigation. 573
Action of *In Forma Pauperis* 574

XLI. Provision for Counsel: General 576
Elimination of Need for Counsel 576
Assignment of Counsel 578

XLII. Office of Public Defender 582

XLIII. Office of Legal Aid: Public 589

XLIV. Office of Legal Aid: Private 594
Movement for Creation of Legal Aid Societies 595
Scope of Work 597
Compensation for Services 598
Relations with Other Organizations 599
General Services 602

APPENDIX

Bibliography 607
Index 653

PART I

PREVENTION

PRINCIPLES OF JUDICIAL ADMINISTRATION

CHAPTER I

INTRODUCTION

Of the many tasks confronting the modern government none exceeds in importance that of the administration of justice. If this task is adequately met the foundation is laid for the solution of many of the other problems which confront governments and society. If it is not so met, society rests under a burden and handicap which affects it in almost all of its relations. The fact that the great majority of the people never come into direct contact with the administration of the law either as defendants in a criminal prosecution or as a party in a civil action does not mean that they do not have a vital interest in this branch of public administration. All are not only liable to have accusations of criminal misconduct brought against them, but suffer more or less from the failure of others rigidly to meet their legal obligations toward them. All have to contribute their quota to the cost of the prevention and prosecution of crime and the administration of the civil law. The more perfect the administration of the law, civil and criminal, the greater the assurance with which the citizen can enter into legal relations and the less he has to pay in various forms of insurance against risks. The efficient and just administration of the law is thus a matter of concern to all.

Present Unsatisfactory System of Judicial Administration in the United States. If one turns to the manner in which this primary task of government is performed in the United States a condition is found which is unsatisfactory in the extreme. Of all branches of public administration that of the administration of the law is the most defective. From whatever viewpoint regarded, whether from that of the citizen looking for a determination and protection of his rights, or that of efficiency and economy in the

performance of a public task, this great field of governmental action presents features so defective and so productive of injustice, hardship, waste and inefficiency as almost literally to cry out for redress. "The judiciary," declares the Journal of the American Judicature Society, "is the Dark Continent of political science."[1] "If one were asked," writes Chief Justice William H. Taft, "in which respect we had fallen furthest short of ideal conditions in our whole government, I think we would be justified in answering, in spite of the glaring defects of our system of municipal government, that it is in our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts."[2] "When we turn," says another great American jurist, Elihu Root, "to the particular field occupied by our profession one cannot fail to see that our country would be made stronger if we could change some characteristics in our administration of the law. There is great economic waste in the administration of the law viewed from the standpoint of the nation and of the states. There is unnecessary expenditure of wealth and of effective working power, in the performance of this particular function of organized society. We spend vast sums in building and maintaining court houses and public offices and in paying judges, clerks, criers, marshals, sheriffs, messengers, jurors, and all the great army of men whose service is necessary for the machinery of justice, and the product is disproportionate to the plant and the working force. There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties."[3] One of our leading writers in jurisprudence, Roscoe Pound, Dean of the Harvard Law School, qualifies existing conditions in the following words: "Our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense and above all the injustice of deciding cases upon points of

[1] Issue of August, 1917, p. 3.

[2] Delays and defects in the enforcement of law in this country. Address, before Civic Forum, New York City, April 28, 1908; in Reinsch, Readings in American state government; 1911, pp. 173-81.

[3] Public service by the bar, Report, American Bar Association, 1916, p. 358.

practice which are the mere etiquette of justice—direct results of the organization of our courts and the backwardness of our procedure—have created a deep-rooted desire to keep out of court, right or wrong, on the part of every sensible business man in the community." [4]

These opinions of individuals are amply supported by the results of careful investigations recently made by commissions of inquiry. Thus the authors of the exceptionally complete study of the administration of one branch of the law in a typical city write: [5]

Turning to matters of organization and system, it is apparent that Cleveland, in common with other cities, suffers from an antiquated and cumbersome criminal procedure utterly unsuited to the modern conditions of her industrial urban life. This produces maladjustment, waste, and friction; it places enormous handicaps on society in its effort to defend itself from criminals. Admitting that the protection of the innocent man, unjustly accused, is the most important single consideration, it is still true that his interests and the interests of the community would best be served by a system of few, simple, effective safeguards and checks which would operate equally in all cases. . . .

The evil of this overcomplicated system is that it has become unwieldy. It gets enmeshed in its own technicalities and defeats its own purpose. It fosters and makes possible the "professional" criminal lawyer, who finds it worth while to test and tamper with it until he discovers the weak spot through which his client may escape. The system may guarantee immunity for innocence, but it tends also to guarantee immunity for crime. The prosecutor is at a disadvantage before the professional criminal represented by the "professional" criminal lawyer, who can gain victory in any one of eight ways: by a police discharge after arrest, by a "nolle pros" or discharge after preliminary hearing in the Municipal Court, by the grand jury's failure to indict, by "nolle pros" in the Common Pleas Court, by acquittal before the jury, by the granting of a new trial, or by a bench parole. Outside of this curriculum, the system engenders delay, and if enough delay can be gained, the case may have to be dropped for lack of prosecution. Or, finally, as a last resort, bail may be forfeited and the criminal leave for parts unknown.

Another commission of inquiry characterized existing conditions in the following way: [6]

[4] Report, American Bar Association, 1906, p. 408.
[5] Criminal justice in Cleveland, 359 *et seq.* (1922).
[6] California Commission for the Reform of Criminal Procedure, Report, 1927, pp. 3-4.

The studies of your Commission have shown that the amount of crime in this state, and indeed throughout the United States, is appalling. The first and most fundamental duty of every state is to insure the safety of the lives, homes and property of its citizens. It is sad, but true, that this primary duty is being performed worse throughout the United States, including the state of California, than in any other civilized country in the world. The prevalence of crime, particularly crimes of violence, is this country is simply staggering. Human life has become so cheap, disregard for it so great, that we have a homicide rate fifty times as high as that of England. Robberies at the point of a gun of citizens on the streets, of banks, stores, oil stations and like institutions, are of daily occurrence. No one's home is safe, for gangs of burglars always armed and ready to kill break into every habitation from the mansion to the humblest dwelling; and in our cities and towns, every morning sees the report of a long list of burglaries frequently accompanied by most atrocious acts of violence. Gangs of gunmen ply their profession of killing for profit or pleasure. In broad daylight, and in the streets of our greatest cities, it is necessary to use armored cars protected by men armed to the teeth—veritable engines of war—to transport money or valuables. Even to move the United States mail, it has become necessary to call upon the armed forces of the United States designed to repel foreign enemies and to use armed marines acting under orders " Shoot to kill," in order that this function of our national government may be carried on.

And on this situation a judge of one of our most important judicial tribunals writes:[7]

There is no mystery as to why we have so much crime in the United States. Evil-minded men in the United States have no respect for the law because their experience has shown that they need have little fear of its penalties. The reason why there are so few premeditated murders in England lies in the fact that when in that country a man deliberates whether he shall kill another he knows while he is deliberating that if he does so that within six weeks or two months thereafter he also will die for the crime. Therefore he lets his enemy live. In the United States, if a man deliberates whether he shall kill another, he knows while he deliberates that if he shall kill, that the chances are three to one he will never be arrested, twelve to one that he will never be convicted and more than one hundred to one that he will not die for his crime. Therefore, only one hundred Englishmen die in a year by the hands

[7] Marcus A. Kavanaugh Improvement of administration of criminal justice by exercise of judicial power, *American Bar Association Journal*, April, 1925. Author is Judge of the Superior Court of Cook County, Ill.

of assassins and ten thousand persons perish every year in the United States.

The substantive laws of all civilized countries are about the same; in that regard no one in thirty-two hundred years has added much to or taken much from the ten commandments. But an untraversable expanse spreads between the adjective criminal laws of this country and those of other lands. Then, if any explanation can be found for the differences in criminal conditions between the United States and Canada or between the United States and European countries, that cause must be discovered in the ropes, pulleys, gearing and tackle which transmit the power from the substantive laws to the crime itself. Now our adjective laws are a century behind this age. Seventy-five years ago their abandonment commenced in England, the land of their origin. The ancient system continues with us, worn out, ramshackle, loose, ill-fitting, and in such rattling uncertain adjustment, that the wonder is not that justice so often fails, but that it so often succeeds. In these ill-fitting, and broken belts and pulleys, in this maladjustment of the mechanism of the law reside the so-called technicalities which, taken formerly as a matter of course, but now contrasted by the results of other systems in other lands, do bring so much discredit upon the administration of the criminal law in the United States that they largely account for the abolition of all fear of its penalties in the hearts of wicked men.

Though the defects in our administration of the criminal law are more striking and have attracted more attention, the conditions as regards the administration of the civil law are scarcely less satisfactory. Here are to be found, often in aggravated form, the same maze of technicalities, the same excessive costs, the unjustifiable delay that characterize criminal administration, and it is a question if the public does not suffer more from this faulty administration than it does from that of the criminal law.

This deplorable condition of affairs, amounting as it does to a denial of justice in many cases, and to unnecessary expense and delay in practically all, is not due to any one specific defect in our system, but characterizes the system as a whole. There is scarcely a feature of this system that is not defective, and these defects relate to fundamental principles as well as to details. Our system of administration of justice can thus be made satisfactory only by a searching examination of all of its features and of the basic principles upon which it is founded, and, on the basis of this examination, the devising and adoption of the means appropriate to secure a proper system.

Distinction Between Substantive Law and Adjective Law. The starting point in a consideration of the problem of judicial administration is a clear recognition of the distinction between those laws which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals, and those laws which have for their purpose merely to prescribe machinery and methods to be employed in enforcing these positive provisions. These two classes into which the whole body of law may be divided are known as substantive law and adjective law. With the first of these two classes, important as it is, the present study, as stated in the preface, has nothing to do. The term adjective law as here employed has, however, a somewhat broader connotation than is usually given to it by students of jurisprudence. As employed by them, adjective law is ordinarily deemed to comprehend the law having to do with the organization and procedure of the judicial branch of the government; that is, the courts and their collateral institutions. The present study concerns itself, not merely with this law, but with all the law and practice having to do with the work of administrative agencies upon whom rests the responsibility of seeing that the laws are duly enforced. The term administrative law as it relates to the administration of justice is thus more descriptive from this standpoint of the field covered by this study.

Joint Responsibility of the Administrative and the Judicial Branches. To too large an extent the problem of the proper administration of the law has been deemed to be one having to do only, or predominantly, with the judicial branch of the government. This has been due primarily, to the fact that most of the studies in this field have been made by members of the bench or bar. No one, however, can attempt, as is here attempted, a study of the whole problem that confronts a government in making provision for the due administration of the law without being impressed with the extent to which this problem involves the organization and procedure of administrative as distinguished from judicial agencies. Primary responsibility for seeing that the laws are faithfully executed rests with the Executive and his subordinate agencies. In no small degree the extent to which the law is duly enforced depends upon the character of these agencies and the faithfulness, energy,

and skill with which they perform their respective duties. The courts themselves have no primary responsibility. In no case do they take the initiative to see that legal provisions are complied with. They are, in a way, but passive agencies to whose assistance recourse may be had in the adjustment of controversies and the performance of certain other duties of a quasi-administrative or non-contentious character that have been entrusted to them. The initiation of proceedings before them must in all cases be undertaken by other parties or agencies—the individual who desires protection in, or determination of, his rights, or the administrative officer upon whom rests the duty of seeing that the law is obeyed, or, if broken, that proper penalty or punishment is meted out to the offender. A descriptive, critical, and suggestive study of the administration of the law must thus concern itself as much with the organization and work of these agencies as with those of the judicial establishment properly speaking. This dual character of the problem of the administration of the law cannot be too much emphasized, and special effort will be made in the present work to handle the administrative phase as adequately as the purely judicial.

Administrative Responsibility. It will be seen from the foregoing section that the problem of the administration of the law, as it confronts a government, falls into two distinct parts: the organization and operation within the administrative branch of a service, or services, having for their function to see that the laws are faithfully executed; and the organization and operation of a service or services, known as courts, having for their function the adjudication of matters brought before them by officers of the administrative branch or individuals seeking a determination of their rights. Unless satisfactory provision is made for both of these establishments, and unless assurance is had that they will work in harmonious coöperation, an efficient administration of the law cannot be had.

Pushing our analysis further and considering first the character of the administrative establishment that is required for the due administration of law, it will be found that this establishment, in the United States at least, comprehends the following agencies:

1. The Chief Executive in the exercise of his constitutional duty to see that the laws are faithfully executed

2. The Department of Justice or Office of Attorney General
3. The Office of States Attorney or Prosecuting Attorney
4. The Police or Constabulary
5. The Grand Jury
6. The Office of Coroner
7. The Penal Institutions
8. Special Agencies such as Public Defenders, Public Trustees, etc.

Each of these agencies presents a set of questions in respect to the scope of its responsibilities and powers and the manner in which they should be exercised, and especially in respect to its relations to the other administrative agencies and to the judicial establishment.

Judicial Responsibility. The judicial establishment consists of the courts and their subordinate officers and agencies. In respect to these there are presented almost all of the questions that are encountered in the organization and operation of any undertaking. These questions, as in the case of those arising in connection with the organization and work of administrative services, fall under certain general heads, as follows:

1. Problem of functions and powers
2. Problem of organization
3. Problem of personnel
4. Problem of procedure
5. Problem of general administration; that is, of direction, supervision and control

Under the first head we have such questions as to whether the functions of courts shall be restricted strictly to contentious matters, that is, the adjudication of specific controversies, or embrace non-contentious matters, such as the administration of estates; whether they shall act as advisory bodies to the legislature and to administrative officers in respect to the constitutionality of proposed laws or the construction of those on the statute books, whether they shall have vested in them the power to perform certain administrative duties, etc.

Under the second head, the more important questions are whether there shall be a single court with subdivisions to handle the different classes of cases to be adjudicated or a number of independent tribunals, each covering a particular field; the extent to which

specialization shall be carried in the creation of subdivisions of a unitary court or separate courts, and especially the extent to which separate courts shall be established to handle the administration of public, criminal, and civil law; the extent to which courts shall constitute a hierarchy of tribunals with the right of review by those of superior grade of the acts of those of lower rank; the internal organization of courts; and the use by courts of subordinate agencies, such as examiners, auditors, masters, etc., and the status and functions of attorneys as officers of the court.

Under the third head, are the great questions of the qualifications to be required of judges, the manner of their selection, their terms of office, the conditions governing their removal; and similar questions in respect to their subordinates, the clerks of the court, marshals, bailiffs, etc.

The fourth head, problems of procedure, embraces a large number of matters constituting the most difficult and important questions presented by the whole problem of judicial administration; the authority by whom rules of procedure shall be prescribed; the manner in which actions shall be brought; the nature of proceedings in court in trying these actions; the use of the petty jury; the rules governing the production of evidence; the rôle of the judge in controlling the attorneys and the conduct of the proceedings generally, and many others of greater or less importance.

Finally, under the fifth head, is presented the great question of the extent to which a system of overhead control shall be set up that will insure that all judicial officers are efficiently performing their duties, and the form that this system shall take.

Centralization versus Decentralization of the Administration of the Law. Another phase of the problem that requires special consideration is that of the extent to which responsibility for the administration of justice shall be centralized or decentralized from the standpoint of the political or territorial divisions of the country. In all modern governments political powers in respect to their exercise are distributed among a central government, major territorial divisions known as states, provinces, or departments, and minor divisions such as counties, municipalities, cantons, communes, etc. In the case of any governmental activity, one of the most important questions to be answered is the extent to which respon-

sibility for its performance shall be vested in the central or general government, or be distributed among the political subdivisions. In the case of a federal government such as the United States, this question is presented in two forms: that of the concentration or distribution that shall be made as between the central government and those of the constituent states; and that of the concentration or distribution that shall be made of the judicial powers vested in the individual states as between the central governments of such states and their political subdivisions. As will appear throughout this study, the extent to which these two questions have been properly handled has an exceedingly important bearing upon the efficiency of the system as it exists.

General Summary. In the foregoing we have sought to do little more than to give a general view of the nature of the problem of judicial administration. One of our purposes in doing this is to emphasize the fact that, though the task of judicial administration constitutes a clear-cut, distinct problem, it is an exceedingly complex one, involving the creation and operation of scores of agencies all of which should work in close coöperation with each other. This means that a satisfactory system is not to be secured by taking action along a single line. The establishment of a proper system of courts will do much toward the improvement of conditions, but if at the same time proper rules of procedure are not formulated, a proper system of selecting and maintaining in office capable and honest judges to preside over these tribunals adopted, proper administrative agencies provided, etc., the system as a whole will fall short of giving satisfaction. What is required is that each phase of this great problem shall be subjected to intensive study with a view to determining how it can best be handled. Only as the attack is made along the whole line can the real end which is sought be accomplished. The task of making such a study is a large one. Many of the special features are of an importance and complexity to merit a volume as large as the present one. All that we can hope to do here is to make known the existence of these many features and their relations to the general problem and point the way along which it is believed that action should lie.

CHAPTER II

PREVENTION OF CRIME AND LITIGATION

Prevention should always take precedence over attempts to relieve. Crime and litigation are both evils of the first magnitude. As in the case of disease, no efforts should, consequently, be spared to lessen their occurrence. The subject of the causes and means of preventing crime involves so many factors and requires efforts in so many directions that anything like an adequate consideration of it is impossible in a work that is not devoted exclusively to it. Here it is feasible only to indicate that efforts looking to the lessening of crime must be made in three fields: eliminating as far as possible the incentive to crime; setting up effective deterrents to the commission of crime; and placing restraints upon the freedom of those whose moral or emotional characteristics are such as to predispose them to crime.

Elimination of Incentives to Crime. In the first field fall all general efforts having for their purpose the effecting of a general improvement in social conditions—the promotion of education, the lessening of destitution, the relief of distress, the broadening of opportunities to gain a livelihood, the effecting of greater distributive justice in respect to the world's goods, etc. Though efforts in these ways have other purposes as their direct end, they exercise an important influence in lessening discontent and a corresponding incentive to the breaking of the laws governing human relations.

Deterrence of Crime. The second field has to do with the single problem of providing penalties for those who break the law and taking the means that will ensure that the imposition of such penalties will follow with certainty all criminal acts. It thus embraces the three distinct tasks of determining what shall be deemed to be criminal acts and the penalties attaching to such acts; the detection of infractions and the apprehension of the offenders; the determination, through a judicial process, of the guilt of those so apprehended; and the fixing of the penalties and the ensurance that such penalties will in fact be suffered by those so found to be law

breakers. It is unnecessary to dwell upon the importance of efforts in this field. Whatever may be the influence of other factors, there can be no doubt that primary responsibility for the prevalence of crime in the United States is due to the fact that the deterrent element is inadequate. This arises partly from the inadequacy of the penalties that are provided for many classes of crime, but chiefly from the fact that the system for the detection of crime, the prosecution of those responsible for it, and the rendering certain that such penalties as are imposed will in fact be enforced is defective.

Segregation of Criminals. Efforts in the third field are necessary as the result of the discovery that there are in all communities a certain proportion of the inhabitants who are by their psychological make-up predisposed to unsocial behavior and who, due to their inherent mental, moral, and emotional failings, are permanent dangers to the community unless in some way subjected to restraint. Persons so afflicted constitute a large proportion of the class of professional criminals, and it is this class that is responsible for the great bulk of crime of a serious character. That there are in each community persons of this kind and that responsibility for their criminal acts is due primarily to their psychological defects, is abundantly proved by the life history of habitual offenders, the relatively small results secured through reformatory efforts, and the results of psychological examinations. So far has research in this field gone that it is claimed by those in charge of the psychopathic clinics that predisposition to crime in those who have never committed a crime can be determined with great certainty by the use of proper methods of enquiry. The claim is thus made that, theoretically, it would be possible to determine in advance potential criminals, and, by the use of proper restraints, prevent such persons from translating their potentialities into fact. It is consequently urged by some that society, instead of waiting until crime is committed, should proceed to determine potential offenders and by their segregation or restraint in some appropriate way prevent the commission of crime by them. It is the opinion of Judge Olson that the only practical solution of the problem of preventing crime on any scale is through the segregation in state-controlled colonies of those convicted one or more times of a criminal act and shown by psychopathic investigations to be mental defectives.

Experience in this field is not sufficiently broad to warrant, at this time, action of so radical a character. Where a predisposition to crime is definitely established through repeated convictions for crime there is justification for the permanent segregation of those found to be so predisposed. Recognition of this fact is the basis for the passage of so-called habitual offenders acts, an account of which is hereafter given, in pursuance of which those convicted a certain number of times of an offense of the grade of felony will receive a sentence of life imprisonment and be ineligible for parole.

Elimination of Causes of Litigation. The country has long been awakened to the desirability of action having for its purpose the lessening of the incentive to crime and the prevention of its occurrence. There has not been, however, a similar recognition of the evils of civil litigation and of the desirability of making positive efforts to remove the causes producing such litigation. Examination will show that, though, as long as human nature is as it is, differences of opinion leading to controversies will occur, much can yet be done to lessen the frequency of such differences and to provide for their adjustment by more effective means than resort to the formal action of judicial tribunals. So true is this that probably the most important work to be done in improving the administration of the civil law in the United States falls in this field. It is for this reason that this subject is the one to receive first consideration in this work. In the remaining paragraphs of the present chapter mention will be made of the possible ways of preventing civil controversies. In chapters immediately following consideration will be given to the means of adjusting those controversies that do arise without resorting to the regular court procedure, which at the best entails expense, delay, and too often bitterness between the parties.

Improvement of Contract Forms. Differences in respect to civil rights and duties are of two kinds: those in respect to facts and those in respect to the law governing the facts. As regards the first category, much can be done in the way of their reduction by the taking of greater care in determining the conditions under which individuals enter into relations with each other. Most relations of a business character rest, in their final analysis, upon contract, express or implied. In no small degree, business controversies arise from

the failure of contract agreements clearly to express the terms and conditions to be observed by the contracting parties. Especially is there often a failure to make provision for eventualities that may arise in the execution of the contract. One of the most effective means of lessening controversies is thus that of improving the character of business contracts both as regards their scope in the sense of providing for all possible contingencies, and in their technical draftsmanship or form of statement. What can be done in this way is evidenced by the work of the great trade associations of England in the drafting of standard forms of contracts, the use of which by their members is practically obligatory if they wish to remain in good standing in their associations. Regarding these contract forms Mr. Samuel Rosenbaum in his able study of arbitration in England,[1] writes:

> The object of a written contract is to avoid disputes, not to foster them, and a contract should be so drawn as to make some provision against the commoner sources of misunderstanding. That is the great advantage of the contract form supplied by the trade associations. They are not merely drafts prepared with an eye solely to future dealings; they embody the experience of many years, and, more specifically, they are altered from time to time to cover any open point disclosed in the course of an arbitration or dispute before the association's tribunal. In this way the number of possible differences is reduced to a minimum and questions of interpretation or legal difficulty are very rare.

In the United States the most encouraging evidence of work in this field is the increasing extent to which efforts are being made to standardize specifications for the purchase of materials and contract forms. Especially is work in this field being done by the national government. It is certain that these efforts will not only greatly facilitate the conduct of business relations but will also diminish greatly the number of controversies arising under the contract agreements to which they relate. The promotion of similar efforts by other public bodies and private undertakings is thus one of the important means of lessening controversies and consequently litigation in the business field.

Improvement in Statement of the Law. As regards the second category of controversies, those regarding the law, it is evident that

[1] Report on commercial arbitration in England, American Judicature Society, Bulletin XII, October, 1916, pp. 21-22.

many are due to the defective character of the substantive provisions, or the form of statement of the law. This law may be in the form of statutes or decisions of the courts. The character of our statutory law has long been the subject of criticism from the standpoint of technical draftsmanship. The proper framing of legislation is an extremely difficult matter and calls for the highest order of technical draftsmanship. Each statute should be so framed as to be consistent not only with itself but also with all preceding legislation dealing with the same subject. Its provisions should be clear and definite. Many laws violate all the canons of proper legislation. Often they represent little more than pious wishes and are impossible of enforcement except as interpreted by the courts. It is recognized that even under the most perfect conditions the actual application of the law to specific cases will have to be had through the courts. At the same time the laws should be so drawn as to reduce to a minimum the necessity for such action and to facilitate the work of the courts when recourse to those bodies is necessary.

One of the most effective means for attaining this end is that of making provision in each legislative body for a bill-drafting service, whose duty it will be to pass upon the technical drafting of all legislation prior to its enactment. The leading example of such a service is the Parliamentary Counsel to the Treasury in Great Britain, the duty of which is to draft or to pass upon the drafting of all government bills. Similar services have in a few cases been created in the United States, though in no case has as full and consistent use of them been made as in the British service.

The danger of controversies regarding statute laws can also be lessened by the periodical revision and codification of the statute law.

As regards the statement of the law contained in judicial decisions, much can be done by the restatement in better or more acceptable form than as contained in the separate decisions. A noteworthy attempt in this direction is now under way under the auspices of the recently created American Law Institute.

This is not the place to attempt any detailed consideration of the technical problem of legislation, bill drafting, codification, or restatement of the law. All that it is desired to do here is to point out that much can be done in the way of preventing legal controversies by improving the character of statute law and restating case law in better form.

CHAPTER III

ADMINISTRATIVE ADJUDICATION

Excessive Use in the Past of Courts for the Settlement of Controversies. Turning now from the lessening of controversies that may give rise to litigation to that of the lessening of litigation in the sense of formal proceedings in the regular courts, one of the most effective means available is that of removing whole categories of cases from the courts and vesting their handling in administrative authorities or in administrative tribunals of a quasi-judicial character. The extent to which our courts in the past have been burdened with the task of acting as auxiliary agencies for securing the administration of public law is not generally appreciated. This has arisen from the emphasis that the English speaking people have placed upon the doctrine of individual rights and the deep-rooted belief that adequate protection of such rights can be secured only through the judicial branch of the government. As a necessary consequence of this position, the American people, in common with other English speaking people, have been loath to grant to administrative officers other than the most limited powers to enforce, through their own action, compliance with provisions of law. In general the doctrine has been that where coercion of the individual has to be resorted to in enforcing legal provisions, resort must be had by the administrative officer having responsibility to the courts definitely to determine the precise measures to be employed and to take the action required for their application.

The situation which existed down to recent times in respect to this matter has been graphically set forth by one of our leading students of jurisprudence, Roscoe Pound, Dean of the Harvard Law School. After calling attention to the development of the doctrine of the right of courts to pass upon the constitutionality of legislation, he said:[1]

At the same time, we had developed a system of judicial interference with administration. Law paralyzing administration was an

[1] Organization of courts. *Journal of the American Judicature Society*, October, 1927, pp. 69-70.

every-day spectacle. Almost every important measure of police or administration encountered an injunction. We relied on taxpayers' suits to prevent waste of public funds and misuse of the proceeds of taxation. In many jurisdictions it was not uncommon to see collection of taxes needed for the every-day conduct of public business restrained by injunction. In case of disturbance of the peace, the individual and even, in one single instance, the nation had come to appeal, for the protection of property and business, not to the police or to the administrative authorities, but to courts of equity. In a number of states the courts would direct writs of mandamus to the governor, where ministerial action was involved, and in one state, in a heated election contest, the Supreme Court, by mandamus, ordered the presiding officers of the houses of the legislature to carry out constitutional provisions as to canvass of returns. We seemed to have achieved in very truth a Rechtsstaat. Our government was one of laws and not of men. Administration had become "only a very subordinate agency in the whole process of government." Complete elimination of the personal equation in all matters affecting the life, liberty, property or fortune of the citizen seemed to have been attained. What in other lands was committed to administration and inspection and executive supervision, we left to courts. We were adverse to inspection and supervision in advance of action, preferring to show the individual his duty by a general law, to leave him free to act according to his judgment, and to prosecute him and impose the predetermined penalty in case his free action infringed the law. It was fundamental in our policy to confine administration to the inevitable minimum. In other words, where some peoples went to the one extreme and were bureau ridden, we went to the opposite extreme and were law-ridden. . . . Obviously it threw a great burden upon the judicial system, and despite the reaction which has taken place, will continue to put a strain upon the courts for a long time to come. . . . Nothing is so characteristic of American public law of the last half of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review.

Modification of the Problem Through Changed Conditions. This position was possibly basically sound when the courts were the only bulwark against a tryannous ruler who was beyond the reach of the people through political action or otherwise. It was, moreover, one that was practically feasible so long as the functions of government were comparatively few and simple. Present conditions, however, are radically different. In the first place the American people are enjoying popular government, and all branches of the government are subject to popular control. If anything, this

control is more effective in the executive, administrative, and legislative branches than in the judicial branch. That it is possible for the judiciary as much as the other branches to exercise its powers in such a way as to do violence to the will of the people, to principles of equity, and to individual rights, is evidenced by the profound dissatisfaction that has been at times manifested with the manner in which they restrained the legislative and administrative branches in their attempts to exercise the police power for the purpose of improving labor conditions and promoting the public welfare in other respects, and the manner in which they applied the old common law doctrine of employer's liability for accidents suffered by employees while in the performance of their duties.

Secondly, governmental activities are now on such a vast scale and of such a variety that it is a grave question whether this system of recourse to the courts in enforcing administrative determinations, whatever may be its theoretical merits, does not break down in practice. The time, in a word, has come when serious consideration must be given to the question of the extent to which it is feasible to relieve the courts from the great burden of acting as agencies for the application of public law to specific cases.

In considering this problem, two considerations must be kept in mind: the distinction between the function of courts in determining facts and that of determining the law as applicable to such facts; and the distinction between the function of the courts as agencies for handling matters to be adjudicated in the first instance and their function of acting as agencies of review to which appeal may be made to correct improper action on the part of administrative officers. This right of review may embrace the right to review matters both of fact and law or be confined to matters of law only. If these distinctions are kept in mind, it is possible greatly to relieve the courts as fact finding agencies, and, by confining their function to review, to throw a large part of the work of determining facts now being performed by the courts upon administrative officers or quasi-judicial administrative tribunals.

The point might be made that action along this line does not lessen the amount of work to be done but merely transfers responsibility from one branch of the government to another. In one sense this is true. The gain, however, can be none the less great. A court is at best an expensive institution. Its methods of pro-

cedure are formal and technical. It can only handle matters brought before it. It does not act upon its own initiative. In the determining of facts it has no technically trained staff of its own. The proceeding is in the nature of a duel between the parties, and almost its only method of determining facts is by the cumbersome and expensive question-and-answer device. More fundamental still, the burden of the inquiry is in large part thrown upon private individuals. In marked contrast with this, administrative agencies can act on their own initiative, assume responsibility for determining facts, and have expert staffs to do the work of investigating. They are not bound by formal rules of evidence and procedure as are the courts, and they generally can, and do, act in a more direct, efficient, and economical manner and with much greater dispatch.

Modern Movement for Increase in Administrative Adjudication. Fortunately, recent years have witnessed a profound reaction from this position of looking to the courts for the adjudication of all sorts of questions. As Professor Pound points out in the article from which we have earlier quoted, "Today, the tendency is no less strong to take away judicial review of administrative action wherever it is constitutionally possible to do so, and when it is not possible, to cut down such review to the unavoidable minimum." This tendency, indeed, has gone much further and, as will shortly be shown, embraces the transfer to administrative agencies of whole categories of cases which were formerly handled by the courts. It represents one of the most fundamental changes that have taken place in our political institutions during the last few decades.

Administrative Determination of Tax Obligations. One of the first examples of where, as a practical need, it became necessary to take from the courts practically all participation in applying a branch of public law to specific cases, even though the property rights of individuals were vitally concerned, was in the field of the assessment of property for purposes of taxation. To have permitted every property owner believing himself aggrieved by the valuation placed upon his property for purposes of taxation to appeal to the courts for a judicial determination of the question, or for the courts to have taken the position that the principle of due process was applicable in such a way as to entitle the property owner to a judicial determination of the proper valuation, would have resulted,

on the one hand, in making any efficient administration of the tax system impossible, and, on the other, in burdening the courts with an enormous amount of work. The law on the subject is now fairly well settled that, in the absence of statutory provisions to the contrary, an appeal to the courts, even in the way of review of the acts of the valuing authorities, does not lie except where fraud or such a gross abuse of authority as to amount to constructive fraud, is alleged, or due opportunity has not been given to the taxpayer to be heard. For all practical purposes this important category of issues, in many jurisdictions, does not come before the courts. In so far as a review of the valuations as first made by the assessors is needed, provision therefor is made by the setting up of purely administrative boards of review. In the case of other categories of public revenues of the national government, provision has been made to review the acts of administrative officers by special tribunals, such as the so-called Customs Court, to pass upon the classification and valuation of goods entering the United States for the purpose of fixing customs dues taxable, and the Board of Tax Appeals for the taking of similar action in respect to determination of taxes due under certain of the internal revenue laws.

As a further example of the manner in which the courts may be relieved of a great burden of work, mention may be made of the two alternative systems for administering the excise laws of a government. Under the one, the statutes may provide penalties for the violation of any of its provisions, and chief reliance for enforcing the law be thus placed on the deterrent effect of the arrest and criminal prosecution in the courts of offenders. Under the other system, power may be placed in the hands of administrative officers to prescribe the conditions under which articles subject to the excise tax may be manufactured, transported, and sold, the requirement made that no person shall engage in such work without a license, and power conferred upon the enforcing service, to suspend or cancel such licenses if any of the conditions imposed are violated. Though statutes drawn upon this basis will contain penal provisions, comparatively rare recourse will be had to them, since the conditions imposed by the administering authorities can usually be so drawn as to make the illicit manufacture, transportation, and sale of the excise articles, difficult, and the fear of cancel-

lation of licenses will be as great a deterrent as that of prosecution in the courts.

An illustration of the use of this system with which the writer was himself directly concerned shows the importance of its adoption both from the standpoint of efficient administration and from that of the relief of the courts. When he was appointed treasurer of Porto Rico, shortly after the establishment of civil government in that island, he found that one of his duties was the enforcement of the law imposing an excise tax upon the manufacture and sale of intoxicating liquors, tobacco, matches, etc. This law was so drafted that its enforcement was almost wholly dependent upon the deterring effect of its penal provisions. The actual work of enforcement had to do largely with the detection and prosecution in the courts of persons violating its provisions. This resulted in a great amount of work on the part of administrative officers in the treasury department, and the throwing of a large burden upon the courts. The law was immediately redrafted so as to provide that the treasurer should have power to determine and fix the conditions under which the manufacture and sale of these commodities might be engaged in, that no person should engage in such business until he had received a license or permit to do so from the treasurer, and that the latter could suspend or revoke the license of any individual not complying with the conditions under which it was granted. Though the revised act contained penal provisions to be invoked in case of necessity, the result of the change was to place in the hands of the administration a means of enforcing the law without resorting to the courts except in unusual circumstances.

In connection with this topic, mention should also be made of the fact that resort to the courts in the enforcement of classes of regulatory law may be avoided by the grant to administrative officers of power to impose fines for petty offenses. Authority to do this was granted by the excise law of Porto Rico, to which reference has just been made, with excellent results in practice.

Administrative Enforcement of License and Permit Systems. Another important field of public law, where this system may be employed to great advantage, is that pertaining to the regulatory functions of government. The regulation of the conditions under

which labor shall be performed in factories and mines with a view to the protection of the employees against accident and injury to their health offers one of the best examples in this field. The factory and mines acts first enacted by the states were defective in that they attempted to set forth in the acts themselves the conditions to be observed and made no provision for enforcement except through prosecution in the courts. More and more, however, it became apparent that this system was at once ineffective and expensive, and that it threw too much work upon the courts. Laws were accordingly passed providing for the establishment of administrative services with power to prescribe the details of conditions to be observed and to inspect establishments for the purpose of assuring themselves that they were in fact observed. In some cases at least provision was at the same time made for the introduction of the licensing system.

This system, under which a person may not begin operations until he has received a license or permit so to do, and having as one of its essential features the agreement on the part of the licensee to observe the conditions prescribed, subject to the penalty of revocation, takes from the courts almost the entire work of enforcement and vests it in the hands of administrative services. Though this system has been widely adopted, there are opportunities for its further extension.

Administrative Enforcement of Proper Trade Practices. Still another example of the alternative to the system of relying chiefly upon the courts for the enforcement of a body of public law, and of organizing an administrative enforcement system so as to eliminate the participation of the courts except by way of review, and that only in respect to matters of law, is presented by laws having for their purpose to prevent combinations in restraint of trade and unfair or improper trade practices generally. At the outset, when the policy was adopted of supplementing or supplanting the common law on the subject, the only method of enforcement provided was through the Attorney General, or by private parties believing themselves aggrieved, instituting proceedings in the courts. This system proved unsatisfactory from a number of standpoints, and, in the case of the national government at least, resulted in the creation of the administrative agency known as the Federal

Trade Commission. The nature and functions of this body are well known and need not be elaborated upon here.[2] It is sufficient to point out that, from the standpoint of the present study, it represents the interesting policy of emphasizing the affirmative responsibility of the government, rather than of individuals, to determine, on its own initiative, if formal complaint by private parties is not made, whether improper conditions and practices exist, and, if found to exist, to take necessary steps to correct them; of vesting this responsibility both for determining when action should be initiated and for taking the action required in an administrative agency; and of attempting to distinguish between the functions of determining facts and of determining the law. In respect to the latter feature, the law creating the Federal Trade Commission provides that the determinations of the Commission as to matters of fact shall be conclusive but that an appeal to the courts will lie in respect to matters of law. Unfortunately, the courts have so construed this provision as largely to break down the distinction between matters of fact and of law which the act attempted to set up, and have correspondingly broadened the jurisdiction of the courts. Speaking on this point Mr. Girard C. Henderson, in his careful study, "The Federal Trade Commission," says:

I have referred to the tendency in the courts to restrict within the narrowest limits the scope of the clause which declares that the findings of the Commission as to the facts, if supported by testimony shall be conclusive. Whether or not a method of competition is unfair, and whether or not a practice may substantially lessen competition or tend toward monopoly, are said to be questions of law for the decision of the courts. According to these dicta, all that is left to the Commission is to decide mere questions of physical fact.[3]

Mr. Henderson evidently believes, as does the present writer, that this attitude of the courts is unfortunate, since he continues:

I do feel that where a Commission, created to deal in an expert way with a special field of controversy, has made findings of an

[2] For an account of the history, organization, and work of this body, see: The Federal Trade Commission; its history, activities, and organization (1922), Institute for Government Research, Service Monograph No. 7; and The Federal Trade Commission: a study in administrative law and procedure, by Girard C. Henderson (1924).

[3] Henderson, pp. 336-37.

expert character which involve elements of practical judgment rather than of law, those findings should be respected by the courts. Any other point of view seems to me to be inconsistent with the whole theory of administrative rather than of judicial enforcement. The expert judgment of the Interstate Commerce Commission is, as I have said, respected by the courts, and the only reason I can think of for not giving the same treatment to the findings of the Federal Trade Commission is that it is difficult to tell from the great majority of the findings that the Commission has ever exercised an expert judgment, since the reasons for the decision are never given.

Whatever the outcome in respect to this matter, the establishment of the Commission has resulted, and will continue to result, in a great lessening of work on the part of the courts in respect to this class of controversies, since in many cases appeals are not made to the courts, and, when made, can be handled by the latter with greater ease and expedition than would be the case had the Commission not done its investigatory work.

A further extension of the policy involved in the creation of the Federal Trade Commission is found in the creation of the Packers and Stockyards Administration in the Department of Agriculture, though here a somewhat different form of administrative organization has been set up.

Administrative Enforcement of Workmen's Compensation Acts. A still more interesting and radical example of the transfer of the handling of a specific class of controversies from the judicial to the administrative branch of the government is that presented by the policy which has been so generally adopted both in foreign countries and in the United States of entrusting to administrative agencies the work of determining and making provision for the compensation of workmen for injuries and diseases contracted in the course of their employment. The special significance of this policy is that it represents the taking away from the courts of cases which theretofore had been a matter of purely private litigation.

This is not the place to trace the movement for the adoption of what are known as workmens' compensation acts in substitution for the old common law employer's liability provisions as worked out by the courts. Suffice it to say that the old system, under which a workman injured in the course of his employment could

secure indemnification only as the result of a suit for damages against his employer, whatever may have been its justification under early conditions when work was carried on in small shops, and the relation between employer and employee was direct, had become thoroughly unsatisfactory under modern conditions. Under that system, not only was a great burden of work thrown upon the courts, but a denial of justice to the employee resulted in probably the great majority of cases. This arose through the existence of certain legal doctrines such as those of the assumption of risk by the employee, contributory negligence, and the fellow-servant principle, and the fact that even under the most advantageous circumstances, justice could be had only as the result of an acrimonious action at law, long delay, and great expense.

Through the passage of what are known as workmen's compensation acts, most modern nations have completely done away with this system and substituted in its place one under which the burden of compensation for accidents to employees is definitely placed upon the employer, except where the employee is wilfully or grossly at fault, under which the payment of such compensation is assured through the requirement that such accidents shall be insured against, and under which the determination of the cases where compensation shall be paid, and the amount to be paid, is taken out from the courts and vested in an administrative or quasi-administrative body.

It is this latter provision that makes the subject one of importance from the standpoint of the present study. Prior to the passage of those acts, and the adoption of the principle of having their application administered by an administrative board, the courts of the country were devoting no small part of their time to the trial of long and expensive suits for damages for personal injuries brought by employees against their employers. Under the new system of administrative determination, action is for the most part speedy and is had at comparatively little cost to the claimants. To quote Mr. Reginald Heber Smith:[4]

Ninety per cent of all accident cases which come before an industrial accident board are settled automatically, promptly, and without expense. That is something which our courts have never

[4] Denial of justice, *Journal of the American Judicature Society*, III, 122 (December, 1919).

been able to do. The honor of making such a plan operate successfully must be awarded to an administrative, and not to a judicial, tribunal.

This marks a tremendous advance towards freedom and equality of justice. Today, nine men out of ten get their fair compensation at once, without costs and without the expense of employing counsel. Formerly they were obliged to take what the insurance company adjuster offered or else obtain a lawyer on a contingent basis and wage a long and dreary fight. The new administrative method is so far superior to the old tort system that I hope to see it extended to interstate commerce employees, and to passengers on railroads and street railways.

Administrative Enforcement of Public Utility Laws. The creation of public utility commissions for the determination and enforcement of conditions to be met by public utility corporations has also done much in the way of relieving the court from classes of cases involving the relations of those organizations to the government and to the public. Regarding these and other extensions of governmental control to be exercised through administrative agencies, Elihu Root had the following to say in his annual address, at the annual meeting of the American Bar Association in 1916 on Public Service by the Bar.

There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burden thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the state public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervising offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial condi-

tions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.[5]

The movement for the establishment of public utility commissions in the United States started with the creation by Massachusetts in 1864 of its Railroad Commission. It has since spread until practically every state of the Union and the United States has one or more such bodies. In an unusually interesting paper by Mr. Max Thelen, President of the California Railroad Commission, on "Advantages of Administrative Tribunals in the Determination of Controversies," [6] the extent to which the motive lying back of the creation of these bodies was that of getting away from the disadvantages of ordinary court procedure is emphasized. He says:

A marked similarity exists between these various state commissions. All seek to administer justice speedily and efficiently. All try to dispose of complaints informally without the necessity of formal hearings. The pleadings in their formal proceedings are simple, the hearings direct and to the point and the decisions generally promptly rendered. The railroad commissions all represent a definite and largely an effective revolt against the technicalities and delays of many of our courts. . . . The atmosphere of the hearing before a typical state commission is entirely different from the atmosphere of many of our courts. A hearing before a state railroad or public service commission is not a contest between trained intellectual gladiators, each seeking to take advantage of every technicality and both frequently trying the procedure instead of the facts of the case. A hearing before a state commission is a simple and direct investigation to ascertain the facts. The presiding commissioner is not an umpire for the purpose of seeing to it that counsel play the game in a particular way. His function is to have the facts developed as promptly and as fully as possible. His attitude is that of a co-investigator and he feels entirely at liberty to take an active part in the examination and cross-examination of witnesses. The theory of proceedings before the California Railroad Commission and similar commissions is that the state itself is interested in the ascertainment of the truth. Accordingly, the Railroad Commission's own experts investigate the facts and introduce their reports in evidence, being subject to cross-examination in exactly the same manner as other witnesses. . . . One of the distinctive features of practically all administrative tribunals exercising judicial functions is that they are not bound by the technical

[5] Report, American Bar Association, 1916, pp. 368-69.
[6] *Utilities Magazine,* January, 1918.

rules of evidence. Specific provision to this effect is contained in the California Public Utilities Act. . . . Only too frequently the technical rules of evidence result in concealing the truth instead of permitting it to be developed. The California Railroad Commission accepts hearsay evidence whenever it believes that such evidence will assist in developing the truth, but never rests its decisions solely on hearsay evidence. Objections to the introduction of evidence are seldom made before the California Commission, except occasionally by some lawyer who comes before the Commission for the first time still corrupted by the practice of the courts. To those who practice daily before the courts it will be unnecessary for me to direct attention to the enormous saving of time which results from the absence of objections to evidence.

Proposed Administrative Adjudication of Personal Damage Cases. The foregoing but represent illustrations of what may be done in the way of both improving the method of handling specific classes of controversies and, incidentally, of relieving our overburdened courts of matters involving primarily the mere determination of facts by transferring the work to administrative officers or administrative boards of a quasi-judicial character. They but point the way towards the application of the policy to other fields. Especially would it seem that the same method might be applied in the handling of the thousands of personal damage suits other than those covered by the workmen's compensation acts, and in particular those resulting from automobile accidents. The importance of this proposal is seen by the report of the recent Calenda Committee of the Appellate Division of the Supreme Court of New York which was appointed to consider ways and means of relieving the congested calendars of that court. This committee found that actions for personal injuries resulting from automobile accidents represented 75 per cent of all the business of the supreme court in the County of New York during 1926 and 73 per cent of the total litigation before the court in 1927, while additional cases were handled in the city court and the municipal court.

Justice Robert S. Marx of the Superior Court of Cincinnati, Ohio, has taken the lead in advocating the adjudication of cases of this kind by administrative tribunals patterned after the workmen's compensation commissions. In an address delivered before the Cincinnati Bar Association, April 15, 1924, entitled "The Curse of the Personal Damage Suit and a Remedy,"[1] he points out that

[1] *American Bar Association Journal*, July, 1924.

while the first workmen's compensation act in 1911 was viewed as revolutionary and bitterly fought by lawyers, employers, and insurance companies, this system is now in force in forty-two of the states of the Union, and is generally accepted as bringing about a great improvement, both from the standpoint of doing justice, and from that of efficiency in administration. He maintains that every argument in favor of these acts is equally applicable to traffic accidents. His proposal is for the substitution for the personal injury suit, as the only remedy now available to those who are injured or killed in the use of the streets, a state compensation fund to which owners of all vehicles, principally automobiles, shall be required to contribute a premium as a condition of operation upon the streets, and to compensate those who are injured and killed from that fund in a similar manner to the present workmen's compensation act.

After pointing out the constantly increasing number of traffic injuries, the fact that many responsible for the accidents are judgment proof, the expense to which injured parties are subjected in securing compensation, and the extent to which the courts are burdened with the trial of such cases, he continues:

I have come to this conclusion as a result of nearly ten years more or less active experience in the trial of personal injury suits and approximately four and one-half years observation of same as a trial judge; and that experience has convinced me of the utter futility of the personal injury suit as a remedy for those who are injured or killed in the legitimate use of our streets. . . . I have no hesitancy in indicting the whole legal system of liability based upon fault as a remedy for people who are hurt or killed—indicting it upon the grounds that it is inadequate, that it is incomplete, that it is hazardous, that it is unjust and uncertain. More than that, it is worse than the old employer's liability suit, because at least, under the employer's liability suit the employer was a known defendant; he usually was a solvent defendant; the witnesses were available and were very often friendly workmen.

In a subsequent address before the Ohio Bar Association, July 17, 1925, entitled "Compulsory Automobile Insurance," [8] and intended

[8] *American Bar Association Journal*, November, 1925. Mr. Marx has handled this whole subject in a comprehensive way in a recent article, "Compulsory automobile insurance," *National Municipal Review*, August, 1927. Up to the present time but one state, Massachusetts, has adopted the system here advocated, by the enactment of its Motor Vehicle Compulsory Security Act, which became effective January 1, 1927.

as a reply to an article on the same subject[8] by Henry Swift Ives, of Chicago, Secretary of the Casualty Information Clearing House, Chicago, Judge Marx said:

Three-fourths of all civil jury trials are concerned with personal injury claims largely arising from automobile accidents. The major portion of the time of all civil courts in the trial divisions is consumed in the trial and disposition of these cases which also take the time of appellate courts to a greater extent than we realize. . . .

All of you know from personal experience of the futility of these personal injury suits as a means of doing justice. . . . For practical purposes the personal injury suit in automobile accident cases is frequently entirely worthless and at best is slow, uncertain, wasteful and unsatisfactory. It is a survival under modern conditions of a legal system which has outlived its usefulness and its retention is working irreparable injustice. . . .[8]

He then went on to show that but 14 per cent of automobile owners carry liability insurance and that those responsible for accidents are largely judgment proof. What is required is compulsory compensation along the lines of the compulsory compensation now provided for by industrial accident compensation laws, in which the factor of fault is practically eliminated. On this, he said:

There is nothing new or radical in this proposal. At the present time employees who are injured as the result of an automobile accident receive compensation although the accident was clearly their own fault. In the common case of taxicab accidents in which a passenger, a pedestrian and the driver are all injured by the gross carelessness of the driver—the negligent driver receives hospital care and compensation at once while the innocent passenger and pedestrian have no remedy except the hazard of a personal injury suit. If the taxicab company is insolvent, as occurs quite frequently, the innocent victims will receive nothing while the guilty driver is protected and compensated.[8]

In this proposal Judge Marx is not alone. He called attention to the fact that a committee of the New York City Club, of which the eminent actuary Miles M. Dawson was chairman, in 1921, prepared a bill providing for the putting of this proposal into effect, in the State of New York, which was introduced in the state legis-

[8] *American Bar Association Journal*, October, 1927.

lature by Nathan Strauss; and that a commission in Massachusetts which had been appointed to investigate the subject had reported favorably in 1920 and that bills looking to the putting of its recommendations into effect had been introduced in the legislature.

Both Arthur Train and Chief Justice Taft have recommended that the trial of damage suits against public service corporations be taken from the courts and decided by official arbitrators. Mr. Taft said:[10]

Another method by which the irritation at the inequalities in our administration of justice may be reduced is by the introduction of a system for the settling of damage suits brought by employees against public service corporations through official arbitration and without resort to jury trials. Such a system is working in England, as I am informed. Under the statute, limitations are imposed upon the recovery of the employee or his representatives proportioned to his earning capacity. The hearing is prompt and the payment of the award equally prompt, and in this way a large mass of litigation that now blocks our courts would be taken out of our judicial tribunals and be settled with dispatch. Of course it would not be proper or possible to prevent the plaintiff litigant from resorting to a jury trial if he chooses, but I believe that the result would be very largely to reduce the character of such litigation. The truth is that these suits for damages for injuries to employees and passengers and to trespassers and licensees have grown to be such a very large part of the litigation in each court, both in courts of first instance and in courts of appeal, and involve so much time because of the necessity for a jury trial, that they may be properly treated as a class and special statutory provision for their settlement made.

Administrative Enforcement of Payment of Wages Due. Another striking illustration of the failure of the judicial process to furnish relief to the poor is presented by the numerous class of claims for wages due and unpaid. Theoretically the courts are open to the person who has suffered injustice in this way. Actually this provision is of little value. The expense involved in resorting to this process, in the form of court costs, attorneys' fees, and the like, to say nothing of the loss of time of the claimant in prosecuting his claim, is such that in the great majority of cases it is better for the claimant to stand the loss than to incur the greater loss

[10] *Yale Law Journal,* November, 1908.

of seeking to recover through court action. In this class of cases there is practically a denial of justice, and consequent injustice and suffering. On this subject, the National Association of Legal Aid Organizations, speaking through one of its committees has said: [11]

Wages are the life blood of the employee. If they are not paid promptly, poverty, crime and illness follow rapidly. Delay in collection of money earned lowers the morale of the laborer. The effects are particularly noticeable in the poor man. The wealthy employee has recourse to the courts to assert his rights. The poor man in endeavoring to secure his due is confronted with ignorance, court costs, delay of court procedure and expense of counsel. Ignorance is a barrier particularly among the foreign population. The workman does not always know where to go for aid; assuming that he may be instructed on this point, he again faces the barrier of court costs. Most states require the payment of court costs as a prerequisite to the hearing by the court. There is good reason for it but if the poor man without wages cannot beg or borrow the court costs he may not secure the aid of the court in the collection of his wages. Even if he can find the money for court costs he is again halted by the delay of court procedure. It takes a month or two to dispose of even the simplest case in court. If the poor man cannot afford to wait that long he may well be denied justice. Finally how can he hope to contend successfully with the intricacies of court procedure unless he has the assistance of a lawyer. To secure legal services costs money and the poor man cannot afford this. The denial of justice in the case of wage claims may be a very real thing.

The inability of the ordinary courts to meet this situation has led to action in a considerable number of the states having for its purpose to submit to administrative agencies, either the direct enforcement of wage payments due, or the aid of the working man in securing redress through the courts.[12] Of these, the systems of California and Massachusetts are probably the most important. The

[11] Reports of committees, 1924-5. This report is a valuable document on the subject, giving, among other things, an account of the laws enacted to meet the problem.

[12] California (Deering, Calif. Cons. Supp., 1917-1919, Act 2142 V, sec. 7); Nevada (Acts 1919, ch. 71, sec. 7; Statutes 1920-21, ch. 138); Utah (Acts 1919, ch. 71, sec. 9); Wyoming (C. S., 1920, sec. 264); Massachusetts (G. L. 1921, ch. 149, et seq.); and Washington (Acts 1919, ch. 191).—Reginald Heber Smith and John S. Bradway, Growth of Legal Aid Work in the United States, United States Bureau of Labor Statistics, Bulletin 398, January, 1926, p. 40.

California system, as described in a report of the California Bureau of Labor Statistics, is as follows: [13]

Briefly stated, claims for wages are handled by the bureau as follows: Every wage claimant is interviewed by an agent or deputy of the bureau and the facts pertaining to the wages claimed are entered on uniform blanks used in all of the district offices of the bureau. The employer is then notified that a claim for unpaid wages has been lodged against him with the labor commissioner and he is asked to explain his reasons for failing to pay the claimed wages. In most cases the employers are cited to appear at a hearing before the commissioner or his deputy at a specified time when the wage claimant is also cited to appear. This procedure enables the commissioner or his deputy to secure all the facts involved in the wage dispute. At this hearing an attempt is made to settle the differences between the employer and the employee and to accomplish the payment of wages wherever due to the claimant. If no settlement can be arrived at, and the employer refuses to pay the amount of wages that has been determined upon as due the claimant, a citation is issued directing the employer to appear at the office of the district attorney, to show cause why a warrant should not be issued for his arrest. The matter in dispute is then again threshed out before a representative of the district attorney's office in the presence of the employer, the employee and a bureau's agent or deputy. If the employer still refuses to pay the amount of wages determined as coming to the claimant, a criminal warrant is issued for his arrest. Every effort is made to avoid court proceedings but when no other alternative is available criminal or civil action is started against the employer.

The Massachusetts system is one where the Labor Commissioner, instead of himself undertaking to adjudicate the wage claims, acts rather as the advisor and counsel for the claimant in enforcing his claim. The prime feature of this system is that the failure on the part of the employer to pay the wages due is made a criminal offense and proceedings to enforce payment are of a criminal instead of a civil character. To quote Mr. Reginald Heber Smith: [14]

In Massachusetts it is a crime in nearly all industries not to pay employees each week. Infringements of this law are prosecuted by the Labor Commissioner. In other words, an unpaid wage earner

[13] Quoted from Fred M. Wilcox, Governmental officials and legal aid, *Annals of the American Academy of Political and Social Science,* Vol. 124, March, 1926.

[14] Denial of justice, *Journal of the American Judicature Society,* December, 1918.

can apply to the Commissioner and, as the proceedings are criminal, he secures justice promptly, without cost and without engaging counsel. Despite some disappointment with the work of the Commission itself the plan has been a great success. . . .

This function is not to be confused with that of the industrial accident commissioners. Their function is judicial; they themselves render judgment on the facts. The Labor Commissioner does not decide the issue, he presents the facts to a court for its decision. In a word his function is that of a lawyer.

Strictly speaking the Massachusetts system is thus not one where the adjudication of wage cases has been transferred from the courts to an administrative agency. Actually, however, the system in practice works in such a way that payment of the wage claim is in the great majority of cases secured through the efforts of an administrative officer, without the necessity for such officer seeking the aid of the court.[15]

Regarding the advantages of invoking the aid of administrative agencies in handling this class of cases, Mr. Smith states as follows:[16]

Certain it is that the administrative plan offers an excellent solution for this particular aspect of our problem. A proper wage payment law, enforced by a labor commissioner, will afford a summary and inexpensive method whereby wage earners may enforce their claims. In fact, the existence of such a law and of such an official is apt to make the law self-executing; in states where it exists wages will be paid, and it will not need to be invoked except in comparatively few instances. The solution is a sound one because it eliminates those factors that heretofore have prevented the law from becoming actively effective. Delay is avoided because the proceeding is summary in nature, no prepayment of court costs is required, and in most cases no employment of counsel is needed because the labor commissioner himself or his deputy can furnish to the complainant legal advice as to his rights and assist in drawing and presenting the complaint.

[15] In Massachusetts there is no constitutional provision against imprisonment for debt. In other states with such a provision constitutional objections to the Massachusetts system may be presented. For a consideration of the legal difficulties presented in establishing a system for the enforcement of wage claims through administrative agencies, see, Reginald Heber Smith and John S. Bradway, Growth of Legal Aid Work in the United States, United States Bureau of Labor Statistics, Bulletin 398 (1926).

[16] *Op. cit.*, 42.

Administrative Enforcement of Blue Sky Laws. Still another example of the use of administrative, in substitution for judicial, action is found in the policy that has developed in recent years of enacting laws for the prevention of fraud and misrepresentation in the sale of securities. These laws, which are popularly known as Blue Sky Laws, not only make it a penal offense to misrepresent the facts in offering securities for sale, but provide for administrative boards or commissions for the enforcement of their provisions. Though the function of these commissioners is primarily that of protecting the public generally, their operations, in effect, afford protection to the individual in individual cases. As the authors of the report on "Growth of Legal Aid in the United States" point out:[17]

> They [the Blue Sky Commissions] have jurisdiction to hear complaints about stocks and bonds that are sold, about the salesmen who sell them, to determine the facts, and to cancel the permission to sell securities in question or to revoke the salesman's license. In other words, if a wage earner has been defrauded in a stock transaction today he goes to the administrative official in charge of the blue sky law, whereas ten years ago his only redress would have been to employ an attorney to bring a suit for him in the courts. The blue sky commission will investigate the complaint through its staff of auditors and inspectors and will summon in the suspected parties, all at public expense. Thus the problem of expense which has heretofore baffled the man of limited means is eliminated because the State has assumed it. The State is interested in running down fraudulent promoters primarily in order to safeguard the public in general but the effect, nevertheless, is often to secure justice for an individual complainant in an individual case. We must recognize therefore that through such administrative officials we may discover one more method whereby the laws may be made actively effective and whereby justice can be secured to the individual.

Administrative Enforcement of Small Loans Laws. Analogous to the work of these blue sky commissions is that of the administrative officers which in twenty or more states are attached to the state banking departments having jurisdiction over small loan agencies. In these states small loan agencies may operate only upon securing a license from the state, and this license may be revoked if the provisions governing their operation are violated. The system not only puts this business upon a proper basis but affords a

[17] *Op. cit.*, 37.

protection to the individual which formerly could be secured only by resort to the courts. To quote again from the report just cited: [18]

If a borrower has been charged more than the legal rate of interest, he need not employ a lawyer to bring a suit in the courts. Instead he walks to the state house, complains to the commissioner, who has wide powers of investigation and power to summon the lender to appear with all his books and answer the charge. The Commissioner hears the evidence, and while has has no power to enter a legal judgment for the amount of the overcharge, he has the power to revoke the lender's license. In practical effect he can always secure the refund of the overcharge because the lender would prefer to do that than lose his license. Thus the borrower secures justice through a summary proceeding which he can institute without the prepayment of costs and for which he ordinarily need retain no attorney.

Development of Administrative Adjudication in England. The United States is not the only country that has found it advisable, to a constantly increasing extent, to confer upon administrative officers and bodies the determination of matters of fact. England, in some respects, has gone further in this direction than has the United States. Thus the adoption of this policy has been mentioned by the editor of the annual volume on Civil Judicial Statistics as one of the reasons for the steady decline in litigation in the High Court.[19] Mr. Rosenbaum in his careful study of arbitration in England devotes a section to this subject.[20] It should be said that the English acts for the most part provide for the settlement of controversies by an arbitration tribunal rather than by a permanent board. They,

[18] *Op. cit.*, 38.

[19] Annual Report, 1913.

[20] Among the statutes making provision for the determination of facts and the settling of differences outside of the courts, he enumerates the following; Markets and Fairs Clauses Act, 1847, The Harbors and Docks Clauses Act, 1847; The Towns Improvement Clauses Act, 1847; The Cemetery Clauses Act, 1847; the Elementary Education Act, 1870; the Tramways Act, 1876; the Public Health Act, 1875; the Electric Lighting Act, 1882; the Small Holdings and Allotment Act, 1908; the Development and Road Improvement Funds Act, 1909; the Housing of the Working Classes Act 1890-1909, the Housing, Town Planning, etc. Act, 1909; the Regulation of Railways Act, 1868; the Light Railways Act, 1896; the Metropolitan Water Act, 1872-1902, and the Social Insurance Acts of which the most important is the Workmen's Compensation Act, 1906.

however, illustrate the policy of having specific classes of controversies settled by some tribunal other than the courts.[21]

General Summary. So much attention has been paid to this whole subject of advisability of transferring to the administrative branch work now, or formerly, performed by the courts since it is a comparatively novel proposition. In practically all cases where such a transfer has been effected the motive has been, not the relief of the courts, but the provision of a more efficient and economical system of adjudication and the doing of a larger measure of justice. The movement, however, is one well meriting attention purely from the standpoint of relieving the courts of a great mass of work involving primarily the determination of facts, a function for which they do not have the facilities of administrative agencies and which at best must be performed subject to limiting rules of procedure. As bringing out the importance of this subject we cannot better conclude our discussion than by quoting the following from one of the leading students of the whole problem of bringing justice to the poor.[22]

If one were compelled to state the most important experiment in the administration of justice made in the twentieth century, the answer would unhesitatingly be the attempt to secure justice through administrative tribunals. Such tribunals have sprung up with amazing rapidity, they have taken over an enormous amount of litigation formerly handled by the courts, and the law concerning administrative justice is the most rapidly growing branch of law in our entire jurisprudence.

[21] On this whole movement see the recent excellent work by William A. Robson: Justice and administrative law, (London, 1928).

[22] Reginald Heber Smith, Justice and the poor, Chapters XII and XIII, "Administrative tribunals" and "Administrative officials," (1919). An exceptionally interesting consideration of certain phases of this question is the article by Thomas I. Parkinson "The relation of administrative procedure and devices to the restatement and classification of the law," appearing in the July, 1923, number of The Proceedings of the Academy of Political Science.

A comparatively recent development that might be considered in connection with this question is that of the growing practice of giving to judicial tribunals administrative agencies to aid them in the performance of their functions. Among such agencies may be mentioned auditors attached to equity courts, psychological clinics, and probation officers.

CHAPTER IV

CONCILIATION

In the immediately preceding chapter it has been shown that formal adjudication in the courts does not constitute the only method available for the settlement of controversies; that there are not only other methods but that these methods may, in certain cases, have distinct advantages over that of resort to the courts. In this and the next succeeding chapter consideration will be given to two other methods—conciliation and arbitration.

Distinction Between Conciliation and Arbitration. In considering the first of these—conciliation—the distinction between it and arbitration should be clearly understood. Conciliation is the process whereby a third party seeks to secure an agreement between the two parties to a controversy in respect to its settlement; arbitration is the process whereby the parties agree to refer the matter to a third party and abide by his decision.

Necessity for Legal Establishment of Conciliation. It is, of course, possible for disputes to be adjusted by a friendly third party intervening and bringing the parties to an agreement, without any formal action having for its purpose to establish a conciliation system. Experience, however, has fully shown that resort to this method will rarely occur unless careful provision has been made for the establishment of a system of conciliation, for the procedure to be employed in resorting to it, and for the rules to be followed in conducting the conciliation and the binding force of the agreement if reached. To state this in another way, any general resort to conciliation is not to be expected unless formal provision is made for such a system as an integral feature of the judicial system and this system has received at least legal recognition. The best definition of conciliation, from this standpoint, which has come to the attention of the writer is that of Reginald Heber Smith, given at the Eighth Annual Conference of Bar Association Delegates, 1923:

Conciliation is an informal proceeding by which two disputants are enabled to discuss the issue between them in private before a trained and impartial third person having the dignity of official position representing the state who explains to them the rules of law applicable, informs them of the uncertainty and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts. If an adjustment agreeable to the parties is reached, the official draws up a proper agreement, has it signed and certifies it so that it may be entered in the court as a judgment. There are no pleadings. There are no rules of evidence. The parties tell their stories in their own words. There are no lawyers—plaintiffs and defendants appear in person.

It will be seen from the foregoing definition that conciliation is viewed as a distinct branch of the judicial system, a device to be made use of by the courts in adjusting disputes without employing its formal procedure. If it is to achieve its maximum usefulness, not only must it receive legal recognition, but provision must be made that jurisdiction of a dispute will not be taken by a court until evidence is had that resort to conciliation has been had and has resulted in failure. This is more fully brought out by the following description of the model act providing for the establishment of conciliation in the states drafted by the American Judicature Society and urged for adoption by the states.[1]

Briefly the plan is that no civil action shall be commenced (with a few exceptions) until the claimant shall have given the opposing party an opportunity to discuss a settlement in the presence of an assistant of the court known as conciliator. If the party complained of does not appear in response to the request, the conciliator certifies that the attempt at conciliation has been made and has failed, and the claimant is then entitled to other process. If he does appear, it is then the duty of the conciliator to hear the statements of both parties and their witnesses and to council an amicable settlement agreeable to law and equity. If a settlement is reached, the conciliator will certify it to the court which will docket it as a judgment. If there be no agreement, the certificate of failure will be granted. The disclosures made at the conciliation hearing are not admissible as evidence at any subsequent proceeding. The conciliator is presumed to be a person of good judgment and good social intent representing the principal trial court and answerable to it for all his acts.

[1] *Journal of the American Judicature Society*, February, 1919.

Advantages of Conciliation. It is hardly necessary to point out the advantages that such a system offers. It meets almost all of the criticisms that are now made of the courts as institutions for adjudication of disputes. Instead of an acrimonious battle in public which is almost certain to deepen animosities, and leave at least one of the parties with the feeling that justice has not been done, it offers a means of friendly adjustment. It places emphasis upon equity rather than the strict letter of the law. It furnishes a device that can be operated with promtpness and with a minimum of expense and trouble. From the procedural standpoint, it does away with all technicalities and formalities which are such outstanding features of formal litigation in the courts and productive of so much criticism by the layman. Finally, it serves the useful purpose of relieving the courts of a great mass of cases which should never come before them.

Though it is desirable that the law should permit of the use of this device in practically all civil cases, its special field is that of petty cases involving primarily matters of fact rather than law. These are the cases for the handling of which the courts are ill-adapted, since they have to apply to them the same elaborate procedure that is employed in the cases of major importance. In considering this matter, it cannot be too strongly urged that in many, if not the great majority, of civil disputes, both parties are at the outset persuaded of the justice of their sides, or the disputes are ones where the right does not lie wholly on one side. Both parties are to some extent responsible for the situation giving rise to the dispute, and the matter is often one to be adjusted by a compromise. Though the same is probably true of cases involving large amounts, the feeling is more apt to prevail that the decision should be made by the more formal tribunal, the court.

Conciliation Systems of Norway and Denmark. Having stated the case for conciliation, and, it is hoped, made clear how desirable it is that the judicial system of any country should make definite provision for the device as an integral part of its system of judicial administration, it will be of interest to know the extent to which this position has been recognized by other countries and by the United States, and the extent to which results have justified this procedure.

The oldest and probably the most striking illustration of the use of conciliation on a wide scale is to be found in Norway and Denmark.

Following is a summary of the essential features of this system as given in one of the bulletins of the American Judicature Society.[2]

The main features of the institution as it exists today in both those countries are the following: Every city and village containing at least sixty families constitutes a separate district of conciliation. The districts are small, in order to make it as easy as possible for the parties to attend the courts in person, as personal attendance is the main feature of the proceedings. The court, or commission, as the statute styles it, is made up of two members, one of whom acts as chairman and clerk respectively. These officials are chosen for a term of three years at a special election by the voters of the district. Only men at least twenty-five years of age are eligible; and the law expressly provides that only "good" men may be nominated and elected.

The court meets at a certain place, day and hour, every week in the cities and every month in the country districts. The proceedings are carried on behind closed doors and the commissioners are bound to secrecy. Nothing is permitted to reach the outside world. Admissions or concessions made by one party cannot be used against him by his adversary, if the case should come to trial in the regular courts; but a party wishing to settle his differences before the commissioners is entitled to their certificate to that effect.

The Court of Conciliation has jurisdiction in all civil cases. Appearances before the commissioners is the first step in every legal proceeding. The law court will dismiss every case that does not come to it from the Court of Conciliation with a certificate of the commissioners attesting that an effort at conciliation of the parties has been duly made before them.[3]

[2] Conciliation Court of Cleveland, Bulletin VIII, April, 1915, pp. 8-9.

[3] It would appear from papers prepared by George Ostenfeld of the Copenhagen Bar and Axel Teisen, and read by Julius Henry Cohen at the 1923 meeting of the Bar Association Delegates, that this is not strictly so. The summary of these papers states that "in the Copenhagen Town Court, an inferior tribunal, conciliation is attempted by the regular judges, while in the rest of the Kingdom and in the High Court of Justice in the Capitol, conciliators are especially selected lay officers. Attachment cases, cases of special urgency, suits on written instruments and cases in which a counter claim is made, with some others, are exempt from the requirement that an action shall not be brought until an attempt has been made to reach an amicable settlement. Conciliators are appointed by the Town Council or county board as the case may be and serve for six years, and are recompensed with small fees."

The method of procedure before the peace court is simple; the plaintiff states his case in writing, reciting in plain, everyday language the facts upon which he bases his complaint and requesting that the defendant be cited to meet the plaintiff in the Court of Conciliation, in order to reach an agreement in the manner prescribed by law. The senior commissioner writes the court's summons upon the complaint, citing both parties to appear. A fee of twenty-five cents is charged for issuing the summons, to which is added fifty cents in the event a conciliation is effected. The commissioners receive no other compensation.

Litigants must appear in person except in case of sickness or very pressing business engagements, when the use of a representative is allowed, provided, however, that such representative is not a practicing attorney. Lawyers are rigidly excluded from the courts of conciliation, except, of course, when they attend in their own behalf. If a party fails to appear in person, without a good excuse, he will be adjudged to pay the costs in the law court, even if he should win the case.

Each party tells his own story in his own language. With a statement of both parties before them, the judges reduce the differences to their true proportion; and, by emphasizing the expense of litigation, endeavor to make it plain to the contestants that each can have the matter adjusted at once, save a large amount of court and lawyer's fees, and, in fact, can save more that he can obtain even if successful in the law courts.

In three cases out of four the parties conclude that a poor settlement is better than a fat judgment.

The agreement of settlement is then recorded and has the force and effect of a final judgment. Seventy-five per cent of the cases arising in Norway are peaceably adjusted in the Courts of Conciliation; while in Denmark the percentage is increased to ninety.

When Norway and Denmark established free governments, they recast their systems of law so as to make them conform to the spirit of their constitutions, but the Court of Conciliation was not only left intact but it has been very greatly strengthened and perfected from time to time.[4] The institution has stood the test of a century and has grown stronger from year to year.

The significant features of this system, it will be seen, are that it has been made an integral part of the judicial system of the country; that it is state-wide in its application; that resort to it must be had before proceedings in the regular courts of law can be begun; and that it has been successful to a marked degree in

[4] This system in all its integrity was retained in the New Danish Judicial Code, which took effect April 11, 1916.

preventing formal litigation in the courts as evidenced by its long retention and development.[5]

Conciliation in the United States. It is of historic interest that over half a century ago, the possible value of conciliation for the settlement of civil disputes was recognized by the United States and that at least six of the states, in remodelling their constitutions about the middle of the last century, inserted provisions empowering their legislatures to establish tribunals of conciliation or arbitration.[6] For some reason, however, the matter was not pushed and as a matter of fact no legislature took occasion to use the power so conferred upon it. The real movement for the establishment of tribunals of conciliation, therefore, dates from not more than fifteen years ago and constitutes one feature of the general movement inaugurated during recent years for the improvement of our system of judicial administration. The ground for such action was laid by the rise of the system of municipal courts to which were given wide powers in respect to determining their organization and procedure for the handling of the business coming before them.

Conciliation Branch: Cleveland Municipal Court. To the Cleveland Municipal Court belongs the credit of the first attempt on the part of a court to make conciliation proceedings an important feature of it procedure. The act under which this court was organized made provision for litigants who were too poor to secure the services of a lawyer, by providing that a deputy clerk might be delegated to assist parties in preparing their cases and filing the necessary papers, and, when feasible, to bring about an adjustment of cases involving small sums. The success of this system led the court, acting under the wide powers conferred upon it, to establish a conciliation branch to be presided over by one of the justices of the court. This branch began operations on March 15, 1913.

The rules provided that all claims for less than $35, afterwards increased to $50; all cases of garnishment involving less than $50,

[5] More than 75,000 law suits were handled in this way in Denmark in 1922.—Reginald Heber Smith, The Danish conciliation system, *Journal of the American Judicature Society*, October, 1927.

[6] New York 1846, Ohio 1851, Indiana 1857, Michigan 1850, Wisconsin 1848, and California 1849.

and all cases of replevin should be entered upon the conciliation docket of this branch. The cases on this docket are assigned for hearing and the parties are notified by mail. If a party does not appear a summons is issued. At the hearing, the judge, through the use of conciliatory methods and advice, attempts to secure an agreement between the parties and thus to avoid a formal trial of the issue. The proceedings are of an informal character with little or no discussion of principles of law or regard for the technical rules of evidence.[7] If an agreement is reached the total costs of the proceedings never exceed one dollar.

Mr. Herbert Harley, in commenting upon the work of this branch says[8] that, though every litigant has the right to demand a jury trial in another branch of the court, this right is rarely exercised, and that in the last seven years over 35,000 cases have been disposed of in this branch.

Conciliation Court: Minneapolis Municipal Court. The second municipal court to make formal provision for the adjustment of civil controversies through a conciliation procedure was that of Minneapolis. This court was authorized by a special act of the legislature, passed in 1917 at the instance of the Minnesota Bar Association to make provision for a conciliation branch.

The act provides that any case within the jurisdiction of the Minneapolis Municipal Court (*i. e.*, involving a sum not in excess of $1000) may, at the option of the plaintiff, be commenced in

[7] According to Professor John H. Wigmore (American Judicature Society, Bulletin VIII), a distinctive characteristic of the procedure in this branch is that the technical features of the substantive as well as the objective law are often disregarded when justice appears to demand it. He thus says, "The rules of technical substantive law defining in detailed logic the parties' rights and obligations, are either ignored or modified or roughly followed, as each case may seem to require, in the judge's opinion of the ethical merits of the whole case." Later, in commenting on this, he continues: "Taking first the law of substantive rights and obligations, it signifies that there is a place, at some point, where its mass of technical details is not needed. . . . Here we face the old problem, perennially discussed by the philosophers of the distinction between law and justice. . . . Law protects us against the incompetence, whimsicality, corruption and variability of the human judge, among thousands of whom will be few who are wise and sound enough to do justice. And justice is theoretically superior to law, in that it represents the wise and just solution which uniform rules cannot expect to attain in each individual case."

[8] *Journal of the American Judicature Society*, October, 1920.

the Conciliation Branch of the Court. If requested, the clerk of the Court will draw up the statement of the claim. The defendant is summoned orally by telephone or by letter and notified that, if he fails to appear, judgment by default will be entered against him. In the trial of the case the judge first attempts to bring the parties to an agreement through the process of conciliation. If this is unsuccessful, he is empowered to render a judgment when the sum involved does not exceed $50. In cases involving over that sum and not exceeding $1000, the proceeding is wholly of a conciliation character. No execution issues from the conciliation branch, but any judgment creditor therein can procure a transcript of the judgment which may be docketed in the office of the clerk of the Municipal Court and be enforced by execution the same as judgments obtained in the other branches of the court.

Judge Thomas H. Salmon, who for several years presided over this branch of the Municipal Court, in an address at the annual assembly of Bar Association Delegates, 1923, stated that the history of the court proved that few cases involving more than $50 were adjudicated by agreement: that is, by the conciliatory procedure, while the cases involving less than that amount were quite uniformly settled in that way. He was positive in his statement that the court had been a great success. On being asked whether the facilitation of the settlement of small cases in this way did not have the injurious effect of promoting litigation, he replied:

It certainly tends to improve the peace of the community. Take a poor fellow to whom somebody owes $50 or $75 and there is no hope of his getting it for a long time by going into an ordinary court, he is going to talk and quarrel and fuss and make a commotion, whereas, now, if he has a case anyone will say to him "why don't you go down and put your matter before the court; it will be heard within ten days" and he has nothing to say. Our socialistic friends here, who harped constantly on the delays of justice, as they do in every city, saying that there is no justice for the poor man, and so forth, are silent on that subject now.[9]

The best evidence of the success of this court is that the Minnesota Bar Association was so satisfied with its workings that it

[9] For a fuller account of this system, see articles in the *Minnesota Law Review*, February, 1917, and *Journal of the American Judicature Society*, June, 1918.

secured the enactment of a law authorizing the extension of the system, approved April 19, 1921.[10]

Conciliation Procedure: Municipal Court of New York City. In 1917 the Municipal Court of New York City made provision for the use of methods of conciliation in the transaction of its business. Instead of creating a conciliation branch, it adopted rules providing that in all civil cases within its jurisdiction (*i. e.*, involving not over $1000) the claimant may apply to the clerk of the court for the issuance of a notice of conciliation, addressed to the party against whom the claim is made. The clerk thereupon immediately fixes a date for the hearing and informs the applicant of the date and mails a notice to the person against whom the claim is made summoning him to appear before a justice of the court at the time and place designated for the purpose of an amicable adjustment of the controversy.

At the appointed time the parties are received by a justice in his private chambers, who attempts by conciliatory efforts to bring the parties to an agreement. In these hearings the procedure is informal, no attempt being made to apply the technical rules of evidence or even to follow the strict provisions of the substantive law. All that is sought is an equitable adjustment of the matter in view of all of the circumstances of the case. The judge, as a matter of course, points out that an agreement, even though not fully satisfactory in the sense of awarding or denying the full claim, will probably be more advantageous than a verdict in a formal trial, due to the avoidance of the expense and delay thereby entailed. If an agreement is reached the clerk of the court is notified of its terms and makes a record of it, though no formal judgment is entered. Compliance with this settlement agreement rests wholly with the parties.

It would appear from a paper presented by Edgar J. Lauer, a judge of the New York Municipal Court, presented at the annual meeting of the Bar Association Delegates, 1923, that, up to that time, this system had been productive of but slight results. This failure he attributed to the fact that the plaintiff feared that an offer to meet his opponent for a private settlement would be taken

[10] This law is reproduced in full in the *Journal of the American Judicature Society*, June, 1921.

as a confession of weakness and that it would result in a loss of time if unsuccessful.

Due to the practical failures of this system to produce results, the Court, on January 2, 1925, introduced a new procedure. Under this procedure all cases on the regular calendar are divided into two classes according to the plaintiff's names: those beginning with the letters A to K going into one class and those beginning with other letters into the second class. As explained by Justice Lauer, this division into two classes is made to meet the criticism that judges who attempt to conciliate cases may be prejudiced if the cases where conciliation fails come before them for adjudication or trial. The two classes make it possible to provide that in all cases a different judge from the one who attempted conciliation will preside when the case goes to trial.

The entire system is on a voluntary basis so far as the parties to the controversy are concerned. It merely provides that in all cases an attempt at conciliation will be made prior to trial in open court. The possibilities of conciliation, even when it is on this voluntary basis, is shown by the results that Justice Lauer has secured. Regarding the results of his efforts, Justice Lauer writes: [11]

My experience on the bench of the Municipal Court for upwards of twenty years leads me to say that I entertain no doubt that conciliation can be made a medium for the speedy disposition of litigation.

I have consistently made it a practice in cases to be tried before me with the aid of a jury to call counsel to the bench before me and interrogate them respecting the nature of the case and the prospect of adjusting differences. . . .

In February, 1925, I made an experiment in my court with the aid of my associates. I asked and obtained the coöperation of the *New York Law Journal,* a daily publication for lawyers, which goes into almost every law office in the city of New York. It was announced for two weeks before the experiment was undertaken that there would be an effort made to conciliate every case marked ready for trial on the day calendars; 163 cases out of 272 were settled and 109 cases were tried. In addition to these 212 cases were settled by the attorneys or parties without the aid of the judges. It would have required at least twice the number of judges to dispose of the cases ready and disposed of had it been necessary

[11] Conciliation: a cure for the law's delay, *Annals of the American Academy of Political and Social Science,* March, 1928.

to try them all. In this formal experiment the judge who made the effort to conciliate the parties did not try the case where conciliation failed. This was done in order to obviate any fear of bias on the part of parties or their attorneys consequent upon non success. I regard this feature as important in any plan of conciliation by a judge. It is important that a judge who tries a case be free from any bias or prejudice, and it is likewise important that the belief of litigants in this freedom should remain unimpaired.

Conciliation: North Dakota. The first state-wide conciliation act was adopted by North Dakota, March 10, 1921. This act is modeled closely on the model act prepared by the American Judicature Society, but departs from it in providing for small fees for conciliation and in limiting the procedure to cases involving not more than $200. The constitutionality of this act was contested and upheld by the Supreme Court of the State in a decision rendered in the case of Klein v. Hutton, September 22, 1922.[12]

Following is an abstract of a description of the act and its working by George G. Shafer, Attorney General of North Dakota:[13]

The conciliators are appointed by the district court judges, not less than six or more than twelve in any county. Except in cases involving "provisional remedies" comprising mainly attachment and garnishment actions, no cause can be started (*i. e.*, in causes involving not more than $200) until an attempt has been made under the conciliation law to effect a settlement. That means that the respondent will be given an opportunity to hear the claimant's story, and to tell his own, at a private hearing presided over by a representative of the district court judge. He may refuse to attend, or either side may be entirely unreasonable, but at any rate the opportunity is presented for a negotiated settlement. The agreement, if there be one, will be put into writing and signed by the parties and may be filed in the district court as a judgment. While the respondent may refuse to attend the hearing he cannot send a lawyer in his place. No record is kept of testimony or disclosures and all proceedings had before the conciliator are privileged in any subsequent action.

Lawyers commonly avoid the operation of the new law by resorting to garnishment proceedings in contract cases and of securing from the district judge special leave to institute suit in tort cases.

[12] For a copy of the act, the decision of the court, and the brief submitted in favor of the act by the American Judicature Society, see *Journal of the American Judicature Society*, February, 1923.

[13] Proceedings of the Bar Association Delegates, 1923, p. 557.

The speaker quoted a conciliator living at Fargo as saying that the procedure appeared successful in the small causes which did not reach lawyers—the kind of claims that legal aid bureaus frequently handle—but that in larger matters settlements were rare.

It is evident from the foregoing that the act has not as yet proved as effective as its advocates might wish. It demonstrates the difficulty of effecting changes that do not receive the full support of all interested parties. There is no reason, however, why the law, either in its present form or with amendments to strengthen it, cannot become one of progressive usefulness.

In its general character it follows the Norwegian and Danish system, though it requires the consent of both parties, while, under the latter system, resort to conciliation must in all cases be had before formal action in court may be instituted.

Conciliation Branch: Des Moines Municipal Court. In 1923 the Iowa legislature enacted an act entitled "Court Rules for Conciliation of Small Claims,"[14] which authorized the judge of any district, superior, or municipal court to adopt special rules for the settlement of controversies through conciliation procedure. The first court to avail itself of the power was the Municipal Court of Des Moines, which, in 1927, adopted rules providing for a special branch to handle cases through the use of conciliation. The procedure established is exceedingly simple and informal. An important provision is that no claims of $100 or less may be filed in the trial branches of the court until a *bona fide* effort has been made to settle it in the conciliation branch and a certificate to that effect has been issued by the judge in charge of that branch. The court has apparently been a success from the start. From the date of its establishment, September 1, 1927, to March 1, 1928, it has had before it a total of 1043 cases, of which 926 have been disposed of, thirty-eight dismissed, and seventy-nine are pending.

The Present Situation. It will be seen from the foregoing that little more than a beginning has been made towards any general adoption of conciliation as an integral part of the system of judicial administration in the United States. Moreover, where it has been

[14] For a copy of this act, see *Journal of the American Judicature Society*, June, 1923.

adopted, the results have fallen short of the expectations of its supporters. The reason for this, in view of the evident advantages of the system, is not clear. It has been suggested that one explanation why a device which has been so markedly successful in other countries has not met with greater success in the United States is that the provisions of the foreign system have been adopted too bodily, with insufficient efforts to adapt them to American conditions and institutions.[15] Another, and more fundamental explanation is that a new device will not receive ready acceptance except as it is based under a more general appreciation of its advantages. Substantial progress can thus not be expected except as a large amount by educational work is done. Unless there is a background of public support, legislatures cannot be expected to act, nor can practical results follow when the necessary legislation is secured. It is a source of gratification, therefore, that the strong American Judicature Society is actively promoting this reform and that the bar associations of the country are giving it increasingly favorable consideration.

[15] Mr. Reginald Heber Smith says: "There is reason to believe that the very limited success that we have thus far obtained may be due to the fact that we have copied our ideas from an original that we only imperfectly understand. Our information has been drawn from meager and antiquated sources. English translations of the Danish and Norwegian conciliation laws have not been available. Much of our evidence was hearsay or came at second hand. In 1923, however, direct light was thrown on the subject by the papers on the conciliation procedure of Norway and Denmark presented by Mr. Axel Teisen and Mr. George Ostenfeld at the Conference of Bar Association delegates in Minneapolis. In the same year the American Bar Association's Committee on Legal Aid Work reported that the advancement of conciliation procedure in the United States was seriously jeopardized, not necessarily because of any inherent weakness in the procedure itself, but because we were trying to make bricks without straw. The committee on conciliation and small claims procedure at the conference of Bar Association delegates proposed, therefore, to make a direct investigation at first hand of the actual present situation of conciliation in Norway and Denmark and commissioned John P. Matsen, of the Boston Bar, to make such a study. His report based on his personal investigation, has now been submitted. It is to be hoped that his complete report, together with his translations of all the laws governing conciliation may be published in its entirety, but in order that the benefit of his observations and conclusions may be made immediately available two summaries have been prepared. The present article deals with conciliation in Denmark and a second article dealing with conciliation in Norway will be published in a succeeding issue of the Labor Review."—Reginald Heber Smith and John S. Bradway, Growth of legal aid work in the United States, United States Bureau of Labor Statistics, Bulletin 398 (1926).

CHAPTER V

ARBITRATION

Arbitration is akin to conciliation both in respect to the ends that it has in view and in representing a method for the settlement of controversies out of court through the good offices of a third party. It differs from that device, however, in the important respect that the function of the third party, instead of being restricted to that of seeking to induce the parties to come to an agreement regarding the matters at issue, is that of himself making a decision that will be, not only binding upon the parties, but also enforcible in a court the same as an ordinary judgment.

Advantages of Arbitration. All of the advantages that have been enumerated as attaching to conciliation—promptness in the settlement of controversies, the meeting of the convenience of the parties in respect to the time of the hearing, elimination of the heavy costs attaching to a formal trial in court, avoidance of the technicalities governing the giving of evidence and other aspects of judicial procedure, the preservation to a greater extent of good will between the parties, the placing of the emphasis upon doing justice rather than following the strict letter of the law, and, finally, the relief of the court—equally characterize arbitration if properly organized and conducted. In effectiveness, this device, however, far outstrips that of conciliation. This is due, not merely to the fact that a definite award is made in the case of all controversies to which it is applied, but that its use on a large scale can be ensured by the adoption of the policy to which reference will hereafter be made, of incorporating in contract agreements clauses providing that all disputes arising under them shall be adjudicated by this method. Furthermore, it is possible to set up arbitration tribunals having a technical competence exceeding, not merely that of private conciliators, but even of judges, whether sitting as conciliators or in their formal capacity as judges in courts of law.

As in conciliation, the great field for arbitration is that of controversies involving matters of fact rather than of law. It is in

this field that most commercial disputes lie, and it is in respect to commercial disputes that the application of the device of arbitration has found its chief usefulness. As Samuel Rosenbaum has written in his able study of commercial arbitration in England:[1]

> No contract, though drawn with the most accurate precision, can hope to prevent differences arising on questions of fact, and it is the common experience of business men that differences of fact in the course of dealings outnumber differences of law many times over. The great source of disputes in every business that has to do with the purchase, sale, manufacture or distribution of some form of material article, is the quality, condition, or value of the article at the time of delivery. Provide some means by which there can be obtained a speedy and intelligent decision on a question like this as soon as it arises, and a very large proportion of the ordinary run of business disputes, real or alleged, are at once disposed of, and this question is one purely of fact not of law. Some other fields of controversy are whether the conduct of a party, not strictly in accordance with his contract, is nevertheless a reasonable compliance therewith; whether there has been unreasonable delays in fulfilling a contract, and if so what injury has been caused thereby; whether certain services are worth the amount demanded for them, for instance in commissions; questions of the extent or division of business territory; questions of the value of goods or property, real or personal; these are all questions primarily of fact, which cannot always be decided by scrutinizing the terms of the contract. For their decision it seems almost self-evident that the ideal tribunal is one possessing first-hand knowledge of the values, facts, customs, technical terms and course of dealings prevailing in any particular line, if there can be found together with this knowledge the fairness and unprejudiced effort to give a square deal that a judicial tribunal should exercise.

The foregoing brings out a fact to which too much emphasis cannot be given in considering the possible field of usefulness of arbitration; namely, the relative efficiency of a court as an organ for determining law and as an agency for determining fact. In the first of these capacities a court not only has no competitors but it can act with great effectiveness. In the second, it labors under at least two serious handicaps: the method employed by it in determining facts, involving as it does the observance of the many technicalities governing the pleadings and the production of evi-

[1] Report on commercial arbitration in England, American Judicature Society, Bulletin XII, October, 1916.

dence; and the impossibility for the presiding judge to have an expert knowledge of the technical phases of the many classes of matters coming before the court for consideration. The first can be remedied, in a measure, by simplifying and otherwise improving the rules of procedure now followed, and by making larger use of agents, such as referees, masters, auditors, etc. The second, however, permits of but slight remedy. It is in this respect that a properly organized system of arbitration offers advantages that cannot be approached by the ordinary court. As will be shortly pointed out, the most effective system of arbitration is that which has been created by the technical trade associations of the country, acting independently or in coöperation with the courts. An important feature of their action is the selection of certain of their members, who are thoroughly familiar with all the technical features and trade customs of the business to which the association relates, to whom disputes to which their members are parties may be referred for arbitration. Unlike the judges of the ordinary courts, these members, when acting as arbitrators, do not have to be instructed through testimony or otherwise regarding trade technicalities and customs that have a bearing upon the controversy, but can proceed at once to a consideration of the particular facts at issue and make their decision with the assurance that they conform to such trade practices. To state this difference in a word, the system of arbitration, at least as developed in England and in process of development in the United States, offers the means for the decision of controversies by experts instead of by judges who, from this point of view, are little more than laymen.

Requirements of a Successful Arbitration System. Though the principle of arbitration is easily grasped, the establishment of an effective arbitration system involves a number of factors requiring careful consideration. These it is now our purpose to consider.

Resort to arbitration can take place in two ways: either by the agreement on the part of parties entering into a contract that all disputes arising under it shall be adjusted by arbitration, this agreement being made a part of the contract itself; or, by the parties to a dispute agreeing, after the difference has arisen, to submit the matter to arbitration. It is hardly necessary to say how desirable it is that the first, rather than the second, condition shall obtain.

Indeed, it is the experience of all countries that, unless the practice develops of business men making use of contract forms which include clauses binding the parties to make use of the arbitration method for the settlement of all disputes arising out of their execution, little development of arbitration can be expected. This is one reason, among others, why the development of arbitration is so largely dependent upon the active initiative, or at least coöperation, of the technical trade associations. It rests largely with these organizations to encourage and, in so far as their powers permit, to compel the use by their members of contract agreements containing this stipulation for the arbitration of controversies arising under them. As will be shortly shown, this practice is almost universal on the part of the trade associations of England.

Closely allied to this feature of agreeing in advance to submit matters of dispute to arbitration is that of the enforcibility of such agreements. At common law, an agreement of this kind is no different from any other agreement, and the only remedy for its violation is an action at law for damages for breech of contract. In other words, resort to arbitration cannot be compelled notwithstanding the fact that the parties have so agreed. Until this law is changed by statute, therefore, the agreement in a contract to submit matters of dispute arising under it to arbitration loses much of its force. An essential requirement of a workable arbitration system is thus the enactment of a law providing that an agreement to arbitrate cannot be revoked, the effect of this being that if one of the parties refuses to participate in the arbitration proceedings the arbitrator will make an award against him by default. This is the English law at the present time.

A third essential feature is that having to do with the enforcement of the arbitrator's award. This is secured by the enactment of a law providing that an arbitrator's award, when made in accordance with such procedure as may be prescribed by law, may be filed in court and have all the force of a judgment to be enforced by ordinary process.

A question is here presented as to whether the arbitrator's award shall be final as to both facts and the law or as to the former only. Either of these provisions is possible. If conclusive as to facts only, an appeal will lie to the court in respect to matters of law. It

is highly desirable, however, that the law shall provide that the award shall be final in both respects. As has been stated, most of the cases in respect to which resort is had to arbitration involve only matters of fact, and as regards the law, it is desirable that regard shall be had to the equities of the particular case rather than the strict letter of the law. Provision, nevertheless, should exist whereby a ruling of the court can be obtained when legal rights and duties are not clear. This can best be secured by a provision in the arbitration act that either party can, at any time prior to rendering of the award by the arbitrator, apply, or have its arbitrator apply, to the court for a ruling on any legal point involved. This provision is far preferable to one permitting of an appeal from an arbitrator's award on points of law, since avail can be taken of this by the losing party to delay complying with the award.

Further features of importance relate to the selecting of the arbitrator and the procedure to be followed by him in conducting the proceedings. In respect to this matter it is desirable that the arbitration act shall restrict itself to general provisions in order that the trade associations may have considerable freedom to devise systems meeting their special needs or at least commending themselves to their members. Some, for example, may desire to provide for the submission of controversies to a single arbitrator, others, to a tribunal of two or three members; some, that the arbitrator or arbitrators shall be selected by the parties, others, that they shall be designated by the trade association or even by the court; some, that the claims of the parties shall be reduced to writing, others, that the proceeding shall be wholly oral; some, that the parties may be represented by counsel, others, that the parties shall themselves or by agents, not lawyers, present their case.

No one of these points is vital. At the same time it may be well to point out the prevailing opinion as to how some of these points should be handled. It is thus generally held that a single arbitrator is preferable to a number. Especially is the system thought to be bad where each side selects an arbitrator and a third arbitrator is selected by the first two, or in some other way. Under this system, the two arbitrators selected by the parties are likely, consciously or unconsciously, to consider that they have specially in charge the interests of the party selecting them. This throws the real decision

upon the third arbitrator, and is no better than the system of a single arbitrator. With three or more arbitrators there is also always possible a decision that does not have the unanimous vote of the arbitrators. This tends to leave the defeated party unsatisfied and to discredit the arbitration procedure.

In respect to the selection of arbitrators, an excellent system is that whereby the trade association compiles a list of persons, preferably from its own members, whom it believes to be specially competent, both from the standpoint of technical knowledge and the possession of a judicial temperament, and who are willing to act as arbitrators. From this list the selection of arbitrators will be made. In England, as will be pointed out, not only is this practice followed by many associations, but provision in some cases has been made for an arbitration board, to which appeals may lie from the awards of the individual arbitrators who handle the submissions in the first instance. The opinion also seems to be general that the actual selection of the arbitrator should be made by the president or by a committee of the organization or by the judge of the court of the district. Under any system the position of the arbitrator should be that of an officer or agent of the court and subject to its general supervisory power. Finally, experience seems to warrant the discouragement of the participation of lawyers in arbitration proceedings and to encourage as far as possible the direct presentation of cases by the parties themselves.

Arbitration in Great Britain.[2] In the foregoing pages an exposition has been made of the advantages of making definite provision for the arbitration of disputes, both from the standpoint of the litigants and from that of the relief of the courts. Fortunately we are not dependent upon a consideration of these advantages from the theoretical standpoint. In Great Britain we have a practical demonstration of these benefits. For years that country has had a system of arbitration as an integral part of its judicial system, which in its completeness and effective workings offers a model to be followed by other countries.

[2] The subject of arbitration in Great Britain has been so thoroughly handled by Samuel Rosenbaum, in his report, that it is difficult for any one writing on the subject to do other than follow him. The present consideration is thus largely a summary of what is there given more fully.

From the earliest times the idea of arbitration for the settlement of certain disputes has existed. Thus, in the old common law action of account, the court made use of an arbitrator to determine the merits of mutual claims between parties. The old court of Pie-Poudre (or Dusty-Footed Court), which lasted down into the nineteenth century, was an informal tribunal of laymen set up at markets and fairs to decide disputes between buyers and sellers. These, however, were but isolated instances where the principle of arbitration was employed. Any general use of the principle was not sanctioned by the common law or encouraged by the courts.

At common law, an agreement to arbitrate was no different in legal effect from any other agreement. A party to it could at any time revoke the arbitrator's authority, or could, in spite of his agreement, begin a law suit to determine his rights. In either case, the only remedy of the other party was the inauguration of a suit for damages on account of breach of contract. The courts, moreover, looked with disfavor upon arbitration as an encroachment upon their jurisdiction and because they were still influenced by the old maxim that the office of a good judge was to extend his jurisdiction.

Dating from the end of the seventeenth century, Parliament, however, inaugurated the policy of enacting laws to facilitate resort to this method of deciding controversies. By a statute passed in 1697 (9 William III, c. 15), it was provided that, upon proof by affidavit, an undertaking to submit a matter to arbitration which had been agreed to be "made a rule of court" could be entered in the court as a rule, whereupon a party to it could not revoke the arbitrator's authority without putting himself in contempt of court. Nearly a hundred and fifty years later the Civil Procedure Act of 1833 (3 and 4 William IV, c. 42 s. 39) strengthened this by providing that no agreement for arbitration that was agreed to be made a rule of the court could be revoked except by leave of the court or judge. And, in 1854, the Common Law Procedure Act (s. 17) extended this still further by providing that every agreement to arbitrate in writing might be made a rule of the court unless there were words showing a contrary intention.

Though the foregoing provisions of law facilitated to a certain degree the development of arbitration as a device for the settling

out of court of disputes, the modern arbitration system which, as will be seen, has received such a great development, is due primarily to the voluntary action of the great trade associations of the country and dates from the American Civil War. That contest gave rise to a great number of disputes, chiefly between cotton shippers and traders in the South on the one side, and factors in the Liverpool Cotton Market on the other, regarding liability for war risk, delays in delivery, the condition of materials delivered, etc. To meet this condition of affairs, the Liverpool Cotton Association, an organization of brokers and buyers, created an arbitration committee to pass upon all such disputes, and the members were required to insert in all their contracts clauses requiring that all disputes arising under them should be submitted to this committee for adjudication. The success of this action was such that other trade associations, exchanges, and professional bodies, such as those of architects, engineers, real estate agents, auctioneers, etc., rapidly followed suit.

This system, however, still had the weakness that, to a considerable extent, it rested upon voluntary action, in respect not merely to resorting to arbitration, but also to the enforcement of the arbitration award. After a decade or more of agitation, the trade associations succeeded in securing the passage of the Arbitration Act of 1889, which put the whole system upon a solid legal basis. The two outstanding features of this law, which is a consolidation and revision of all prior existing laws on the subject, are: that an agreement to arbitrate cannot be revoked; and that an arbitration award may be enforced like the ordinary judgment of a court through judicial process. All classes of civil actions, except that for divorce, are covered by the law. In practice, the great majority of cases that are settled by arbitration fall in the commercial field and have to do with matters of fact rather than matters of law. The arbitration award is final as regards the facts in the case. If matters of law are involved, the arbitrators, before making their award, can appeal to the High Court for a decision, or they can finally determine and make an award as to the facts, leaving it to the court to render a decision as to the law. In either case an appeal lies to the Court of Appeals and the House of Lords as in other cases. The number of cases where points of law have to be referred to the court are, however, very small. This is due partly to the fact that most controversies involve only matters of fact,

partly to the care with which the standard contract forms used by members of the associations are drawn, and partly to the fact that a doubtful point once settled by reference to the court is used as a guide in subsequent arbitration. Finally, appeal to the court is discouraged through the requirement by the association of the payment of high fees for so doing and the payment of the court costs by the member losing.

It cannot be made too emphatic that the success of arbitration in England is due not merely to the enactment of a law making possible its development, but also to the enthusiastic initiative and support of the trade associations. The law is but permissive and provides the means of enforcing awards through the courts if necessary. The real machinery for the operation of the system is furnished by the trade associations. This they do by providing in their regulations that the contracts entered into by their members shall include clauses providing that differences arising under them shall be settled by arbitration, by providing means for the selection of arbitrators, and by issuing rules to govern the arbitration procedure. These provisions vary among the different associations. The prevailing method is to permit the parties freely to select their arbitrators but to provide a board to which appeals may be made from the award of the arbitrators. A few limit the choice of the arbitrators in the first instance by providing that a permanent committee shall act as arbitrators. Others provide that the contracts shall contain clauses specifying that the president of the association shall appoint the arbitrators. An interesting feature which is prevalent, is the provision for a permanent committee or board of appeals to which appeals from the decisions of the arbitrators in the first instance may lie. According to Mr. Rosenbaum, the advantage of the permanent appeals board " is that the older and more experienced men in the trade are usually selected for it, and by reason of the repetition of their duties on appeal boards they acquire a certain amount of familiarity with the more difficult points of arbitration procedure, as well as a certain training in the exercise of judicial powers."

The general procedure followed by arbitrators is laid down in a schedule attached to the act of 1889. These provisions, however, are of the most general character and arbitrators have a wide discretion in respect to the manner in which they shall conduct

the case. In many cases, it is not necessary that the claims or contentions of the parties shall be reduced to writing. In others, the arbitrators may act on written statements submitted by the parties. In some cases, all that is required is that the arbitrators shall inspect the goods delivered or work done regarding which the dispute arises. The trade associations usually require that the award shall be reduced to writing on an official form and be sealed by their secretaries.

Of the success of this system of arbitration there can be no question. The extent to which it has developed and the support that it receives from all classes of the community cannot be better shown than by reproducing the words of Mr. Rosenbaum in the study from which the material for the foregoing has been so largely drawn:

A very large proportion of the business disputes of England never come into the courts at all, but are adjusted by tribunals established within the various trade associations and exchanges. This is especially true of the vast wholesale distributing trades which are responsible for a great part of the immense volume of imports and exports constantly flowing through the ports of England and giving them the commanding position they occupy towards the sea-borne trade of the world. Disputes over the quality and condition of consignments of grain, cotton, sugar, coffee, fruit, rubber, timber, meats, hides, seeds, fibres, fats, and countless other articles of commerce, as well as every conceivable variety of dispute that can arise out of a contract for sale and delivery, such as questions of delays, quantities, freights, interpretation, etc.,—all these are passed upon by business arbitrators selected by reason of their familiarity with the customs of the trade and with the technical facts involved, and not submitted to juries whose ignorance would usually be equally comprehensive.

So firmly established is the custom of arbitration in these lines that every contract form used by shippers, brokers, buyers and users of these articles contains a clause binding the parties to submit to arbitration any dispute that might arise out of the contract. But it is not these trades alone that resort to arbitration. The arbitration clause will be found in every charter-party for the hire of a ship, in every bill of lading for goods carried by sea, in every salvage agreement, in every policy of marine, accident or fire insurance, in every building contract, in every engineering contract whether mechanical, electrical or gas, in every lease of property, in every partnership or agency agreement, and in innumerable other

forms of contract. Finally, there is a well-confirmed tradition among business men, even though there is no written contract covering a particular dispute, to submit differences to arbitration after they have arisen.

What the foregoing means can be seen from the fact that probably one hundred thousand cases are settled every year by this procedure, the greater part of which would otherwise have been thrown upon the courts for adjudication.[3] Indeed, the statement can now be made that commercial litigation in the courts of England is almost unknown.

One of the oldest and most striking examples of the use of arbitration is in connection with maritime contracts. An essential feature of all Lloyd's maritime insurance contracts is the provision that disputes arising thereunder shall be settled by the arbitration procedure provided by that organization. How this works is illustrated by the following hypothetical case cited in the *Journal of the American Judicature Society:*[4]

Take an extreme but not uncommon instance: a Norwegian ship, carrying an American cargo, grounds on a reef on the coast of China. The cargo is insured by an English concern. First relief comes in the arrival of an English wrecking outfit. No time is wasted in cabling and bargaining. The Norwegian ship is released and towed to the nearest port for repairs and surveys. The condition of the cargo is noted by expert appraisers. Every step needed to conserve the interests of business men in several countries is taken speedily. Some months later representatives of the parties gather in a chamber in London and the rights and interests of all, including the wrecker's charges, are adjudicated in an expert manner.

Efforts to establish arbitration tribunals or systems for the general public, as distinguished from the members of the trade associations, have not met with any high degree of success. The most notable effort in this direction was made by the London Chamber of Commerce, which in 1892 created what was styled "The London Chamber of Arbitration," afterwards renamed "London Court of Arbitration." This chamber or court, however, has never proven

[3] *Journal of the American Judicature Society*, "Commercial arbitration," June, 1917, p. 22, and "Arbitration in United States" August, 1918, p. 53.
[4] "Advantages ascribed to arbitration," October, 1925, p. 74.

popular and has in fact handled but a small amount of business. The reasons for this are various. Among them may be mentioned the fact that the court did not have back of it collaborators such as the trade associations; that it was not cordially supported by the bar; and that the branch to handle commercial cases created in 1895 in the Kings Bench Division of the High Court of Justice to a considerable extent met the need for handling general commercial disputes in an expeditious manner.

Arbitration in the United States. In the United States, arbitration, though it has not advanced as far as in England, has nevertheless made substantial progress. Practically every state of the Union has an arbitration law of some kind upon its statute books.[5] Though these laws, in general, provide that an arbitration award, when properly made, may be made the basis for judicial process to enforce them, they have been ineffective because it has been possible for the parties to withdraw from the proceedings at any time before the award has been made; because the awards were not deemed to be final but were subject to revision by the courts; and because inadequate provision was made for arbitrators securing from the courts rulings upon points of law.

New York Arbitration Act. New York was the first state to secure a really effective state-wide arbitration law. For years that state had had upon its statute books an arbitration act which, like those of other states, was practically a dead letter. After a campaign lasting seven years, conducted with great energy by the Chamber of Commerce of the State of New York, the Bar Association of the State of New York, and other organizations, success was finally

[5] Ala., Ariz., Ark., Calif., Colo., Conn., Del., Fla., Ga., Idaho., Ill., Ind., Iowa, Kans., Ky., La., Me., Md., Mass., Mich., Minn., Miss., Mo., Nev., N. H., N. J., N. M., N. Y., N. Dak., Ohio, Ore., Pa., S. Dak., Tenn., Texas, Utah, Vt., Va., Wash., W. Va., Wis., Wyo.—National Association of Legal Aid Organizations, Reports of Committees, 1924-1925, p. 6.

It is a matter of historical interest that George Washington in his will provided that in case of disputes arising in executing its provisions the disputants were each to select a man "known for probity and good understanding" and these two were to select a third, "which three men thus chosen shall unfettered by law or legal construction, declare their sense of the testator's intention; and such decision is to all intents and purposes to be as binding on the parties as if it had been given in the Supreme Court of the United States."—Annual Report of the Committee on Arbitration of the Chamber of Commerce of the State of New York, 1922.

achieved in 1920 in securing the passage of an arbitration act,[6] following, as regards basic principles, that of Great Britain. This, it is believed, will put arbitration upon as firm a legal foundation as exists in the latter country.

This act, to quote an able analysis of it, embodied the following five cardinal principles, without which it is difficult for an arbitration system to work successfully:[7]

(1) It declared that a written agreement to arbitrate, either an existing or a future dispute, was valid and irrevocable (save as any other contract was revocable) and enforceable at law. (2) It prescribed that when such an agreement was entered into, the court (upon being satisfied that the issue involved a suit brought by either party which was referable to arbitration) would stay the suit. (3) When a party failed, neglected or refused to arbitrate, the court would direct the arbitration to proceed and would, if necessary, appoint the arbitrator. (4) The award was enforceable in the same manner as a judgment, upon being confirmed by the court; and it would be confirmed unless the court found evidence of corruption or bias in the arbitrator, in which case it could set aside the award. (5) That a case was not reviewable upon its merits, that being left to the arbitrators, but only upon the question of whether the procedure was in accordance with the law.

New Jersey, Oregon, Massachusetts, and California Arbitration Acts. The passage of the New York Arbitration Act has had an influence extending beyond the boundaries of the state. Organizations such as the American Judicature Society, the Chamber of Commerce of the State of New York, the Arbitration Society of America, and the American Bar Association have united their efforts to secure the enactment of a similar law in the other states of the Union. These efforts have been successful in four states. New Jersey by an act approved March 21, 1923, Oregon by an act approved February 25, 1925, Massachusetts by an act approved

[6] For a history of arbitration in New York, see A brief history of commercial arbitration in New York, Chamber of Commerce of the State of New York. For a copy of the act (Ch. 275, Laws of 1920), which went into effect April 19, 1920, see Commercial arbitration in the United States: laws and procedure, Arbitration Society of America, Information Series 1, July, 1925; and *Journal of the American Judicature Society,* August, 1920. The constitutionality of this act as regards its enforcement provisions was sustained by the New York Court of Appeals and the Supreme Court of the United States.

[7] Carl E. Herring, The lawyer's relation to arbitration, *Journal of the American Judicature Society,* February, 1929.

April 29, 1925, and California by an act going into effect July 29, 1927, have put upon their statute books arbitration acts modelled upon and closely following the New York statute.[8]

Uniform Arbitration Act for the States. It is not only desirable that all of the states should pass acts providing for the arbitration of commercial disputes but also that, as far as possible, these acts should be uniform. To this end, the American Bar Association, acting through one of its committees, has drafted a model bill which it is seeking, through its own efforts and those of state bar associations and commercial organizations, to have enacted into law by the several states. This bill follows closely the acts of the states that have been mentioned and the federal act, hereafter described. There is strong probability, therefore, that a fair measure of uniformity will be secured in respect to this legislation.[9]

United States Arbitration Act, 1925. The enactment of adequate arbitration acts by all of the states would not fully cover the need for legislation in this field. There would still remain the great field of controversies falling within the jurisdiction of the federal courts. From the beginning of the modern movement for the promotion of commercial arbitration in the United States, special efforts have accordingly been directed toward securing the enactment by Congress of an arbitration act that would apply to such controversies. In this movement the American Bar Association took the lead, though it had the valued support of the other organizations that have been mentioned. A committee of that Association drafted a bill, modelled upon the New York act, which was successively approved by the Association at its annual meetings in 1922, 1923, and 1924. The Association had this bill introduced in Congress, and, through the presentation of testimony and the submission of briefs and memoranda at hearings on the bill, it brought

[8] For copies of the acts of New Jersey, Oregon, and Massachusetts, see Commercial arbitration in the United States. The California act was strongly urged by the Judicial Council of California in its first annual report. It is substantially a copy of the New Jersey act.

[9] For a copy of this model bill, see Annual Report of the Committee on Arbitration, Chamber of Commerce of the State of New York, 1922. A model arbitration act has also been published by the American Arbitration Association. For a copy of this draft, see *Journal of the American Judicature Society*, December, 1926, p. 122. The *American Bar Association Journal*, November, 1927, states that during 1927 the states of North Carolina and Wyoming adopted the uniform arbitration act.

to bear the necessary pressure to secure favorable consideration. After undergoing certain amendments in committee, which did not vitally affect its character, this bill was finally passed and received the approval of the President on February 12, 1925.[10]

Following is a brief analysis of this act, which went into effect January 1, 1926, as given in the Annual Report of the Committee on Arbitration of the Chamber of Commerce of the State of New York, 1925:

Speaking in general terms, the act provides that written clauses providing for arbitration of future disputes contained in any contract relating to maritime transactions (*i. e.,* matters which would normally be embraced in admiralty jurisdiction) or involving interstate commerce shall be valid, irrevocable and enforceable except on the grounds for which any contract may be revoked. The same rules apply to a submission to arbitration of a controversy already existing. There are excepted from the operation of the statute however, contracts for the employment of seamen, railroad employees, and other workers in foreign and interstate commerce.

In addition to the declaration of the validity and enforceability of arbitration agreements within these two fields, the federal courts are given jurisdiction to enforce agreements for arbitration or submission and a procedure is established by which such enforcement can be had summarily. The jurisdiction exists in those cases in which, under the Judicial Code, the federal courts would normally have jurisdiction of the controversy between the parties. The right of a party to libel a vessel or other property at the commencement of the proceeding, in cases otherwise justiciable in admiralty, is preserved so that this important safeguard is not lost by an agreement to arbitrate.

There are two possible steps in the enforcement of the agreement. In the first place, any suit commenced in a federal court upon an issue referable to arbitration may be stayed until arbitration is had, provided the applicant for the stay is not in default with the arbitration. In the second place, the court may order the arbitration to proceed pursuant to the agreement, appointing an arbitrator itself if appointment under the agreement cannot be had.

The provisions for enforcing the agreement assure a prompt, speedy and non-technical determination of the merits both of the

[10] For a copy of this act (Public No. 401, 68th Cong.), see 43 Stat. L., 883; The United States arbitration law and its application, Commercial arbitration in the United States; and Annual Report of the Committee on Arbitration, Chamber of Commerce of the State of New York. This last report is of especial value, since it gives a copy of the bill as originally introduced, with indication of the changes made in it by the law enacted.

application for enforcement and of the matter in controversy. The proceeding is commenced by a petition to the federal court which, except for the agreement, would have jurisdiction of the subject matter of the controversy, seeking an order directing that the arbitration proceed in accordance with the agreement. Only five days notice of the application is required, but service is to be made in the manner provided for service of a summons in that jurisdiction. If there is a dispute as to the existence of the agreement for arbitration, or as to its performance, the court shall determine that dispute forthwith. A jury trial of the issue may be demanded, except in admiralty, and the issues are then to be submitted to a jury as though they were issues in an equity action, or a jury may be specially called. If no jury is demanded, or if the case is one of admiralty, the court is to decide the question summarily.

Upon decision either by the court or the jury that the agreement or submission was made and that there is a default, the court will issue an order summarily directing the parties to proceed with the arbitration in accordance with the terms of the agreement, except that the proceedings must be within the district in which the petition for the order is filed. The court is empowered to appoint an arbitrator, or arbitrators, if necessary. The entire proceeding, except as to determination of the existence of the agreement is to be heard as though it were a motion. The arbitrators have the power to secure the attendance of witnesses and to bring before them any papers they may need.

The parties may agree that a judgment of the court shall be entered on any award. They may specify the court, but if none is specified, then the application shall be made to the court for the district in which the award was made. The judgment is secured by an application to confirm the award, which must be granted unless the award is vacated, modified or corrected. The award shall be vacated only when it is procured by corruption, fraud or undue means or there was evident partiality or corruption on the part of the arbitrators, or they were guilty of certain misconduct, or they exceeded or imperfectly executed their powers in certain respects specified. Resubmission may be directed in such a case, if the time limited for the award has not expired. The award may be modified or corrected for an evident material miscalculation or mistake in description, or where the arbitrators have awarded on a matter not submitted to them, but not affecting the merits of the decision on the matters submitted, or where the award is imperfect in form without affecting the merits of the controversy. Proceedings to confirm are to be brought within one year after the award is made; to vacate, modify or correct within three months after it is delivered. The proceeding is commenced by an application to be served on the adverse party or his attorney as though it were

service of a notice of motion in the same court. If he is a non-resident, it is to be served by the marshal of any district within which the adverse party is found, in like manner as any process of the court. A stay of proceedings to enforce the award pending the determination of a motion to vacate, modify or correct is provided. The papers to be filed with the order granted on such application are specified.

The judgment is to be docketed as though rendered in an action and has the same force and effect and is subject to the same provisions of law as judgments in an action. Hence it may be enforced like an ordinary judgment.

Regarding this law the committee, in the annual report cited, said:

It is the opinion of leaders of the bar that no piece of commercial legislation has been passed by Congress in a quarter of a century comparable in value to this. . . .

When the Federal Arbitration Law is put into operation there is scarcely any doubt that it will develop the necessity for amendments. In the course of peregrinations of the Bill through the Committee of the Senate various amendments were made—sometimes with a sympathetic hand and sometimes with a critical hand. If these amendments had not been accepted it is doubtful if the necessary unanimous consent for consideration by the Senate would have been secured at the last Session. It was our judgment, based upon past experience, that these amendments should be accepted though some of them were in the opinion of the committee, as well as in the opinion of the Chamber counsel, Mr. Cohen, of doubtful value and validity; none however will seriously interfere with the usefulness of the law and all can be corrected in due course.

Sufficient time has not elasped to permit of a statement of its operation in practice. That it will have a far-reaching influence, not only in the field to which it relates, but also in promoting the cause by arbitration generally, is however, certain.

Right to Provide for Arbitration of Future Disputes. It is unfortunate that general acquiescence on the part of the Bar in the United States has not been had in the principle that legislation should be enacted permitting the insertion in contracts of clauses providing that all disputes arising under them shall be settled by arbitration. Notwithstanding the fact that the three great arbitration acts of New York, New Jersey, and the national government contain this provision as one of their most important features, and

that the federal act was drafted and passed at the instance of the American Bar Association, the Commission on Uniform Laws, which functions under the auspices of the American Bar Association, in its draft of a uniform arbitration law has taken the position that arbitration laws should not cover disputes arising in future, but provide merely for the arbitration of disputes already arisen. The Commissioners base their position on the old doctrine that it is inadvisable that persons should assign away their right to resort to the courts. This difference of opinion in the American Bar Association gave rise to a lively discussion at the 1925 meeting of the American Bar Association at the conclusion of which the position of the Commissioners on Uniform Legislation received the endorsement of the Association, this notwithstanding that the Association had previously endorsed the federal act. This endorsement is deeply regretted by all who have interested themselves in the promotion of arbitration in the United States.[11] In support of the provision by the proponents of the broad arbitration acts, the *Journal of the American Judicature Society* quotes the following from an address of Justice Harlan S. Stone on "The Scope and Limitation of Commercial Arbitration" at the 1923 meeting of the Academy of Political Science:

That two merchants of full age and mental competency should not be permitted by the laws of their country to stipulate for the adjustment and settlement of controversies between them exclusively by the arbitration of a fellow merchant, would seem incredible to a layman. It would seem incredible to most lawyers did we not actually know that such at one time was the law of England and that until the recent adoption of the arbitration statute in New York it was the law of our greatest commercial state, as well as that of most of the states of the Union. There could be no better example of the vitality and persistence of a false doctrine when it once lodged in the body of our common law than the history of the common law view of the invalidity of arbitration agreements. As a result of the earnest and persistent efforts to secure the adoption of a more enlightened policy, headed by the Chamber of Commerce of New York State, we now have placed on the statute books of the state of New York provisions making stipulations for arbitration obligatory and affording a convenient and expeditious procedure for compelling the performance of arbitration agreements. Our courts have upheld the constitutionality of

[11] See comments on this discussion in the *Journal of the American Judicature Society*, December, 1925.

this statute and are enforcing its provisions so that it is possible in New York, at least, for the parties to a contract to provide by agreement that controversies arising with respect to its interpretation or performance may be settled by arbitration. Similar legislation is being pressed upon Congress and the several state legislatures and will no doubt be enacted into law, and we may confidently look forward to the time when arbitration will become a recognized and accepted method of settling commercial disputes.

The action of the American Bar Association undoubtedly interposes an impediment in the path of arbitration legislation in the United States. The movement, however, will still go on and it is to be expected that before long the Association will change its attitude.

Trade Associations Arbitration Tribunals. It cannot be made too emphatic that, while it is essential that there shall be adequate laws authorizing parties to commercial controversies to resort to arbitration for the settlement of their differences, providing that agreements to arbitrate shall be irrevokable and enforceable, granting to arbitrators necessary powers, and providing for means for enforcing awards, one must look primarily to the trade associations of the country for the securing of results under such laws. Indeed these associations can do and have done a great deal in this field even in the absence of such laws. In their hands largely rests the extent to which resort to this method of settling disputes will be had.

The part that has been played in the development of arbitration in Great Britain has been pointed out in the consideration of arbitration in that country. In the United States, though similar action has been slower in taking form, great progress has been made in recent years and the movement is now advancing with accelerated speed. Thus, to quote from a pamphlet prepared by the Chamber of Commerce of the United States:[12]

Commercial arbitration is so well recognized in the United States as to be a business institution. Commodities valued at billions of dollars are bought and sold every year under contracts which provide that differences are to be arbitrated under auspices and according to rules to which the contracts refer. Exchanges which have

[12] Commercial arbitration: a plan for constituent members and National Chamber (not dated).

trading floors for the convenience of their members usually require their members to settle their disputes by arbitration. The great exchanges upon which grain, cotton and other commodities are bought and sold are well known illustrations.

When markets have not been organized in exchanges the appropriate trade associations have frequently made it one of their important functions to prepare rules with reference to which their members are expected to contract in their transactions with one or another. Codes of this kind have commonly contained provisions for arbitration and they have often become of such general adoption as to govern practically all transactions in the commodities to which they relate.

What can be done by a trade association, even in the absence of desirable laws, is strikingly evidenced by the experience of the motion picture industry. In that industry three classes of interests are represented: the producers of films, the distributors, and the exhibitors. It was found that numerous controversies arose in the adjustment of relations among these interests, and much litigation resulted. To avoid litigation, and to put relations upon a more friendly basis, an elaborate and, as it has proven, a very successful arbitration system was devised and put into operation. This system, as described by Charles C. Pettijohn, General Counsel of the Film Boards of Trade, in an address before the Arbitration Society of America, May 6, 1924, is as follows:[13]

Fourteen or fifteen months ago we started to put into effect arbitration. There were first organized in thirty-one key distributing centers in the United States, in thirty-one cities (I will not stop to name them) Film Boards of Trade, composed of the branch managers of each distributing company doing business in that particular city. Each of these Film Boards of Trade selected or elected three managers of three companies, alternating from time to time, to sit upon an Arbitration Board composed of six members for that key distributing center. The other three members were selected by the exhibitors or theatre owners of that same distributing zone in like manner, and these six men constituted the Arbitration Board with the provision for and the right to select a seventh arbitrator or an umpire in case of a tie vote. . . .

A uniform exhibition contract was agreed upon by many of the distributors, and I think I am conservative in saying that today nearly all distributors are using contracts providing for arbitration,

[13] The full address was issued as a pamphlet by the Arbitration Society of America.

and probably 90 per cent of the contracts that are being written for motion pictures today contain these uniform provisions for arbitration. . . .

During our first year of arbitration (or to be a little more accurate, one Board is about ten months old, some are eleven months, one year, thirteen and fourteen months because they were not all organized on the same day, but approximately a general average for one year) these Arbitration Boards have heard, decided and disposed of more than five thousand cases. The figures of the New York City Arbitration Board alone show more than five hundred cases disposed of during this period of time. I am referring now to cases actually heard and disposed of by Arbitration Boards and not the number of cases that were disposed of by reason of the fact that both parties to our contract were obliged to arbitrate, brought into touch with each other, encouraged to sit down calmly and discussed their difficulties—and I may say here that three or four times as many cases, probably five times as many cases, were disposed of in this manner before they were actually brought before the Arbitration Boards, than were disposed of by the Arbitration Boards themselves. The percentage of unanimous decisions in these five thousand cases was a fraction better than 90 per cent. In less than 10 per cent of these cases the votes were five to one or four to two, and in twenty-two cases only in the United States—although we have no provision for appeal and arbitration decisions are final—in twenty-two cases only was the seventh arbitrator called in and five of these cases were in the City of New York.

The money savings in distribution costs during this period of time can be most conservatively set at one and one-half million dollars. . . . But a much bigger thing, a much more material thing has been accomplished within our industry through arbitration. There is a better spirit and understanding now existing between the buyers and sellers of our product. Arbitration has gone great distances toward stabilizing our business.

The problem of promoting arbitration presents itself in different forms according to variations in the types of trade associations. In those associations which cover all branches of a trade, the contracting parties are generally members of the same organization and it is thus a matter of comparative ease to secure the settlement of their controversies through the arbitration tribunal of the association. Where there is a number of trade associations each having to do with but one branch of a trade, the contracting parties are for the most part members of different associations. In such cases it is necessary for the several associations to establish

through joint efforts some means for the settlement by arbitration of disputes between their several organizations. The report of the National Industrial Conference Board on Trade Associations [14] mentions the shoe and grocery trades as ones where such provision has been effectively made.

In the shoe industry [it writes] there has been established joint arbitration machinery by the National Boot and Shoe Manufacturers' Association, the National Association of Shoe Wholesalers, the National Shoe Retailers Association and the Tanners Council of America. The presidents of these associations constitute a Council of Arbitration to which a member of any of the four organizations may submit a controversy which he has been unable to adjust with any concern in the collective membership. In the event of the two or more disputants reaching an agreement to arbitrate, they may jointly apply for the appointment of an arbitrator or arbitrators by the Council. As a means of pressure towards the utilization of this machinery, one of the associations participating in the plan has authorized the publication in its official bulletin of the name of any member refusing "without justifiable reasons" to arbitrate a controversy which the other party has offered to submit to arbitration. This disciplinary measure tends to exert considerable influence in bringing about general compliance with requests for arbitration. In any case this joint arbitration procedure appears to have gained the confidence of business men in the several branches of the shoe trade. There were upwards of fifty disputes submitted to the Council of Arbitration during 1922 and the work of the Council is steadily growing.

* * * *

In the grocery trade, there has existed, since 1913, appropriate joint machinery for the out of court settlement of commercial controversies. The Dried Fruit Association of California and those of New York, Chicago, and St. Louis, the National Canned Foods and Dried Fruits Brokers Association, the National Canners Association and the National Wholesaler Grocers Association have made available joint arbitration boards in strategic centers for the dispatch of commercial disputes arising between members of their respective organizations. The report of the Arbitration Committee of the Grocers Association for 1923 announced that the association was represented on standing arbitration committees in twenty-eight markets. During the year 1923, fifty-seven submissions had been disposed of, as compared with forty-six decisions rendered in 1922. The report notes that "in the great New York market the policy of arbitration of all controversies has grown tremendously during the past year—in fact more than doubled. Disputes involving about

[14] Trade associations: their economic significance and legal status, 284-86 (1925).

twelve million dollars, arising out of cancellation of contracts between English manufacturers and merchants of this country, recently were settled through arbitration." And the committee concludes in this enthusiastic strain: "When we consider the rapid growth of this method of settlement of trade disputes, it is safe to say that within the near future practically all commercial disputes in this country will be settled by arbitration instead of resorting to the delay and heavy expense incident to legal action and recourse to the courts."

A third situation is presented when only one of the parties to a contract is a member of a trade association. Here the best that can be done is for the association to use its best effort to have such outside parties agree to the making of contracts containing agreements to arbitrate clauses or, subsequent to the controversy arising, agree to have the matter adjusted by arbitration procedure.

Arbitration in Government Contracting. A special case where it is unusually desirable that provision be made for arbitration arises in the field of government contracting for the purchase of supplies, for the construction of works or for other purposes. Many dealers refuse to compete for the sale of supplies to governments, and contractors are disinclined to undertake public work, due to the difficulties encountered in settling questions that arise in respect to the carrying out of such contracts; and, when they do compete, they are likely to ask higher prices in order to compensate themselves for such delay and possible loss. The result is that governments very generally do not secure the competition between dealers that will lead to the most favorable terms and often pay higher prices than are paid by private purchasers. Commenting on its efforts to secure such provision for arbitration in the law governing purchases by the State of New York, the Committee on Arbitration of the Chamber of Commerce of the State of New York in its annual report for 1922 said:

Your committee's endeavors, under this last head, were based on the theory that a merchant in bidding on state contracts adds to the price a certain amount representing the risk of rejection, claims, fault-finding, etc., which includes possible litigation for these reasons. If inexpensive arbitration were possible, instead of costly time-consuming and troublesome litigation, the risk would be correspondingly smaller, thereby reducing the price and improving the

terms of purchase to the State. From observations made, your committee is of the opinion that the merchant would not only bid a considerably lower figure were arbitration provided for in the event of controversy with the State, but the number of bidders would be increased, many of them being now deterred from so doing because of the difficulty, imaginary or real, which they believe will be encountered if, on technical grounds, fault-finding with the delivery to the State develops.

Industrial Conciliation and Arbitration. Another field in which in would seem that there is room for the wide application of the principle of conciliation and arbitration is that of industry. Reference is here made not to collective disputes between employers and their employees giving rise to cessations of work through strikes or lockouts, but to differences arising between an employer and an individual employee under the individual contracts existing between them. These differences relate to such matters as the amount of compensation, dismissals without adequate notice, imposition of fines, docking of wages for materials injured or wasted, etc. In all such controversies the right on the part of the party believing himself to be aggrieved to resort to the ordinary courts for redress is practically an illusory one. The amount involved is usually so small that the costs of litigation exceed the amount at issue. Even were this not so, neither the employer nor the employee would find it worth while to incur the loss of time and trouble that such procedure would involve. What makes it especially impracticable is that initiation of the procedure by the employer is futile, since the employee is likely to be judgment proof, and action by the employee means the loss of his job, and probable difficulty in securing other employment. Unless some special procedure is provided for handling controversies of this character there will be no remedy at all and wrongs suffered will go unredressed.

To meet this situation, various devices have been employed. Among these shop councils, embracing representatives of both the employer and the employees, offer probably the greatest advantage. In European countries there have long existed special tribunals for handling controversies of this character. In France these are known as *Conseils de Prudhommes* and in Germany *Einigungsamt*.[15]

[15] For an account of these tribunals, see reports by the present writer on Foreign labor laws, United States Department of Labor, *Bimonthly Bulletin*, November, 1899, January, 1900, March, 1900, and May, 1900.

Though they have apparently given satisfactory results, there has been no attempt to develop similar tribunals either in England or in the United States.

Arbitration of International Commercial Controversies. Another field in which the principle of arbitration can be applied with advantage is that of commercial controversies arising between citizens of different countries. The settlement of controversies arising between parties to a contract residing in different countries in the ordinary courts presents unusual difficulties. Questions are presented as to the court in which action should be brought, the law of which country applies, etc., and at best the expense and trouble of conducting the proceedings are heavy. All these difficulties can be avoided by adopting the practice of providing that the differences arising under such contracts shall be settled by arbitration, and setting up adequate arbitration machinery. Efforts looking to the promotion of this method of settling controversies of this character have been made under various auspices.

Since its organization in 1920, the International Chamber of Commerce has not only used its influence to promote the organization of systems for the arbitration of international commercial disputes, but has itself furnished facilities for such arbitration. At its meeting in London in 1921, it recommended the adoption by the nations of the world of legislation that would (1) recognize the validity of the arbitration clause; (2) permit foreigners to perform the function of arbitration; (3) make awards enforceable regardless of the nationalities of the parties without extended discussion upon the merits, limiting the inquiry merely to ascertaining whether or not the rules of procedure in force in the country where the award was made have been complied with and whether or not such awards contain anything contrary to public order; (4) provide for uniform legal procedure in arbitration; and (5) recognize the validity of the arbitration clause even in cases where arbitration is to be carried on by *de facto* arbitrators closely dependent on the possibility of arbitrators being guided in their decisions rather by principles of equity than by provisions of law.[16] In its meeting in

[16] Substantially quoted from "Comparative study of American legislation governing commercial arbitration," published by the Central Executive Council of the Inter American High Commission, 1928. This pamphlet has been largely drawn upon for the whole consideration of international commercial arbitration here given.

1922, it definitely formulated the principle to be followed in arbitration proceedings which was revised at its meeting in Stockholm in 1927.

The subject of international commercial arbitration has also had the attention of the economic committees of the League of Nations since 1921. In its plenary session in September, 1924, the fourth assembly of the council approved a protocol governing arbitration clauses in agreements between nationals of different states which has been approved by twenty-eight states.

The Inter American High Commission (at that time known as the International High Commission) at its meeting in Buenos Aires, in 1916, recommended the adoption by all of the countries constituting the Pan American Union of the convention that had been signed by the Bolsa de Comercio of Buenos Aires providing for the arbitration of international commercial controversies and that " as soon as possible there be formulated laws or other adequate regulations so that all the commercial differences of international character might be settled through the mediation of amicable arbitrators, recommending in addition, that in the absence of special agreement to the contrary between the contracting parties the committee of arbitration should sit in that country in which the respective contract is to be carried into effect or in which is located the merchandise over which the suit has arisen."

In the United States, the Department of Commerce has devoted considerable attention to the adjustment of international commercial controversies and to the promotion of means for handling such controversies through arbitration. At a meeting held at the Department at Washington on November 15, 1921, at which executives representing fifteen different trade associations were represented, a resolution was adopted recommending among other things:

That the Secretary of Commerce urge the Secretary of State to negotiate at the earliest possible moment:

1st. Treaties with foreign countries with which our country does business which shall provide that arbitration agreements in commercial contracts made between their respective nationals shall be valid, enforceable and irrevocable.

2d. That such treaties contain provision for reciprocal enforcement of such arbitration agreements by the courts in the countries parties to the treaties.

3d. That in such treaties it be covenanted that reciprocally, arbitration decisions in the countries party to the treaties be honored and enforced.

4th. That such treaties provide that arbitration agreements in foreign trade bind the American merchant when they are equally binding upon the foreign merchant in his country.

This effort has received the earnest support of the Chamber of Commerce of the United States, the Chamber of Commerce of the State of New York, and the American Bar Association. The Chamber of Commerce of the United States is likewise actively promoting the development of commercial arbitration in the settlement of differences arising under contracts between citizens of the United States and of other countries. This it is doing through negotiating agreements between itself and similar organizations in other countries providing for the setting up of arbitration tribunals and the formulation of rules of procedure to which parties desiring to arbitrate their differences may resort.

CHAPTER VI

DECLARATORY JUDGMENTS

Mention has been made that an important source of controversies leading to litigation is the lack of definiteness or precision of statement of statutes and of contract agreements. Though, as pointed out, much can be done in the way of lessening controversies due to this cause through the improvement of statutes in respect to draftsmanship and the standardization of specifications and contract forms, all grounds for differences of opinion cannot be eliminated in this way. Unless these differences can be adjusted through the process of arbitration, formal recourse to the courts must be had.

For years the question has been raised as to why courts should not be empowered to decide such issues as the proper construction of a statute, ordinance, or written instrument, such as a will, deed, or contract immediately upon the issue arising and without waiting for one of the interested parties to take the action that will lead to the other interested party or parties to seek redress for injuries believed to have been done them. Authority on the part of the courts to act in this way is known as the power to make "declaratory judgments." The distinctive characteristic of such a judgment is that it carries with it no coercive decree or order commanding the defendant or the sheriff to do anything—an inherent element of all executory judgments.

The Declaratory Judgment in England. The power to make declaratory judgments to forestall litigation has long been one of the essential features of the British judicial system. In 1852 Parliament passed a law amending the practice of the High Court of Chancery, which contained the provision that "no suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief." This provision, in broadened form, became a provision of the Judicature Act of 1873, applying to both equity and law courts. Its present reading is:

No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

The testimony is unanimous to the effect that this provision has given excellent results in practice. Of it, Professor Sunderland, in his appraisal of English procedure, says:[1]

So useful and effective has this practice become in England that several judges of the High Court are frequently engaged simultaneously in making declarations of rights, and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work can be done.

And in another place:[2]

The practice of making declarations of right has completely revolutionized English remedial law. . . . The client consults his lawyer in case of doubt, frames a case for the court and the court on a full hearing with all interested parties before it, makes a final and binding declaration on which the client can act with perfect security. The practice is so convenient and so obviously advantageous that it has become almost a matter of course in English chancery cases and is very common on the law side of the court. An examination of a typical volume of chancery reports shows that out of sixty-four cases reported, forty-three were brought for declarations of right. It would be safe to say that approximately two-thirds of the current chancery litigation in the Supreme Court of Judicature is directed to obtaining the advice of the court as to the rights of litigant parties with or without prayer for consequential relief.

Speaking of this feature of the British judicial system, Professor Edwin M. Borchard, of Yale University, has said:[3]

The strongest attestation of the efficacy of this procedure is the increasing frequency with which it has been resorted to in the English courts. Of the official reports of cases in the Chancery Division in 1884, 34 per cent were declaratory actions; in 1916, based upon the cases reported in two chancery divisions, this percentage had risen to 67 per cent, and, in 1917, it reached 66 per cent.

[1] Address before American Bar Association, September 2, 1925.

[2] The courts as authorized legal advisors of the public, *American Law Review*, March-April, 1920.

[3] The declaratory judgment: a needed procedural reform, *Yale Law Journal*, November and December, 1918.

There is every probability that recourse to the declaratory action will continue to increase. The great merits of the procedure, as evidenced by its constant employment in England, Scotland, Ireland, India, Ontario, British Columbia and other Canadian provinces, in Australia, New Zealand, and several of the Australian states, in Germany and Austria, commend it to the American legal system as a reform worthy of adoption.

Movement for Adoption of the Declaratory Judgment in the United States. The adoption of the declaratory judgment in the United States is strongly urged by students of judicial administration, and has made some progress. The American Bar Association has given it its support. The Judicial Council of Massachusetts puts it in the forefront of its recommendations. In advocacy of it, it writes:[4]

One of the criticisms made of our system of procedure has been expressed in the statement that "we provide no method by which business men can find out what a contract means unless one of them breaks it." . . . It is unfortunate that a man who wishes to do his full duty under a contract of doubtful meaning must act at his peril and expose himself to be mulcted in damages to find out its true meaning, and that the public should be put to the expense of a trial on damages in place of a suit to obtain a declaratory judgment of the rights of the parties.

The American Judicature Society is likewise a strong supporter of the system. It has included in the Rules of Civil Procedure recommended for adoption by the states the following:

ARTICLE 14. *Declaratory Relief.*

SECTION 1. *Scope.* In any action the plaintiff may ask for a declaration of rights, either alone or with other relief, in his complaint; and the court may make a binding declaration of rights, whether or not consequential relief is or could be claimed at the time.

SEC. 2. *Construction.* Any person interested under a deed, will, contract or other written instrument, or whose rights are affected by a statute, may bring an action to determine any question of construction or validity arising under the instrument or statute and for a declaration of his rights or duties thereunder.

SEC. 3. *Before Breach.* A contract may be construed before there has been a breach thereof.

SEC. 4. *Discretionary.* The court may refuse to exercise the power to declare rights and to construe instruments in any case

[4] Annual Report, 1925, pp. 33-35.

when a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary and proper at the time under all the circumstances.

SEC. 5. *Executors, Etc.* Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust,* in the administration of a trust or of the estate of a decedent, an infant, a lunatic or an insolvent, may bring an action.

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction.

SEC. 6. *Parties.* When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall, except as otherwise provided in these rules, prejudice the rights of persons not parties to the action.

SEC. 7. *Attorney General.* In any action which involves the validity of a statute the Attorney General shall, before judgment entered, be notified by the party attacking the statute, and shall be entitled to be heard upon such question.

SEC. 8. *Municipal Ordinance.* In any action which involves the validity of a municipal ordinance the corresponding municipal legal officer shall be similarly notified and entitled to be heard; and if the ordinance is alleged to be unconstitutional the Attorney General shall also be notified and entitled to be heard.

The Conference of Commissioners on Uniform State Laws has drafted a model act of sixteen sections making provision for declaratory judgments.

While this draft and that of the American Judicature Society cover the proposition in a comprehensive way, it is the opinion of the Massachusetts Judicial Council that there is no need for such an elaborate act, and that a simple section reproducing the English provision is all that is required. It thus says that "if the English courts have been able to administer fairly a rule of four lines for more than fifty years since it was adopted in 1883, the Council sees no reason why Massachusetts needs a statute as long as the so-called Uniform Act."

Professor Sunderland is authority for the statement that eighteen states now make provision for the use of the declaratory judgment in some form. Among the states taking the earliest action are Michigan, Wisconsin, and Florida, which enacted declaratory judgment laws in 1919, New York, which acted in 1920, and Kansas, which acted in 1921.[5] The strength of the movement for the establishment of the system of declaratory judgments at the present time is shown by the fact that, in 1927, four states, Arizona, Indiana, Oregon, and Wisconsin, adopted the uniform declaratory judgment act as drafted by the Commissioners on Uniform State Laws[6] and the national House of Representatives passed a similar bill on January 25, 1928.

[5] The Michigan act was declared unconstitutional: in Anway v. Grand Rapids Ry., 129 N. W. 350 (September 30, 1920) on the ground that it did violence to the traditional separation of powers and sought to impose upon the court the improper duty of furnishing legal advice to the citizens of the state. Commenting on this decision, the *Yale Law Journal*, in an excellent note by E. M. Borchard, appearing in the issue for December, 1920, says: "It is regrettable that the declaratory judgment, used so efficiently in England, Scotland, and the British dominions and in continental Europe to prevent and allay disturbances of the legal equilibrium, should have produced such judicial irritation in an American court. It will be a matter of surprise to the judges of the British Empire, who are as familiar with the limitations upon "judicial power" as the courts of the United States, that any court should have questioned that the rendering of declaratory judgments was anything but the exercise of judicial power. Indeed the only explanation for the conclusion reached by the Michigan court in the instant case is that the majority completely ignored the distinction between the advisory opinion and the declaratory judment, which in principle are utterly different, and permitted the resulting confusion to mislead them. . . . The apparent failure of the majority to understand that a declaratory judgment is as final and binding upon the parties and as conclusive upon their legal relations as any other judgment, and differs from the ordinary judgment only in dispensing with a coercive degree, *e. g.*, for damages or an injunction, accounts for the question of pages of alleged precedents and dicta denying the power of American courts to render advisory opinions or decide most cases, which, I submit, have "nothing to do with the case."

[6] *American Bar Association Journal*, November, 1927.

CHAPTER VII

ADVISORY OPINIONS

The function of the declaratory judgment is to declare, in advance of any formal litigation, the manner in which documents affecting the private rights of individuals should be construed. In the same way that individuals may have doubts regarding the legality of the action that may be taken under a contract or other document having for its purpose to set forth rights or duties, legislative bodies may be uncertain regarding the constitutionality of measures, the enactment of which they have under consideration, or executive officers may be uncertain regarding their rights, as defined by constitutional provisions or statute law, to take contemplated action. Under ordinary conditions the only course open to the legislatures and the executive or administrative officers under these conditions is to use their best judgment, leaving the validity of its action to be subsequently determined by a formal action in court brought by some person who believes that his rights have been illegally violated by such action. Years may elapse before such determination is had, and, if the action is determined by the courts to have been illegal, great harm may have been done.

The only method open for meeting this difficulty is the grant of power to legislative bodies and executive officers to request an opinion from the courts regarding the legality of the proposed action, and the authorization of the courts to give such opinion when properly requested so to do. Opinions so given by the courts are technically known as advisory opinions.

Advisory Opinions in England and Canada. According to the leading authority on this subject[1] the giving of opinions of this character, from early times, has been deemed to be one of the prerogatives of the English courts. It exists also in Canada, where

[1] Albert R. Ellingwood, Departmental coöperation in state governments (1918). This work is devoted entirely to a consideration of the law and practice of advisory opinions and is an exceptionally thorough study of the subject.

express authority to give such opinions was conferred upon the supreme court of the Dominion by the act of 1875 organizing that tribunal. A like power was conferred upon the supreme courts of seven of the nine provinces embraced within the Dominion. The system has also been provided for in the constitutional system of certain of the Central and South American states.

Advisory Opinions in the United States. In the United States, the constitutions of seven states, Massachusetts, Maine, New Hampshire, Rhode Island, Florida, Colorado, and South Dakota, provide for the rendering of advisory opinions by the justices of the supreme court; and five others, Oklahoma, Vermont, Minnesota, Delaware, and Alabama, have made similar provision by statute.[1] In general, if not invariably, the right to request opinions is conferred only upon the legislature and the chief executive, and the power to give them upon the supreme court of the state. The provision is also general that the court shall be required to give opinions only in respect to important questions of law and upon important occasions. Thus, the constitutional provision of Massachusetts, which is followed to a great extent by the provisions of the other states, reads:

> Each branch of the legislature, as well as the governor and council, shall have authority to require opinions of the justices of the supreme judicial court upon important questions of law and upon solemn occasions.

It seems to be well established that the opinions, when rendered, are the opinions of the individual justices, that they are merely advisory and in no way an adjudication of the questions submitted. The questions must also relate to pending matters and must have to do with concrete proposals relative to public rights. Questions relating merely to private rights, to abstract principles, or to matters, not of serious importance, are not held to be covered by the provision.

Mr. Ellingwood's researches revealed that, up to 1918, a total of 410 opinions had been requested and given in these eight states. Though they are merely opinions, as their name implies, according to Mr. Ellingwood, they have, "been received for the most part,

[1] Paul C. Clovis and Clarence M. Updegraff, Advisory opinions, *Iowa Law Review*, February, 1928.

with all the deference accorded to the solemn decisions of a court of last resort. Both the legislative department and the executive department have usually treated the pronouncements of these opinions as final, and shaped their course of action accordingly." [3]

The statement that has been given of the nature of advisory opinions and the conditions that they are desired to meet would seem to indicate the desirability that provision should be made for them in the judicial system of any country and particularly in the United States where the constitutionality of statutes may be contested in the courts. To quote again from Mr. Ellingwood's work: [4]

As generally understood, the advisory opinion is an opinion rendered by the highest judicial officers in the state, acting as individuals and not in a judicial capacity, in response to a request for information as to the state of the law or counsel as to the constitutionality of proposed action, coming from the legislative or executive branches of the government. The form in which its usefulness appears varies with the question asked. In connection with pending legislation, it is designed to improve the form of bills, to make for perspicuity, consistency and satisfactory technic, to reduce the possibility of enacting statutes that will have to be declared null and void. In connection with completed legislation, it is valuable as indicating to the legislative department the need for further legislation, as furnishing to the executive department a construction that will insure a consistent and, in all probability, correct administration of the statute, as informing the people whether what appears to be law is actually binding upon them, in whole or in part. Why should it be necessary for these groups to be unenlightened by the wisdom of the chosen judicial servants of the state, until some individual is willing to devote enough time and money to bring the matter up in connection with a particular set of facts? We know too that there are many public questions that can with difficulty be brought before a court in a regular case. Not only would an opinion often prevent errors on the part of the public, doing away with a great deal of uncertainty and confusion, but it would in many instances save the taxpayers considerable expense. The cost of enacting an unconstitutional statute and then going through the process of getting it declared unconstitutional is a dead loss to the state's treasury.

It may be that great use will not be made of this service; in practice indeed, it may be desirable that it shall not be used except

[3] *Op. cit.*, 154.
[4] *Op. cit.*, 253.

in cases of unusual importance, but its existence can do no harm and in cases may be productive of great good.[5]

[5] A recent occurrence in the national government illustrates the value that this device would have had, had resort to it been possible. The act providing for the compensation of federal employees injured in the course of the performance of their duties was so drafted as to make it uncertain whether the act covered vocational disease as well as accidents, strictly speaking. The Attorney General rendered an opinion giving the broader interpretation to the act. The Comptroller General, whose duty it is to pass upon all claims against the government, held to the contrary and refused to be guided by the opinion of the Attorney General. This difference could only be resolved by a suit in court or appeal to Congress for amendatory action that would make clear its intent. Had provision existed for the giving of advisory opinions by the Supreme Court, this difficulty could have been readily adjusted.

PART II

ENFORCEMENT

CHAPTER VIII

THE FUNCTION OF THE EXECUTIVE IN THE ADMINISTRATION OF THE LAW

Notwithstanding the doctrine of the separation of powers, there is no function of government requiring for its successful performance a more effective coördination of efforts on the part of two of the great branches of government than that of the administration of the law. A country may have the most efficient judicial system that it is possible to devise, manned by officers of the highest capacity, and yet be one where lawlessness prevails and private rights are violated with impunity, unless there exists in the executive branch a machinery and a will to do its part in securing an enforcement of the law.

In a general way the responsibilities of the two branches in respect to the administration of the law may be contrasted by qualifying the one as negative, or at least neutral, and the other as positive or affirmative. It is no part of the duty of the courts to act affirmatively on their own initiative either for the detection or prosecution of crime or for the redress of private grievances. Their responsibility comes into play only when matters are brought before them by others for adjudication or action.[1] In sharp contrast with

[1] This statement applies to the regular system of courts as they function at the present time in the United States and in most, if not all, modern states. It is of at least speculative interest to raise the question whether this restriction of the duties of courts is a necessary feature of judicial administration, and whether they should not have conferred upon them the positive duty of seeing that the laws are duly enforced which now rests upon the executive. One of the most significant features of the quasi-judicial tribunals, such as the public utility commission and the Federal Trade Commission, is the conferring upon them of the power, and, as a necessary consequence, the duty, of acting on their own initiative to secure a proper administration of the law in respect to which they exercise authority. This power, it is true, relates chiefly, if not exclusively to enforcement of public law and only incidentally, if at all, to the administration of the law as it affects rights as between private parties. Even with this limitation, however, the system vests in a judicial tribunal responsibility for seeing that the law is enforced and

this, the duty of the executive is of a positive, affirmative, character to see that matters requiring adjudication are brought before the court for action by it. A proper administration of the law thus requires effective work on the part of both branches of government.

Enforcement of Law According to Its Character. Although the affirmative responsibility of the executive branch as to the enforcement of the law has been stated in general terms, it is important to note that it varies in character, degree, and the means employed, as it has to do with the three great classes into which law, for certain purposes at least, may be divided: public, criminal, and private.

By public law, as the term is here employed, is meant the laws having for their purpose to determine the organization, activities, rules of procedure, and powers and duties of the government as an institution and those laws governing matters in respect to which the government has undertaken, through administrative agencies, to subject the public to governmental regulation and control, while not including criminal laws nor, of course, those having for their purpose to regulate the relations between individuals and their general property rights.

By criminal law is meant those laws having for their purpose the regulation of the conduct of individuals, infraction of which subjects those offending to penalties of a punitive character.

By private law is meant that body of law having for its purpose to determine the rights and duties of individuals as affecting their relations to each other, violation of which is deemed to be primarily a matter of individual concern.

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comprehends the giving to the tribunal of a staff through which it can make investigations and bring parties before the bar. It is conceivable that a similar power of even broader scope should be conferred upon the ordinary courts, that the chief justice of a supreme court of judicature should combine in himself, not only the powers of an administrator in chief in respect to the operation of the court as an organ for the adjudication of cases coming before it, but those of the head of a department of justice, and that provision be made for the attachment to the court of an executive or administrative staff having police powers of investigation and the bringing before the court of cases requiring action by it. Under this system responsibility for the administration of the law would be vested in a single agency instead of being divided between two agencies representing two distinct branches of the government.

Enforcement of Public Law. The enforcement of public law is of course the direct responsibility of the government, since this law has to do with its own operations. The only feature requiring special comment is, that only to a limited extent is it under the necessity for resorting to the courts in administering this law. For the most part its administrative agencies have the necessary power to make their determinations prevail. Resort is had to the courts chiefly when public law statutes contain penal provisions and the government takes steps to enforce them, or appeal is made to the courts to secure redress against actions of government officers which are believed not to be sanctioned by law. In another place the possibility of avoiding the necessity for appealing to the courts as an aid to administration through the use of the franchise or permit system has been considered, and the bestowal of power upon administrative officers to impose pecuniary and other penalties. In point of fact, the enforcement of public law is more a matter of administration than of judicial adjudication. Mention is made of it here only in order that the consideration of enforcement of the law may be more complete.

Enforcement of Criminal Law. In principle, the function of the government in respect to the enforcement of criminal law is no less direct and positive than it is in respect to public law. In practice, however, there are certain qualifications to this obligation. The present interpretation of this duty, as constituting one of the essential functions of government, has only been arrived at as the result of a long evolutionary process. And, to a considerable extent, the manner in which this function is now viewed shows the effect of this process.

The early idea in the England of Anglo-Saxon days was that an injury of one individual by another, such as from assault, theft, or other act now deemed to constitute a criminal offense, was a purely personal matter the redress of which rested with the injured party. The idea that the act was an injury to the state, in that its laws had been violated, was not present. The state's participation in the matter was that of determining the character of the redress that was open to the injured party and the means that might be employed by him in securing that redress. Whether he should take any action at all was a matter that concerned him alone.

The first departure from this system was the development of the idea of the "King's peace"; namely, that a breaking of the law accompanied by violence or disorder was an offense against the public peace that did injury to the state as well as to the individual. Especially was this true when those acts took place on the King's highways. Gradually, therefore, the King began to take cognizance of such acts. The idea that a criminal act was an offense against the welfare of the state once recognized, it was but a matter of steady growth until the present conception was reached that a criminal act is one directly concerning the state, and therefore one which the state should not only seek by all the means in its power to prevent, but should proceed against the responsible parties when committed. At the present time, therefore, the principle is firmly established that a criminal act is essentially an offense against the state and only secondarily a private wrong. The old idea of a criminal act as a private wrong still persists, however, and exerts an important influence upon the administration of the criminal law. This is seen in the designation of the injured party as the complaining witness and the failure of the government to prosecute in many cases when the injured party fails or is unwilling to request that proceedings be instituted. It thus often occurs that no step will be taken by the government in case private money has been embezzled unless the party suffering loss brings a complaint. Indeed, until comparatively recent times, whatever the theory, the government in fact did not concern itself very positively with criminal acts that did not involve violence or were not of a character likely to provoke violence. The old idea of the King's peace still persists, and alongside of it the feeling on the part of officers responsible for the detection and prosecution of crime, that crimes in which the element of actual or potential violence is not present, are primarily matters of private concern, which the government is not called upon to prosecute unless action is desired or urged by the injured party.[2]

[2] The persistence of the idea that even criminal offenses are primarily matters of individual concern is shown by the fact that it was not until 1879 that England made provision for the office of public prosecutor. Though the Attorney General represented the Crown in a general way, most prosecutions were undertaken by the injured parties, who hired their own attorneys to act for the prosecution.

This persistence of this old idea is believed to be unfortunate. If the state has any essential function that stands out superior to all others, it is that of the administration of the law. Whether viewed as acts detrimental to its own interests, or as causing injustice and suffering to its citizens, crime is an evil of the first importance to the state. As an agency for protecting and promoting the public welfare, the state falls short in the performance of its duty if it does not do everything in its power to prevent criminal acts. The greatest deterrent to the commission of such acts is the certainty that prosecution will immediately follow their detection. To make prosecution dependent in any way upon the action of the particular person injured, is a direct incentive to what is equivalent to a compounding of a felony through the injured person's agreeing not to prosecute as the result of appeals to his sympathies, restitution, or other means of influence.

Enforcement of Private Law. The function of the government in respect to the enforcement of private law, as accepted by modern states, is in sharp contrast with its function in respect to public and criminal laws. As regards this body of law, the state is deemed to have no affirmative responsibility to prevent infractions of the law or to institute proceedings for the redress of grievances of individuals injured by such infractions. This responsibility rests wholly upon the individual. All that the state undertakes to do is to provide the instrumentalities, in the form of courts, to which injured parties may resort for a redress of their wrongs, to lay down the rules governing the operation of those instrumentalities, and to undertake through its officers to assist the successful litigant in enforcing the decision that may be rendered by the court. Whether, in any case, a person believing his rights to have been violated, will avail himself of these facilities, is purely a matter for his determination. If he decides to appeal to the courts, he must assume all the burden and expense of prosecuting his cause, and, in addition must contribute to the expense of the maintenance of the court through the payment of fees and other charges, subject only to the possibility that a part of this expense may be thrown upon his adversary if he is successful in his contention and the court so determines in its decision.

Firmly as this principle of the negative or neutral character of the responsibility of the state for the enforcement of private law is embedded in our judicial system, a question may be raised as to whether it is sound. Two important questions may be raised: first, as to whether the state should not assume the same positive obligation to see that the private law is obeyed that it has in respect to the criminal law; and, second, whether, in any event, the costs of litigation should not be borne primarily by the state rather than by the individual. Each of these questions will be considered in turn.

Affirmative Duty of the State in Respect to the Enforcement of Private Law. The prime function of any government is the maintenance of law and order and the administration of justice—justice as between the state and its citizens, and, as between individual citizens. To the extent to which it fails in this task it may be said to fail in the performance of its most essential duty. Slowly, by a process of evolution, the state has reached the position where it recognizes, in principle, and, to a large extent, in practice, its affirmative duty in respect to the two great bodies of public and criminal law. As yet, however, it refuses to recognize the same obligation in respect to the third branch, private law. The question may be raised as to whether there is any valid reason for this distinction.

From the standpoint of the individual there is little difference between his being deprived of property through fraud or failure on the part of a debtor to meet his obligations, and the loss that he incurs through his pocket being picked or his house entered or his goods stolen. He may be, and often is, more grievously injured through the failure of a person to comply with his contractual agreements, or through the negligent act of another person than if he were personally assaulted. Nor is it easy in most cases to draw any logical distinction between the moral character of the two classes of acts. In respect to both, moreover, the state now prohibits the resort to force by the injured party to secure redress and compels him to resort to the state for that purpose. If it is the duty of the state to protect the weak from oppression by the strong, it is difficult to see why this duty does not apply in the field of private law; for in no field is it more possible for those of superior strength to

make an illegitimate use of such strength to the injury of their weaker brethren.

On two grounds only can the distinction between the duty of the state to enforce criminal and private law be maintained: that the state is concerned only with those acts which threaten its own existence or interests; and that it is not feasible for it to assume the same obligation in respect to the enforcement of private law that it does in respect to public and criminal law. That the first of these grounds is unsound, has already been shown. Whatever may have been the idea of the function of the state in primitive times, the doctrine is now firmly established that it is a prime function of the state to do all those things having for their purpose and effect the promotion of the public welfare.

The question of feasibility remains. If practicable, there would seem to be few things more legitimately within the sphere of government or more certain to confer a benefit upon the public than that of assuming the burden of seeing that private rights are enforced.

The undertaking of this task would entail three things: the definite assumption by the government of the same attitude toward the enforcement of private law that it now takes toward the enforcement of criminal law; the creation of an office analogous to that of prosecuting attorney, whose duty it would be to receive complaints of individuals who believe that their rights have been violated or are being threatened, to examine into them, and, if the circumstances justify, to institute and conduct, on behalf of the complainant, the necessary court proceedings; and the creation of a complementary office of public counsel, to which persons accused of violating or threatening the violation of private rights may appeal to represent them.

The objection may be made that it would be unwise to entrust to a public officer the discretion to determine whether action should or should not be taken in reference to complaints involving private rights. To this, two replies may be made. The first is that this discretionary power in respect to the institution of proceedings is precisely that now exercised by prosecuting attorneys in respect to the great majority of cases of violation of criminal law. The second is that utilization of the services of the public prosecutor and public counsel should be optional; that it should be within the

power of the complainant to institute proceedings directly, or, when proceedings are instituted on his behalf by the public prosecutor, to employ at his own expense counsel to assist the public prosecutor in the preparation and conduct of the case, and that a like power should be possessed by the defendant. If a system such as this were adopted, the establishment in connection with it of a system of conciliation and arbitration would be most desirable. When complaints are made to the public prosecutor of civil actions, his first effort should be to adjust the matter through conciliatory methods or to have the parties agree to a reference of it to arbitration. Only failing this should formal proceedings in court be instituted. It is believed that the majority of petty cases could be adjusted in this way, and that the function of the public prosecutor as a conciliator might easily become his most important function.

It is a matter of no little interest to note that the principle of the government undertaking to assume the burden of the administration of the private law is being more and more acted upon. Examples are to be found in the powers and duties conferred upon public utility commissions, workmen's compensation boards, and similar bodies, the creation of legal aid bureaus, the conferring upon an administrative officer, such as the labor commissioner, of power to enforce the payment of wages due to employees, and the duties imposed upon the clerks of courts and judges to assist litigants in the prosecution of petty claims. It is now very generally the duty of public utility commissions to take the action required for the protection of individuals in their rights, which prior to their creation could only be enforced by the injured party assuming all the burdens of litigation in the ordinary courts. To a considerable extent these bodies, in addition to handling complaints brought to their attention by the injured party, have the affirmative duty of acting upon their own initiative to secure redress of private wrongs. In agencies such as the Division of Legal Aid of the Board of Public Welfare of Kansas City and the Bureau of Legal Aid of the Department of Public Welfare of Philadelphia there is presented a striking illustration of the government assuming the duty of seeing that justice is done to persons who have suffered infringement of their private rights. As Mr. Reginald Heber Smith says,

in his study of legal aid work, the taking of this action "was a step of profound importance, destined to influence the entire history of legal aid work and probably destined to affect the entire course of the administration of justice. The public legal aid bureaus challenged the long accepted conception on which our civil administration of justice was built that the state's duty ends when it has provided judge and court house and that it has no interest and no right to take a part in private litigation." No less significant is the passage of the Massachusetts law which provides that the State Labor Commissioner shall have the duty of enforcing on behalf of private persons the payment of wages due them. In many respects, the most important feature of the special procedure that has been adopted for the prosecution of cases in petty claims courts are: first, the great reduction or entire elimination of court costs; second, the duty that clerks of such courts have to aid claimants in the statement of their claims and the inauguration of proceedings; and, third, the function that judges assume of taking direct charge of the proceedings with a view to seeing that the interests of all parties are properly presented and thus obviating the necessity in the great majority of cases for the employment of counsel.

Action by the government in these several ways is of the utmost significance. It represents, as Mr. Smith says, a radical break with past traditions in respect to the function of the state in regard to the enforcement of private law. With the ice thus broken the field is open to the progressive development of this new principle.[3]

Free Administration of Justice. Should the decision be made to retain the existing system under which the responsibility for initiating and the burden of prosecuting and defending civil actions are thrown upon the individual, there will still remain the question whether the existing system under which litigants are in effect required to contribute to the support of the judicial establishment through the payment of fees, court costs, etc., is one that can be defended.

It seems hard to justify this system. The administration of the law is one of the prime functions of government. Its obligation and interest is to see that justice is done in respect to all matters,

[3] For a more detailed consideration of this subject, see Part VI, Legal Aid.

civil and criminal. One of the grave defects in the administration of justice at the present time is the extent to which the unscrupulous are led to violate or ignore the legal rights of others through the knowledge that in many, if not most, cases of lesser importance, those injured by them will rather stand the injury than subject themselves to the trouble and expense of a law suit. Any increase in this cost strengthens this possibility by just so much. If the government refuses itself to assume the burden of seeing that justice is done, it would seem, it should at least put its services at the disposition of litigants without charge.

State Indemnity for Errors of Criminal Justice.[4] The state has assumed the direct burden of seeing that the criminal laws are duly enforced. It not merely furnishes the facilities for determining issues of guilt, but itself undertakes the task of ferreting out and prosecuting infractions of the law. In doing this, undoubtedly at times it works a great injustice to, and inflicts great loss and suffering upon, individuals by wrongfully accusing them of crime, or, more serious still, by convicting them, though innocent, of a crime and subjecting them to punishment. The fact that the state may have acted in the best of good faith and used every due precaution, does not alter the fact that such individuals have unjustly been subjected to suffering and loss through its action. The question is thus presented as to whether when cases of this kind come to light, it should not be incumbent upon the state to do all that is within its power to rectify the wrong. No action by it can wipe out the mental suffering of a person wrongfully accused, or restore to one, improperly convicted, the years of liberty that he may have lost in serving his sentence. It is possible, however, for the state to make pecuniary compensation for the direct monetary loss that its action may have caused, and to atone, in a measure, for the personal suffering caused.

[4] Much the best consideration of this question is to be found in the following two articles by Edwin M. Borchard (formerly Law Librarian of Congress and now Professor of Law at Yale University), which have furnished the basis for the treatment of the subject as here given:

1. State indemnity for errors of criminal justice, with an editorial preface by John H. Wigmore. Reprinted from Journal of Criminal Law and Criminology, January, 1913. 62 Cong., S. doc. 974 (1912).
2. State indemnity for errors of criminal justice. *Annals of the American Academy of Political and Social Science,* March, 1914.

Analysis of the problem shows that, in the administration of the criminal law, an innocent person may be unjustly subjected to suffering and loss through the following acts: (1) Wrongful accusation and arrest not followed by a trial; (2) wrongful accusation and arrest followed by a trial at which the innocence of the accused is declared; (3) improper action of the judge before whom the case is tried; and (4) the wrongful conviction and subjection to punishment of a person whose innocence is afterwards established. In principle, compensation is due in all four of these cases. In practice, each presents a separate problem from the standpoint of the strength of the claim for compensation and the feasibility of establishment of a system under which it may be accorded. It is desirable, then, that a consideration of each should be separately had.

Compensation for Wrongful Accusation and Arrest. In the United States the principle is well established that a person wrongfully accused of a crime has a ground for action for damages against the person making the accusation without having a reasonable ground for believing in the truth of the accusation. "Likewise if his unfortunate predicament is due to the malfeasance, misfeasance or nonfeasance of an officer exercising ministerial powers, or even of certain judicial officers of inferior jurisdiction, the law gives redress to the injured person by an action for damages against the officer."

The desirability of this principle is not open to question. Without it the door would be open to the use of the power of accusation of crime to gratify private spite, or to the grave step of accusing a person of crime without any reasonable cause. But a clear distinction should be made between the cases where a private person, without publicity, goes before the proper officer of the government and express his belief that another person is guilty of a crime, and when he makes his accusation in public or in such a manner as to give publicity to his accusation. It would seem to be not only proper but also desirable that all persons believing another person to be the author of a crime should bring the matter to the attention of the proper officer. Responsibility for taking further action should then rest upon that officer. Only when it can be affirmatively

shown that the person making the accusation has done so with malicious intent, should liability for damages attach.

The possibility for redress will also be dependent upon the financial responsibility of the person making the improper accusation. This means that in many cases the right of redress will be only a nominal one because of the impossibility of collecting upon the judgment for damages which may be secured.

This question, however, is here mentioned only in order that the consideration of the matter of compensation for error in the administration of the criminal law may fully cover all aspects of the case, since it is believed that present conditions in respect to it are fairly satisfactory.

Compensation for Improper Action by the Trial Judge. It has been stated that in extreme cases certain judicial officers may be held personally responsible for the improper arrest and prosecution of an innocent person. As is pointed out in the consideration of an independent judiciary, no such responsibility attaches to the judge, no matter what the character of his action in the conduct of a trial. Even if it be admitted that this principle, in the interest of securing an independent judiciary, is a correct one, though there is a question whether it has not been pushed to an extreme, the question still remains whether a person who had been injured as the result of improper action by a judge should not have a redress as against the government itself. This would seem to be only just when proof is subsequently had that the judge acted in a corrupt or fraudulent manner.

Compensation for Wrongful Trial Followed by Acquittal. In the United States the acquittal, after formal trial, of a person wrongfully accused of a crime does not in any way modify the law regarding the right of redress of the person so accused and tried. Such action as he may have against the private person or officer making the accusation or arrest, may be strengthened by the fact of the acquittal, but the immunity of the state is in no wise affected.

It is recognized that it would be a serious thing to adopt as a general principle that all persons accused of crime who, after trial, are acquitted should be entitled to compensation for their loss and suffering by the state. From the strict standpoint of justice much,

however, can be said in its favor: Thus Professor John H. Wigmore, in his introduction to Professor Borchard's article, says:

> Wrongs done by the state preceding an acquittal include the loss of personal liberty, the loss of reputation, and the expense incurred by one who is later acquitted. Here it is clear that the state must arrest and try *all* duly accused persons though it is certain that a large proportion will be found innocent. The innocent man has been made a sacrifice for the public good. There is no redress against the officers; they have faithfully kept to their duty under the law. The public good has gained quite as much as it would have done when commerce was served by a railroad placed on land taken by force from that same man. Why should not the sacrifice be compensated? In a civil case at least costs are given against the unsuccessful litigant. Why should not the state allow costs against itself? Perhaps the amount of the expense bill would look too great. This may be a practical deterrent. But let us at least admit the principle and go on to the third class of cases (wrong done by the State through erroneous conviction).

Compensation for Wrongful Conviction and Punishment. Though, as has been pointed out, much can be said in favor of the principle that a person wrongfully prosecuted by the state for a crime of which he is innocent has a claim for compensation against the state even though upon trial he is acquitted, the real question of the recognition of liability on the part of the state has to do with those, fortunately, much rarer cases where an innocent party is convicted and subjected to punishment. That such cases, though infrequent, do occur, is well known. One of the most interesting of such cases is that of Adolf Beck in England, which led to the establishment of the Court of Criminal Appeal. Through mistaken identity Beck was unjustly imprisoned for seven years for another man's crime. In this country a case that attracted great attention was that of one Andrew Toth. Toth was convicted of murder in Pennsylvania and served twenty years of a life sentence before his innocence was definitely established. In neither of these cases did the unfortunate person have the slightest legal redress against the state for his loss of liberty and great suffering. In the case of Beck, however, Parliament, as a matter of grace voted him £5000, while, in the case of Toth, Andrew Carnegie saved him from further destitution through the grant of a small monthly pension.

For cases such as these there seems to be no justification for the existing immunity of the state from liability. Common humanity and justice demand that the state should do what it can to redress the wrong it has done. This principle is well established in the leading countries of Europe. Professor Borchard mentions the following countries as having elaborate statutes on the subject: Germany, France, Austria, Portugal, Denmark, Sweden, Norway, and Switzerland. To him belongs the credit, not merely of presenting a very careful study of the subject, but also of seeking to promote the adoption of the principle in this country of the right of persons wrongfully convicted and punished of seeking redress from the state. To this end he prepared and had introduced in Congress a bill providing for this system in cases falling within the jurisdiction of the federal government.[5] Some progress has been made in the United States in the way of enacting legislation of this character. Both Wisconsin and California have passed laws of this kind.[6]

[5] For a copy of this bill, see Borchard's article in *Annals,* March, 1914.
[6] Wisconsin Laws of 1913, ch. 189, and California Laws of 1913, ch. 165.

CHAPTER IX

DUTY OF THE EXECUTIVE TO SEE THAT THE LAW IS DULY ENFORCED

At the head of the system for the enforcement of the law in all American governments, and probably in all modern governments, stands the chief executive. In broad, general terms he is made responsible for seeing that the laws of the land are duly enforced. The provision of the Constitution that the President "shall take care that the laws be faithfully enforced" finds its counterpart in all the constitutions of the states and, in one form or another either by direct statement or by implication, in the charters or organic acts of other political subdivisions.

Definite as is this statement, and general as is the acceptance of the principle for which it stands, there is by no means a unanimity of opinion, and still less of practice, in respect to the extent to which the chief executive is expected actively to seek to meet this responsibility, or the extent to which he should actually be held responsible for the manner in which the laws of the land are obeyed. It is a matter of importance, therefore, to examine existing opinion and practice and determine whether they are in all respects satisfactory.

In doing so the distinction that has been made between public law, criminal law and private law is of value.

Enforcement of Public Law. As regards public law, that having to do with the operations of the government itself, the obligation of the chief executive would seem to be especially direct, but, important limitations upon it must be recognized. The first of these arises out of the principle of separation of powers, which constitutes an essential feature of the American political system. In respect to the legislative branch, the doctrine of the separation of powers would seem to relieve the chief executive of responsibility for seeing that the laws governing the organization and operation of this branch were being duly compiled with, except possibly where infractions of the law are of such a character as

to threaten seriously the proper functioning of the government as a whole. In case a direct obligation is imposed upon the chief executive as an administrative officer to administer or enforce laws such, for example, as those governing corrupt practices at elections and the like, the responsibility of the chief executive to see that these laws are duly enforced would seem to be a positive one.

In respect to the judicial branch, the obligation of the chief executive would seem to be somewhat greater. This arises, in part, from the fact that in many cases the selection of the judges lies in his hands, and, in part, from the obligation placed by the Constitution, in the case of the national government at least, upon the chief executive that "he shall from time to time give to Congress information of the state of the union and recommend to their consideration such measures as he shall judge necessary and expedient." This obligation would seem to impose upon him at least the duty of keeping himself currently informed regarding the manner in which officers of the judicial branch are performing their duties and, when circumstances warrant, of bringing failures on the part of such officers properly to comply with their duties to the attention of Congress for such action as it may deem desirable.

Far otherwise, however, is the responsibility of the chief executive in respect to the administrative branch. Here there would seem to be no question that it is his affirmative duty to see that all officers in this branch faithfully comply with their duties as set forth in law. It is one thing, however, to impose an obligation and quite another to provide the means by which this obligation may be met. One of the most serious defects in our governmental system, national and state, is the failure to vest in the chief executive the powers of a general manager in respect to the administrative work of the government. In most of the states the governor is but one of a number of elected officers. To a considerable extent purely administrative officers are selected by popular election. The governor has no power in respect to their selection, but little, if any, power in respect to their dismissal, and but limited powers to control the manner in which they shall perform their duties. Even when the power of selection is placed in his hands it is limited in many cases by the requirement that the approval of the upper legislative house must be secured, and such approval is often

required before the power of dismissal may be exercised by him. Furthermore, but inadequate provision is made for means by which the governor may currently keep himself informed regarding the conduct of governmental affairs, or be enabled to take the action required in order to correct abuses and secure improvements. The constitutional requirement that it is the duty of the chief executive to see that the laws are duly enforced is, thus, often little more than the expression of an obligation with complete failure to provide means by which it may be met.

Fortunately this defect in our governmental system is becoming recognized and attempts are being made to correct it, through the short ballot; the reorganization of the administrative branch upon a departmental plan, with the governor at the head; the adoption of a budget system under which the duty of preparing and submitting to the legislature a financial and work program is entrusted to the governor; and the enlargement of the powers of the governor to direct and control the work of the administrative branch. When these reforms are fully accomplished the responsibility of the chief executive to see that public law is duly enforced will become real instead of nominal.

Enforcement of Criminal Law. From the standpoint of principle, the obligation resting upon the chief executive to see that the laws are faithfully executed should apply with full force to the criminal law. It is the direct and positive duty of the chief executive to see that these laws are rigidly enforced. This duty has two sides: the seeing that all necessary steps are taken to prevent infractions of the criminal law, and that such infractions as do occur are detected and those responsible for such infractions duly prosecuted. Concretely, therefore, and by way of illustration, the President of the United States is under the constitutional obligation of using his powers to the utmost to prevent infractions of the constitutional and statutory provision relating to the manufacture, transportation, and sale of intoxicating liquors, and to secure the detection and prosecution of offenders against these laws. In like manner the governors of the states have the same responsibility in respect to state laws directed against the liquor traffic.

As in the case of the enforcement of public law, the distinction exists between the possession of responsibility and the possession

of means through which this responsibility may actually be met. It has been shown that, in the case of the enforcement of public law, the chief executive is not in a position to discharge his responsibility unless he is, in fact as well as in name, made the head of the administration; that, until a comparatively recent date, he did not occupy this position; and that only gradually are the powers and duties of this office being conferred upon him. In respect to the enforcement of the criminal law, the chief executive, to a large extent at the present time, lacks the specific power and agencies through which to meet his constitutional obligation. In the states, as is elsewhere pointed out, the governor has little or no direct control over the two agencies having as their function the prevention, detection, and prosecution of crime—the police and the office of prosecuting attorney. Though the enforcement of state law is manifestly a state duty, the actual work of prevention and detection of crime through the operations of a police force has been turned over almost wholly to the political subdivisions of the states and has thus passed out of the hands of the officers proper of the state. Only within recent years has a movement developed for the creation of a state constabulary which will give to the state its own service to act in this field. A like decentralization exists in respect to the work of the prosecution before the courts of those accused of criminal offenses, this work being performed not by officers of the state, but by officers of the political subdivisions of the state. These officers, both of the police and prosecuting services, are local officers, locally selected, compensated, directed, and controlled. Over their selection or the manner in which they perform their duties, the governor has little or no control.

There is some slight evidence that a correction of this anomalous condition of affairs is being attempted. Thus, to quote from Professor Mathews' treatment of this subject.[1]

> Although efficiency in the enforcement of state law is impeded by the prevalent system of administrative decentralization and dependence on local authorities, nevertheless there are some indications of increasing state control or supervision over the enforcement of state law. To some extent, such supervisory power over

[1] J. M. Mathews, Principles of American state administration, 432-33; 435-37 (1917).

law enforcement has been vested in the governor. The enforcement of the police laws of the state belongs primarily to the local officers elected for that purpose, but if such officers are derelict or impeded in the performance of their duties, the occasion may arise for action on the part of the governor. As has already been pointed out, the general power of the governor to see that the laws are faithfully executed is of little significance in the absence of further specific grant of power. This provision is "little more than a phrase conferring not a single specific power and sanctioning merely the privilege of issuing proclamations or writing letters warning officials to do their duty." (S. Freund in Political Science Quarterly 14, 408; cf. Opinion of the Attorney General of Vermont on the Power of the Governor of that state to stop exhibition of Jeffries-Johnson prize fight pictures in violation of a state law prohibiting exhibitions liable to corrupt the morals of youth. Biennial Report of Attorney-General of Vermont, 1910-12, p. 21.) In some states, however, further specific powers have been granted to the governor by constitution or statute. Thus in many states a small contingent fund is placed at the disposal of the governor which he may use in such ways as offering rewards for information leading to the arrest and conviction of law-breakers, employing independent investigators to learn if the law is being violated, to secure essential testimony or evidence and employing special counsel to assist in the prosecution. The fund at the disposal of the governor to be used in this way, however, is usually too small to be of much real service in securing the enforcement of law. The use of such fund on the part of the governor is more effective if combined with the exercise of some other specific administrative power in the enforcement of the law. Thus if the governor has the power of removing or suspending local officers charged with the enforcement of the law, he may sometimes effectively employ such fund in discovering through special detectives whether such officers are performing their duties in a faithful manner. In some states, notably New York and Wisconsin, the governor is vested with the authority to remove certain local law-enforcing officers, such as sheriffs and prosecuting attorneys, for such cause as seems to him sufficient. In other states, the governor may remove such officers, but only for special causes stated in the law. Thus, in Illinois the governor may remove a sheriff from whose custody a prisoner is taken and lynched. The power of the governor to suspend or remove local law-enforcing officers for cause is a mere logical corollary from his responsibility under the constitution for seeing that the laws are faithfully executed, but unfortunately it is not generally granted to him. In most states the condition is very much as described by Governor Shafroth of Colorado: "I am required by the constitution to enforce the laws. But there is not a sheriff or other county

officer that is dependent upon me; he can defy me; he can say 'I will not enforce those laws.' What is the efficiency of my office under those circumstances? The only power I have is to call out the militia to suppress something." Theoretically the sheriff is a deputy governor, acting in subordination to the chief executive. Theoretically the governor "representing the sovereign power in the state, is always virtually present in court to execute its process whenever the power of marshal and ordinary posse may not be sufficient for the purpose, or when the peace and dignity of the state may require." But the governor has no authority to order a sheriff to release a prisoner committed to his custody by a judgment to court, and if courts and juries fail to convict in the face of conclusive evidence of guilt, the governor is powerless to enforce law through his own individual action.

* * * *

In some states the power of the governor over state law enforcement has been strengthened by the enactment of laws vesting in him the authority to appoint special agents for the enforcement of particular laws. Probably the most frequent instance of this power of the governor occurs in connection with the enforcement of state prohibition or liquor laws. Thus a South Carolina act of 1907 authorized the governor to appoint detectives to enforce the Dispensary Law of the state, regulating the sale of intoxicating liquors. The special officers or agents appointed by the governor are sometimes authorized to exercise the same powers as are generally exercised by certain law enforcing officers. The exercise of such powers on the part of the centrally appointed agents may be concurrently with the local officers, or may have the effect of displacing such local officers for the time being with respect to the enforcement of certain laws. Thus a Maine law of 1905 authorized the governor to appoint a board of enforcement commissioners, who are in turn empowered to appoint deputies with authority to exercise in all parts of the state the powers of sheriffs in their counties in the enforcement of the law against the manufacture and sale of intoxicants. Similarly, an act passed in Oklahoma empowered the governor to appoint a special attorney who should, at the direction of the governor, assist in enforcing the state prohibition law and should have all powers of county attorneys in their respective counties. The power vested in the governor to appoint special enforcing agents is sometimes developed into one of a more general character, and not confined to the enforcement of any particular law. Thus, a recent Oregon law, after reciting in a preamble, that "whereas the constitution requires the governor to take care that the laws be faithfully executed and enforced, and whereas there is no adequate provision by statute to effectually carry out the mandate of the said constitutional pro-

vision by vesting the governor with authority to compel observance of said provision" enacted that whenever, in the opinion of the governor, the criminal laws of the state are not being faithfully executed and enforced in any district of the state, he may lay the facts before the circuit court for investigation in a summary manner. If the court finds that the criminal laws are not being faithfully executed, the governor may appoint for a limited period such special officers, as sheriffs, district attorneys, or constables, as may be necessary to correct the failure to execute the laws. Such special officers under the direction of the governor are to exercise the same powers as the regularly elected officers. Such special powers of the governor in law enforcement, however, are found only in exceptional cases.

Even under the best of conditions this power to remove confers but a negative power, and that one to be exercised only under circumstances of unusual gravity.

The function of the state, as contrasted with that of the political subdivision, with respect to the enforcement of the law, and the power of the governor to act, have been increased within recent years, through the establishment in a considerable number of the states of a state police force or constabulary. This significant development will be elsewhere considered when the subject of the police as a law enforcement agency is taken up.

More remarkable still, in most of the states, the governor has hardly greater authority in respect to the chief law officer of the state, the attorney general, since this officer is not selected by him, but holds office as the result of direct election by the people, gets his authority directly from the people or from the legislature, and does not recognize the right of the governor to direct or control him in respect to the manner in which he shall perform his duty, except as to those matters, such as the giving of opinions on legal questions when called upon so to do by the governor, that are specially set forth in the constitution and statutes. The actual situation of the governor in respect to the possession of means by which he can meet his responsibility of seeing that the criminal law is duly enforced, is thus not unlike that occupied by him in the past in respect to the possession of means for seeing that public laws are duly enforced.

In the national government conditions are somewhat better. Here the chief law officer, the Attorney General, is appointed by the President and may be removed by him, and all administrative

officers exercising police or quasi-police functions, such, for example, as officers of the Coast Guard, owe their appointment directly or indirectly to him. This power of appointment and dismissal, which may be exercised by him directly or indirectly, places in his hands the power to make his will prevail even though no constitutional or statutory provision conferring power upon him to give orders may be quoted.

This matter of the power possessed by the chief executive to see that the criminal laws are duly enforced has been discussed at some length, since it is desired to raise the question whether it is proper to provide that an officer shall have a responsibility without giving him the means of meeting this responsibility, and, furthermore, whether as a matter of practical administration, it is not desirable that the chief executive shall, in fact as well as in name, be made the head of the law enforcement agencies, in so far as the exercise of general powers of direction, supervision, and control are concerned, in the same way that it is desirable that he shall be head of the administrative branch generally and be commander in chief of the armed forces. As will appear in the discussion of the offices of Attorney General and prosecuting attorney it is believed that action should lie in this direction.

Enforcement of Private Law. The obligation found in American constitutions that it is the duty of the chief executive to see that the laws are faithfully enforced makes no distinction between public, criminal, and private law. The whole principle underlying the system for the enforcement of private law, as elsewhere set forth, is that the state does little more than furnish the facilities for the enforcement of this class of law, responsibility for making use of these facilities being left to the private parties interested either as complainants or defendants. With this principle in force the duty of the chief executive in respect to the enforcement of private law is limited to that of merely seeing that the facilities for private litigation are adequate and are properly operated. Since the laws governing the establishment and operation of these facilities are a part of public law, his responsibility is to see that public rather than private law is duly enforced. This is a matter which has already received consideration.

Emergency Action by the Chief Executive. Under certain circumstances the duty of the chief executive to see that the laws are faithfully executed becomes of great importance, as where refusal to obey the law is on such a scale that it is difficult, if not impossible, for the ordinary agencies of the government to cope with the situation. Such circumstances arise when disorder assumes the proportions of a riot, when resistance to the law is not individual but collective, and possibly organized, and when attempts are made to overthrow the government itself by force. Under such circumstances it becomes the duty of the chief executive actively to interfere and to take, or authorize to be taken, unusual measures for coping with the situation. The means at his disposal for doing this are various, the most important being the calling out of the armed forces of the government, the army and the navy, or the militia.

Use of the Military Forces. In considering the powers of the chief executive to make use of the military forces to enforce law, a distinction must be made between the power of the governor of a state and that of the President of the United States. As a matter of administration, responsibility for the maintenance of law and order rests primarily upon the authorities of the political subdivision of the state. The chief executives of such subdivisions, however, have no power to summon to their aid the armed forces of the state. If matters go beyond their control, their only recourse is to appeal to the governor for assistance in the way of sending to their aid the state constabulary, when provision for such a force exists, or the ordering out of the state militia. Whether the governor will meet this request, is entirely a matter of discretion on his part. It is not necessary, however, for the governor to await such request before acting. He has complete authority to act whenever in his judgment such action is desirable.

The use by the President of the armed forces of the nation to enforce law raises a number of important constitutional questions growing out of our federal form of government. There is no question that primary responsibility for the enforcement of law speaking generally rests upon the states. Circumstances may arise, however, where the states either are unable or refuse to meet this obligation. The two questions are thus presented as to the circumstances under which the President may, or should, order out the armed forces

of the nation; one, to secure enforcement of the federal laws; and, two, to aid the states in the enforcement of state laws.

The Constitution provides that "The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," and that "The United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

In virtue of these provisions the military forces of the national government may be used: (1) To suppress insurrections and repel invasions; (2) to enforce federal laws and protect federal property; (3) to meet the obligation of guaranteeing to the state a republican form of government; and (4) to repress domestic violence upon the request of a state, acting through its legislature or its chief executive when the legislature cannot be convened.

Though the Constitution does not specifically designate the agency of the national government to exercise the authority of determining when use shall be made of the armed forces, it has been held that the President is such agency; that full discretion in respect to the use of such authority rests with him. Leading examples of the exercise of this power are the suppression of Dorr's Rebellion in Rhode Island, and the use of federal troops to protect the mails, the courts, and federal property by President Cleveland on the occasion of the Chicago railroad strike of 1894.

CHAPTER X

DEPARTMENT OF JUSTICE AND OFFICE OF ATTORNEY GENERAL

Though consideration has been given in the preceding chapter to the functions of the executive branch in respect to the three classes of law, public, civil, and criminal, the practical problems of law enforcement under existing conditions have to do almost wholly with the criminal law. Our subsequent consideration will consequently be devoted to this subject. Examination of this problem shows that use is made by the executive branch of our government of the following agencies in performing its function of securing an enforcement of the criminal law: (1) A department of justice; in the case of the national government, or office of attorney general, in the case of the states; (2) the office of prosecuting attorney; (3) police; (4) grand jury; and, (5) coroner. Each of these agencies will be considered in turn, the present chapter being devoted to the first.

Limited Functions of Attorney General in the States. It is a remarkable fact that, though the primary, and in many respects the most important, function of government is the enforcement of law, and that primary responsibility is placed upon the chief executive to see that this function is properly performed, but slight provision has been made in the United States for vesting in any one officer direct responsibility for taking the action required. The nearest approach to such an officer in the states is the attorney general. A study of the political status and duties of this officer shows, however, that he is far from having the position or powers that should be possessed by one upon whom rests the direct responsibility of seeing that the laws are duly enforced. In the first place the attorneys general in the states are for the most part largely independent of the governor due to the fact that they are generally neither appointed nor removable by the governor, but hold office as the result of a popular election. Secondly, as a matter of law, they are not given the direction and control of the agencies

made use of by the state for the enforcement of law. And, finally, they are not regarded by the public as officers whose duty it is to take the action required to ensure a rigid enforcement of the law of the land. In fact, their position is little more than that of legal advisor to the government with the added duty to represent the government in civil cases in which the government is a party.

It is true that a reading of the law defining the powers and duties of attorneys general indicates that these officers may intervene and play a certain part in the prosecution of crime. In point of fact, however, they do, and can do, but little in this direction. Their function and action in this way, as summarized by Professor Dodd in his excellent work on state government, are as follows:

> In the prosecution of violations of state law, the attorney general has in most cases some broad general authority to intervene in cases and to aid in their prosecution. Sometimes his authority extends to the point of completely superseding the locally elected prosecuting officer. However, the attorney general, even though he possesses such powers, will be able to intervene only in occasional cases of great importance; he must necessarily leave to the local prosecuting officers the general task of law enforcement within their respective territories. There are in many states laws authorizing the appointment, either by the attorney general or by the courts themselves, of special prosecutors for the conduct of particular cases; but such a power will be employed only in exceptional cases. In North Dakota an act authorizing the appointment of enforcement commissioners, who should have all the powers of state's attorneys in the enforcement of the prohibition law was held unconstitutional on the ground that such powers are reserved to officers elected by local vote.[1]

The explanation of this anomalous situation of affairs, where a state has a great function to perform and yet makes no adequate provision for an agency through which to do so, is to be found in the fact that the states have almost uniformly delegated the performance of this function to their local political subdivisions. The result is that there is an almost complete decentralization in respect to the enforcement of law. The two great agencies of law enforcement, the police and prosecuting attorneys, are local, not state,

[1] W. F. Dodd, State government, 290.

agencies.[2] As stated by another of our leading students of state government:[3]

In legal theory, sheriffs, states' attorneys and police are state officers acting as the agents of the state in their localities (Chicago v. Wright, 69 Ill. 326) but for practical purposes they are local officers, because subject in the main to local control only. Other things being equal each local officer enforces the law, or fails to do so, in accordance with whatever course of action will best further his political interests. The sentiment of those who control his tenure of office or his rise to a higher office is naturally a determining factor, unless indeed, present inducements exceed future prospects in his estimation. Those who bewail the prevalent disregard of law and attribute all lawlessness to the pusillanimity of sheriffs, states' attorneys and grand juries may well consider whether this condition of affairs is not due rather to the system of nominal popular election of local executive officers who are thus actually placed under the control of sinister unofficial influences, and to the consequent lack of general popular control over them which might otherwise be exercised through the effective administrative supervision of the state executive authority.

Of this situation our leading journal of law reform, in its editorial comments, writes:[4]

Considered theoretically can anything be more absurd than our traditional handling of this highly important matter of prosecuting? The laws are state laws; the work of enforcing them is a state function. But we have no state organization of prosecutors. Instead we have a thorough decentralization of this function. . . . The lack of state organization makes the administration of this office extremely personal and local. Only in slight measure is the office linked up with the state office of attorney general. There is no broad state policy with respect to prosecutions. There is no interdependence as between the separate units in this field.

The evils of this situation are in part recognized and attempts have been made here and there to place in the hands of the attorney general or the courts power to intervene or to remove local law-

[2] As will later appear, provision has been made by a number of states for a state constabulary. These forces, however, supplement but do not take the place of local police forces.

[3] J. M. Mathews, Principles of American state administration (1917), 424.

[4] *Journal of the American Judicature Society*, October, 1927.

enforcing officers who have been guilty of misconduct in the discharge of their duties. To quote Professor Mathews again:[5]

A method of control over local law-enforcing officers which combines both judicial and administrative procedure is found in some states. Thus, in Indiana and Nebraska, a local prosecuting attorney who is derelict in the performance of his duties may be ousted by the Supreme Court of the state as the result of *quo warranto* proceedings brought against him by the attorney general. Under the so-called Carson law, enacted in Iowa (Laws of 33d General Assembly of Iowa, ch. 78. See also S. D. Sess. Laws 1915, ch. 268) and copied in some other states, the attorney general may bring an action in the district court to remove any county attorney, sheriff, mayor, police officer, marshal or constable, for willful or habitual neglect or refusal to enforce the law. "Under this law a few removals have been made and in many more cases a threat of proceedings has stirred reluctant officials into activity."

At best this method works intermittently and is calculated to meet only the more extreme cases of remissness or misconduct.

Federal Department of Justice. In marked contrast with the states, is the system of the national government. Here, there is a Department of Justice, with general direction and control of the enforcement of all federal criminal law. The several prosecuting attorneys or district attorneys, as they are called, are officers of the Department of Justice. They are appointed by the President who, in making his selections seeks the advice of the head of the Department of Justice, the Attorney General. They constitute the field establishment of the Department and perform their duties under the general direction and control of the Attorney General. Through the requirement of the maintenance by the district attorneys of records showing their operations, and the rendition of reports, the Attorney General is in a position to exercise an effective oversight of the manner in which they perform their duties. If there is a failure anywhere rigidly to enforce the federal laws, the Department of Justice cannot escape responsibility. In the Attorney General the President thus has an officer, corresponding to the Secretaries of War and Navy as regards his duties as commander in chief of the armed forces, through whom he can perform his duty of seeing that the laws are duly executed.[6]

[5] *Op. cit.*, 426.

[6] It is not intended by the foregoing to take the position that the federal system is in all respects satisfactory. Thus, for example, it might be well

Need for Departments of Justice in the States. There can be little doubt that the federal system is far superior to that of the states, and that one of the greatest reforms that can be accomplished in the system of judicial administration in the United States would be the adoption by the states of the federal system. It is impossible to secure a really effective system for the enforcement of criminal law in the United States until the several states make provision for an officer having both the responsibility and the necessary administrative machinery for seeing that the laws upon the statute books are properly enforced. In an interesting passage, Professor Mathews points out that the need for a greater centralization in the state government of authority for the administration of the law was recognized over a hundred years ago.[1]

That the correct solution of this difficulty must consist, at least in part, of greater administrative centralization in law enforcement was perceived and pointed out as early as 1821 by such men as Martin Van Buren and Rufus King in the New York Constitutional Convention of that year. Van Buren called attention to the fact that the want of proper administrative connection between the chief executive of the state and the local officers, such as justices of the peace and magistrates, through the agency of whom he must execute the laws, had produced endless difficulties, embarrassments and lack of coöperation of the public officers during the late war (of 1812). (Proceedings and Debates of the New York Constitutional Convention of 1821, p. 342.)

Rufus King was even more emphatic in his insistence upon central administrative control of local law-enforcing officers. "The

that attorneys should constitute a united force in the sense that, instead of being appointed for particular judicial districts, they should be appointed at large and thus be available for detail by the Department to particular districts, to transfer from one district to another, or for two or more to be assigned to a district when work is heavy or in arrears. It may also be desirable that the force of prohibition agents who are in effect a special police force should be attached to and under the direction of the Department of Justice, instead of being attached as a bureau to the Treasury Department. For analogous reasons, certain other field agents, such as the secret service of the Treasury Department and the force of postal inspectors, whose duties are mostly the detection of violations of the postal laws, could with advantage be transferred to the Department of Justice. Action in this way would not only result in increased economy and efficiency, but would also tend to make more clear and effective the function of the Department of Justice as the agency of the national government having responsibility for the enforcement of federal law.

[1] *Op. cit.*, 427-28.

sheriffs," he declared, "are ministerial officers directly connected with the supreme executive. He is responsible for the execution of the laws and they are the agents and the instruments with which he is to execute them. How can he be responsible for the faithful performance of this important trust, if you deprive him of the only means by which he can execute it? . . . How can the governor be justly held responsible for the faithful execution of the laws, if he has no control over those by whom all processes, civil and criminal, are to be executed; who may command the power of the county and of the neighboring counties to their aid in case of resistance? Suppose a spirit of insubordination and discontent to exist in certain counties, which it was a part of the appropriate duty of the executive to repress and subdue: Would you furnish him beforehand with the excuse, that though he had the best disposition to perform his duty, you had deprived him of the means of doing it, by vesting in other hands the nomination of the agents through whom alone he could enforce obedience to the laws? Is it not risking the good order and harmony of society thus to weaken the responsibility of the executive? In order to secure this responsibility, the executive power must be united, consolidated, and connected in all its ramifications with the supreme government of the state." (Proceedings and Debates of the New York Constitutional Convention of 1821, p. 387.)

The centralization of the function of law enforcement in the state would, of course, mean a revolution in respect to the attitude of the states toward the enforcement of the law. Instead of leaving the performance of this function to local agencies, it would assume the task of law enforcement itself through its own agencies. A necessary feature of the system would be that of providing for a force of district prosecuting attorneys who would be state officers directed and controlled by the state department of justice. This would not do away with the necessity for attorneys attached to and constituting a part of the local governments having for their duty the enforcement of local ordinances as distinguished from state laws.

It is recognized that any such step will have to meet the criticism that it represents a centralization of political authority, and thus does violence to the deep-rooted predilections of the American public for local self-government. It is also one that can only be accomplished through the revision or amendment of the state constitution. It is well, however, to face this issue. We should at least know what it required if this great problem of securing a

rigid enforcement of law is to be met, even though it may be a matter of years before the public are prepared to take the necessary steps.

There is some slight evidence of an increasing recognition of the desirability that the state, acting through its office of attorney general, should exercise a greater part in the enforcement of criminal law. Thus, Louisiana, in its constitution, adopted in 1921, provides for a Department of Justice instead of merely the office of attorney general, and directs that its head, the Attorney General, and his associates "shall attend to and have charge of all legal matters in which the state has an interest, or to which the state is a party, with power and authority to institute and prosecute or intervene in any and all suits or other proceedings, civil or criminal, as they may deem necessary for the assertion or protection of the rights and interests of the state. They shall exercise supervision over the several district attorneys throughout the state and perform all other duties imposed by law." This is a step in the right direction, but it is, at best, but a short one. In the first place, the Attorney General is elected by the people, and thus cannot be used by the Governor as his chief officer in seeing that the laws are faithfully executed in the same way as he could be if he owed his selection to the Governor. Secondly, the district attorneys, though declared to be subject to the supervision of the Attorney General, are elected by the voters of the districts in which they perform their duties. The supervisory power declared to be vested in the Attorney General can thus be of but the most general character.

Department of Justice in Porto Rico. It is a matter of interest to note that the system here advocated of centralizing in the hands of the state department of justice responsibility for the enforcement of law is the one that has been adopted in Porto Rico. There all the local *fiscals,* or prosecuting attorneys, are officers of the insular department of justice. They are appointed and are removable by the insular Attorney General; they perform their duties under his direction and through a system of records and reports he keeps in close touch with the performance of their duties by them. That a centralized system of law enforcement is both feasible and gives excellent results in practice, is a matter of personal knowledge to the present writer who spent eight years in the island as one of its departmental officers.

Need for Centralization of Law Enforcement in the States. Nowhere has the author found so careful and able a consideration of this problem of determining the political authorities that shall be responsible for the enforcement of law as that given by Professor Mathews in the volume above mentioned. So valuable is this discussion as to justify quoting again, and at length, from the general consideration there given of this problem. He says:[8]

Two main difficulties stand in the way of reaching a correct solution of the problem of state law enforcement in the localities. In the first place, under existing state legislation, there is a conflict between the will of the state as embodied in such legislation and the will of the locality in regard to the expediency of such legislation as applied to itself. Unfortunately, it frequently happens that the state undertakes to regulate by law matters in regard to which uniformity of policy is not essential to the well-being of the state, but which are in reality primarily local matters. Under these circumstances a proper consideration for the interests and sentiments of the localities would require the transfer to them of power to regulate such matters to suit themselves. For the solution of this difficulty, therefore, a broader legislative power should be granted to the localities than they now possess, somewhat similar to that which they enjoy in countries of Continental Europe, while state legislation should be confirmed to the regulation of matters which are of state-wide concern, or in which state-wide uniformity of policy is essential to efficiency of administration.

The second main difficulty, which stands in the way of reaching a correct solution of the problem of state law enforcement in the localities, lies in the fact that the officers who are charged with the duty of enforcing state laws are frequently charged at the same time with the performance of purely local functions and through the method of local election are for the most part subject only to the control of the localities. Under these circumstances, such officers play a dual rôle and owe a double allegiance, and if they usually act as though their primary allegiance in case of conflict is to the locality at whose behest they hold their offices and fail to enforce a state law to which local sentiment is hostile, such a result is only a natural consequence of the position in which such officers are placed. To remedy this situation, two principal solutions may be suggested, and have been to some degree adopted. The first solution is to place such local officers under state control. This object may be effected in various ways, such as by taking their selection out of the hands of the localities and subjecting them to the direct appointment and removal of central administrative

[8] *Op. cit.*, 430-32.

authorities. In this way the officers charged with the enforcement of state law will be brought under the pressure of responsibility to state-wide public opinion, which would ordinarily be more favorable to the enforcement of state law than would be the sentiment of many localities. To this solution of the second main difficulty, however, a legitimate objection may be urged. Since no new officers have been created, the law-enforcing officers who, by this proposed solution, have been placed under state control are still charged with the performance also of certain purely local functions. Moreover, proper regard for local interests requires that each locality should have some voice in the selection and control of those officers who perform in that locality functions of a purely local character, while, at the same time, due consideration for the interests of the state requires that the state should control the officers charged with the enforcement of laws of extra-local concern. A better solution of the second main difficulty, therefore, would consist in the separation of state and local functions and functionaries. Local officers, charged with the performance of local functions, should continue to be chosen and controlled by the localities, but should be shorn of all except local functions. For the regulation of matters of extra-local concern and for the enforcement of laws and the performance of functions in which the state as a whole is interested, state machinery and state officers should be created, who should be subject to the immediate control of central administrative authorities. Such new state officers would not necessarily exercise jurisdiction over districts corresponding exactly to the existing local political subdivisions of the state. Upon the supposition that the first main difficulty, enumerated above, has been met by a proper delimitation of the respective boundaries of state and local legislative power, the adoption of this proposed solution of the second main difficulty would bring about a situation in which local ordinances would be enforced by local officers while state laws would be enforced by state instrumentalities. Under these conditions, the state might avoid the imputation of facing two ways, of enacting laws and then not providing the machinery necessary to their enforcement.

It will be noted that the position here taken that provision should be made in each state for a real department of law enforcement involves centralization in two respects: first, the centralization in the state of the work of seeing that the laws are enforced; and second, the centralization in a single department of responsibility for the performance of all the work having to do with the enforcement of the law. The second of these requirements carries with it much more than making the district prosecuting attorneys officers

of this department and subject to its direction, supervision, and control. To be fully effective the department of justice should also have the direction and control of other law enforcement officers and particularly of the state constabulary and even of the ordinary police. This is a subject that will receive further attention in the chapters that follow dealing more specifically with the offices of prosecuting attorney and police.[9]

Proposal for a Department of Justice in England. Before leaving this matter of the need for a department of justice in each of the states, attention may be called to the fact that the desirability of such a department is beginning to be recognized in England. There the special committee, that was created immediately after the termination of the World War to consider how the government might be better organized, in its report, submitted in 1918, laid great stress upon the desirability that existed of effecting a coördination of law enforcement agencies and of bringing into existence a department of justice analogous to the ministries of justice possessed by most European governments. On this point it said:[10]

If the principle to be adopted in distributing the business of government is that of concentrating the various branches of each service as far as possible in the hands of a single authority, considerable changes will be requisite in the case of the administration of justice. No one proposes to interfere with the powers and duties of the judges. But their appointment and the working out and carrying into operation of their decrees and the general administration necessary for these latter purposes, form a division of government as widely scattered as it is large. There is no functionary at present who can properly be called a Minister responsible for the subject of justice. The responsibility, so far as provided for and so far as England is concerned, is shared between the Lord Chancellor, the Home Secretary and, in a less degree, the Attorney General and the Chancellor of the Duchy of Lancaster. Besides these Ministers, there are minor but important judicial or quasi-judicial functions which are increasingly exercised by such Departments as the Local Government Board and the Board of

[9] For a very acute and philosophical discussion of this whole question of the relationship between the state and its political subdivisions in respect to the enforcement of the law, see F. J. Goodnow, Politics and administration (1900).

[10] Report of the Machinery of Government Committee, p. 63 *et seq.* (1918).

Education. We doubt the desirability of attempting to take out of the hands of Departments specially qualified to deal with them the decision of such questions as whether a closing order should be made under the Housing and Town Planning Act, or whether a Local Education Authority has made adequate provision for the salaries of teachers in non-provided schools. It may well be best to leave certain matters where Parliament has placed them, notwithstanding that in certain aspects they fall within the province of justice.

But as regards the general subject, we think that a strong case is made out for the appointment of a Minister of Justice. We are impressed by the representations made by men of great experience, such as the President of the Incorporated Law Society, as to the difficulty of getting the attention of the government to legal reform, and as to the want of contact between those who are responsible for the administration of the work of the Commercial Courts and the mercantile community, and by evidence adduced that the latter are, in consequence and progressively withdrawing their disputes from the jurisdiction of these courts. We are not less impressed with the total inadequacy of the organization which controls the general administration of the very large staffs, with the voluminous business, required to give effect to the decrees of the Courts of Justice throughout the country. One of the chief reasons for this inadequacy is the magnitude and variety of the duties with which the Lord Chancellor is charged without really being allowed the time or the machinery requisite for their performance. It is one thing to hold the position of chief legal adviser to the Government and quite another to possess the powers which a Minister of Justice ought to have.

Here follows an exceedingly interesting statement of the duties of the Lord Chancellor, who, more than anyone else, has the duties of a minister of justice. After showing the great variety and importance of these duties, and the impossibility of any one officer giving to them all the personal attention needed, the report recommends many changes in the office. In respect to the creation of a ministry of justice, it states as follows:

But we think that in order to make it possible for the Lord Chancellor to perform these duties adequately, it is essential that the general work of administration in connection with justice in other matters should pass to a regular Minister of Justice. There seems to be no reason why the Home Secretary should not become this Minister and be relieved of functions pertaining to other national services, such as those concerned with health and with pro-

to "get his rights" by applying to the nearest magistrate. But in point of fact, unless he has the coöperation of the district attorney here and later he can accomplish little. . . .

The very fact that comparatively few people come into contact with the criminal law and that most lawyers avoid the practice of it surrounds the district attorney with an atmosphere of mystery. His word "goes" much further than that of somebody whose statements can be more easily checked up. He can blast and blight an enemy by a skilful innuendo or he can put him in a totally unfair and prejudiced position from which no explanation however sound or truthful, can for the time being extricate him. His words in court are, to a large extent, privileged. If he wants to "pigeonhole" or "smear" a case he can do so in such a way that no one can prove it; and he can obscure the true nature of any official act with such a smoke screen of technicalities that few dare even criticize it.

In a word his office is the most valuable political asset in the community for his party or for himself, for he can annihilate his enemies and exalt his friends, disclose or conceal abuses as may be most expedient and pass as a champion of the people and an enemy of the politicians even when in a "receptive" state of mind or in actual negotiation with the bosses.

Writing on the same subject, the distinguished jurist, Roscoe Pound, says:[2]

. . . The wide powers of local prosecutors, the lack of control over them, and the extent to which they may determine the whole course of law enforcement, without leaving a tangible record of what they have done and what they have undone, are beginning to attract attention. No officer in our large cities has so much real power with so little ostensible power. The easiest path to improper influences upon criminal justice is through the office of the public prosecutor, and there is much evidence that professional defenders of professional criminals and professional extortioners from occasional offenders in more than one American city understand this thoroughly.

The Missouri Crime Survey puts the importance of this office still more graphically:[3]

The very heart of the criminal process is the prosecuting office. Its power over the life of a case is practically without limitation. The prosecutor may prosecute or refuse to prosecute. No prosecution may start until he files his information or until the grand jury finds a true bill. The grand jury, seldom used in initiating

[2] Criminal justice in Cleveland, 595-96.
[3] Missouri crime survey, 113.

prosecutions, is in fact dominated by the prosecutor. He may bring the efforts of the arresting officer to an end by refusing a warrant. After the preliminary hearing, he may, if the defendant is discharged, revive the case by filing an information in the circuit court, and if the defendant is bound over he may terminate the action by refusing to file an information or to present the case to the grand jury. At any stage before the trial jury is sworn he may on his own responsibility *nolle pros.* the case and if the jury is sworn his recommendation is usually followed by the court. After conviction or upon plea of guilty the court usually depends upon the prosecutor's advice in fixing punishment. Finally, the authorities sometimes consult him in the granting of pardons, paroles and commutations. Thus the influence of the prosecutor in the criminal process is continuous, and in most stages decisive.

Broad Powers of the Office. The overwhelming importance of this office arises from the fact that upon the prosecuting attorney, and upon the prosecuting attorney alone, in the great majority of cases, rests the power of determining whether prosecution in any given case shall be inaugurated, or, if inaugurated, pushed to a successful conclusion. As will later appear, the work of grand juries is concerned almost wholly with the consideration of cases brought before them by the prosecuting attorney, and, in the consideration of such cases, it is largely guided, if not dominated, by this officer. In the handling of petty cases his power is still more absolute in determining the cases that shall be brought before the courts. His power does not cease at this point. After prosecution is inaugurated, it rests almost wholly with him whether the case shall be pressed and adequate effort be made to secure the necessary testimony or to take the other steps that will lead to conviction. He can allow the case to drag, ask for continuances if the case is called, and, finally, kill the case by asking for a *nolle pros.*, a request that is almost invariably granted by the court. Finally, if the case is pushed to a conviction, his recommendation has great weight with the judge in fixing the penalty or permitting the prisoner to be discharged under parole. From start to finish, the prosecuting attorney powerfully influences, if he does not wholly control, the prosecution of crime in his community.

It is inevitable and desirable that the prosecuting attorney should have broad powers. There are many cases where discretion should be exercised in respect to the inauguration of criminal proceedings. Some of the circumstances that may render such action inadvisable

are: the petty character of the offense, the lack of criminal intent, inability to secure the evidence that will lead to a successful prosecution, or a crowded condition of the criminal docket, making it necessary to select for prosecution those cases which it is for the best interest of the public to have considered.

Legal Status of the Office. In view of the importance of this office and the gravity of the powers possessed by its incumbent, one would expect that unusual care would be exercised in providing for the way in which the prosecuting attorney is selected, with a view to ensuring that a proper person is secured. Quite the contrary, however, is the case. Foremost among the defects of this office is its legal status. Its incumbent is, with rare exceptions, a local officer elected for a comparatively short term by the voters of the district in which he performs his duties. The office is thus a political one in the fullest acceptation of term. This means not only that considerations other than qualifications for the position will have great, if not controlling, force in determining the selection of the prosecuting attorney, but that political influence will be exerted to control the selection of his subordinates and the manner in which the affairs of his office are to be conducted. To quote Harlan F. Stone, formerly Dean of the School of Law of Columbia University, later Attorney General of the United States, and now a Justice of the Supreme Court of the United States: [4]

Fundamentally, there is no more reason why the office of the public prosecutor should be a political office than that of a judge of the federal courts, and yet infinite harm is done to the course of law enforcement and good government in this country in consequence of the fact that that office is either frankly and avowedly political or in any event is peculiarly subject to untoward political influences. This fact, coupled with our inadequate administrative system, or no administrative system at all in the conduct of those offices is probably more responsible for the lax administration of law than all other causes combined. Lack of system in the assignment of work and handling of cases; inadequate office records; lack of available records of those who are second offenders; carelessness in the preparation of cases; in the filing and recording of affidavits; absence of the methods of fixing personal responsibility which prevail in a well organized private law office; all encourage inefficiency and give latitude and opportunity for negligence and corrup-

[4] Progress in law improvement in the United States. Report, American Bar Association, 1924, p. 199.

tion. I venture the opinion that wherever there is laxity and inefficiency in law enforcement that there these conditions will be found to prevail. With such possibilities ever present, we should not be surprised that the machinery of justice does not always work with that exactness and precision which the legal theory presupposes and that justice is evaded through delays; the *nolle prosequi;* the suspended sentence; through pleas of guilty to the lesser offense; through light or reduced sentences, and the like.

One has but to contrast this feature of the office with that of the corresponding office in other countries to appreciate the handicap that the American system labors under at the very start. In England, all officers having charge of the prosecution of crime are appointed, and are wholly removed from political influence. In both France and Germany, and the same is true of other European countries, the public prosecutor is recognized as a member of a distinct profession in the service of which he has a permanent career. One of the great reforms needed in the American system for the enforcement of the criminal law is to take action that will result in removing this office from the class of political offices. This can be secured by providing that the office shall be filled by appointment, and by making the tenure one for a long period of years, or during good behavior; in a word, by applying to this office the same principles of selection and tenure that are employed in seeking to give to judges an independent status. Much the most effective means of putting this office upon a proper basis would be, as has already been indicated, by making it a state, instead of a local, office, and by providing that its incumbent shall be selected, directed and controlled by the head of the state department of justice.[5]

Evil of Right of Prosecuting Attorneys to Engage in Private Practice. A second defect is the right which prosecuting attorneys usually have to engage in private practice. It permits the prosecuting attorney to devote but part of his time to the duties of his office with the result that his official duties are more or less interrupted, and that he is subjected to influences that cannot but militate

[5] It is of interest to note that the Governor's Committee on Consolidation and Simplification of Virginia, in its able report on "County government in Virginia" (1927), makes the strong recommendation that the commonwealth's attorneys in the several counties hold office by appointment by the Governor instead of by popular election in the counties as at present.

against the proper performance of his duties. As the Cleveland Survey says:[6]

> Private practice necessarily cuts into the time, energy, and attention which proper performance of the work demands. But that is not its most serious defect. Lawyers engaged exclusively in private practice know the frequency with which the possibilities of conflicting interests of clients produce complex ethical problems. For an attorney who represents both public and private interests, these problems become more numerous and difficult. The private practice of a man in the prosecutor's office inevitably furnishes an opportunity and temptation to corruption in the most complex and subtle forms, from which only the strongest man, and one conscious of the finest ethical distinctions, can escape. But more than that, even where there is no corruption, public suspicion may be aroused, and that is damaging to the administration of justice.

Evils of the Fee System. In some cases provision exists for the compensation in whole or in part of prosecuting attorneys by fees. This is undesirable. Until recently this system existed in Maryland as the result of a constitutional provision. One of the accomplishments of the Baltimore Criminal Justice Commission was the securing of an amendment doing away with this system. The amendment was drafted by the commission, its passage by the legislature promoted, and its ratification by the voters secured at the election of November 4, 1924.

Lack of Coördination Between Office and Police. Direct responsibility for the enforcement of the criminal law in the United States is divided between two distinct services: the police and the office of prosecuting attorney. It is the duty of the police to detect crime, to formulate charges against the persons believed to be guilty of such crime, to arrest such persons, or summon them to appear before the proper court for the hearing of the charges preferred against them, and to secure the evidence in support of such charges. It is the duty of the prosecuting attorney to see that this action is taken by the police, when complaint is made directly to him, or violations of the law come to his attention in any other way; to see that these charges are brought before the grand jury, when action by that body is required; and to take charge of the prosecution of the charges before the court. It will be seen from this statement that, though the prosecuting attorney is responsible for the prosecution of crime, he is largely dependent upon the police,

[6] *Op. cit.*, 156-57.

not merely for the detection of crime and the arrest of the offender, but for securing the evidence upon which successful prosecution may be had. Manifestly, therefore, a proper enforcement of the criminal law can only be secured when these two agencies work in close coöperation.

Unfortunately, this coöperation is largely lacking in most jurisdictions. Each service works to a great extent independently of the other. The prosecuting attorney, no matter what his theoretical powers may be, does not concern himself with the securing of the evidence, or the preparation of cases, except when they are of such unusual or considerable importance as to attract public attention. He, or his assistants who undertake the conduct of the case in court, know nothing about the cases except what they learn from the police. This information, moreover, they do not get in any formal report by the police but usually only in the form of the document making the formal charge and the names of witnesses suggested by the police, with possibly some scribbled memoranda. Usually they do not get even those meager data until just before going before the court, and often they do not go over it until after they are in the court room. The following account of the manner in which cases are normally handled, as given by the Cleveland Survey, represents conditions that are duplicated in many other jurisdictions:[7]

The trial of two cases a day by the same prosecutor before the same court is habitual, the trial of three cases a day very frequent, of four cases not exceptional. In addition to the trials, there are generally each day several arraignments of accused "for receipt of the plea," and also the pleas of guilty with sentence thereon. The course of most trials is interrupted by these miscellaneous matters and by the receipt of the jury verdict in a previously tried case.

Just before entering upon the trial of the first case of the day the trial prosecutor receives from the assignment commissioner a package of papers consisting of the indictment, of other pleadings, the names of witnesses, and notes of the testimony of the witnesses before the grand jury in cases which might be reached that day. It is quite apparent that he proceeds to try the case with little or no knowledge of its details almost up to the moment of trial, and that his only information consists of the names of witnesses and scribbled or scattered notes of their testimony before the grand jury. At these he has to glance continually to keep the case going.

[7] *Op. cit.*, 161-62.

For questions to ask the witnesses he must rely largely on the promptings of the police officer, who sits at his side, or on inspiration from the answers to other questions given by the witness on the stand. One is reminded of the Italian *commedia dell' arte,* in which the players not having learned their parts beforehand, take each line from the prompter and improvise the performance as they go along. Both these Italian actors and these trial prosecutors develop a speed and a skill of improvisation which are truly remarkable. But the latter have this disadvatnage—that they are engaged in a combat for which the adversary is carefully prepared. The prosecutor does not, like the English barrister, have at his elbow a junior counsel who has carefully studied all the law and the facts, and a solicitor who has interviewed the witnesses and who supplies the trial lawyer with thoroughly prepared material. The trial prosecutor does not receive, either at or before the trial, a comprehensive brief of the facts, setting forth the testimony which may be expected of the witnesses. Where the case involves no special difficulties of investigation or preparation, and especially where the case has been thoroughly developed by the police department things may go well enough. It is obvious, however, that the State takes more chances than the defense and assumes the handicaps of unpreparedness.

Contrast this with the French system where the case is thoroughly investigated by a trained officer, the *juge d'instruction,* and all the facts, evidence, etc., are fully and clearly set forth in a report which is furnished to the court before the trial of the case is entered upon. It is evident that effective prosecution of cases depends upon careful preliminary work by the police, and the rendering available of these data to the trial officer. This close coöperation cannot be secured when there is no organic connection between the office of prosecuting attorney and the police. On this point the report of the Cleveland Survey says:[8]

In general the prosecuting attorney and his assistants take no part in the investigation of the crime or in the moulding of the proof. He has no machinery, other than his busy assistants, and the single county detective or general utility man, for detection of the offender or discovery of proof. He has no facilities for modern methods of criminal investigation. He pits his unpreparedness, with such assistance as he may obtain from the police department, against the carefully prepared case of the defendant's attorney. He takes the proof in the way it has been prepared by the police or municipal prosecutor, making the best of what he gets, or in more serious cases, attempting to remedy the defects or omissions. An

[8] *Op. cit.,* 169.

unusually sensational case sometimes affords an exception to this practice, but the exceptions are few.

This lack of coördination is also to be found as between the preliminary hearing of the accused and his trial. Usually the prosecuting attorney has had nothing to do with the preliminary hearing and is imperfectly informed regarding what took place at that hearing. Regarding this situation, Mr. Alfred Bettman, who was in charge of the Division of Prosecutions of the Cleveland Survey, has this to say:[9]

In most American communities there is an equal if not greater lack of coördination between the preliminary examination stage of the criminal case and the later stages, such as presentation to the grand jury or trial before the trial jury. In many American communities the preliminary examination takes place in the court of a magistrate or a police or municipal court and the prosecution is under the charge of a police or municipal prosecuting official entirely separate from and independent of the county, district or circuit attorney who will ultimately try the case. Thus, in the most sensitive stage of the case, the ultimate trial attorney, not only has no participation in the preparatory steps but no knowledge whatever about the case, and when the case finally reaches him, he has to take it in the shape in which it comes to his office. Usually it comes in a half-prepared shape and he does the best he can with it. In only the few prominent cases does he take the time to supplement this half-baked preparation with his own more thorough work; but by that time months have elapsed since the commission of the crime and there has been ample time for manipulation or loss or destruction of evidence as well as for ample lapses in the memory of the witnesses. Except in the few sensational cases which receive close attention, the whole process is one of serial unpreparedness.

Lack of Business Methods and Especially of Proper Records. A final criticism of prosecuting attorneys' offices, as they exist in the United States today, is their general lack of business methods in the conduct of their affairs. There is probably no other government office of equal importance where the actual conduct of affairs is as inefficient, unbusinesslike, and uneconomical, and where powers are improperly and only too often corruptly exercised. One can almost go to the extreme of stating that there is scarcely a feature of this office that is not upon an unsatisfactory basis. Practically every investigation that has been made of the administration

[9] Criminal justice in America, *American Bar Association Journal*, July, 1925, p. 456.

of criminal justice in this country has commented upon this fact. In no case, so far as investigation has thus far disclosed, has there been found a prosecuting attorney's office in which even the most elementary principles of business organization and procedure are observed. Yet in few offices is the need for the observance of such principles more essential if a proper conduct of affairs is to be had. In the large cities at least, the volume of work passing through these offices is large. Many thousands of cases have to be handled each year. Each case neeeds individual consideration. To handle these cases a large force of deputy attorneys, law clerks, and other employees is required. In the ordinary administrative service having work of this character to perform, the cases to be handled would be carefully classified and a scheme of organization would be worked out, under which each class of cases would be assigned to a particular division or officer, if for no other reason than to locate responsibility and to enable the head of the service to exercise that general supervision and control over the conduct of the affairs of the service that is his most important duty. There is no evidence that this is done in the case of prosecuting attorney's offices, though of course, there may be exceptions here and there to this statement.

The greatest defect in the prosecuting attorney's offices, from the standpoint of business organization and methods, however, lies in their failure to provide for any proper system of records of their work. Conditions in this respect found by the Cleveland Survey in the municipal prosecutor's office of Cleveland fairily describe those generally prevailing in these offices:[10]

The municipal prosecutor's office has no records or files. There is no docket—no record of cases pending or past. Memoranda made by the individual prosecutor are kept or disposed of by him as he may please. There is no means within the office itself by which the chief prosecutor can ascertain the history or status of any case or check the work of an assistant.

In work of this character records constitute the bookkeeping of the service. Through them, and them alone, is the responsible head, the prosecuting attorney, able to exercise his function of direction, supervision, and control, and the legislature or the public, to whom he is accountable, able to inform itself regarding the manner in which he is meeting his responsibilities. These records should be of such a character that it would be a matter of ease to determine

[10] *Op. cit.*, 120.

the essential facts regarding each case coming before the office for action: the date on which the complaint or charge was filed, the nature of the charge and by whom made, the names and addresses of the witnesses, the date of the arraignment, and the plea of the accused, the date of the preliminary hearing, before what magistrate had, and the facts brought out at such hearing, the deputy or division in the office to which the handling of the case was entrusted, the reasons for failure to prosecute, if such action is determined upon, the date on which the case is docketed, the date on which the case was called for trial, the reasons for postponing the trial, if continuances were asked, the reason for which a *nolle prosequi* was asked and granted if the dismissal of the case was requested, the verdict upon trial, and generally all essential facts regarding the case from its inception to its final disposition.

Apart from the general desirability that an office shall keep proper records of its work, there is a special need for such records in the prosecuting attorney's office, due to the large discretionary powers of that officer. It has been pointed out that whether a case shall or shall not be prosecuted, and whether, if begun, it shall be vigorously pushed, *nolle prossed,* or otherwise abandoned, rests almost wholly within the discretion of the prosecuting attorney. It has, furthermore, been shown that, due to the political character of the office, the prosecuting attorney is subject to political and personal pressure which it is difficult for him to resist, even if he is desirous of conducting his office in an upright manner, and that such pressure, in the case of a weak or corrupt prosecuting attorney, throws open the door to favoritism and corruption on a large scale. In view of this fact, the least that can be done in the way of throwing proper safeguards about the conduct of the office is that it shall maintain a record of its work in such a form that the character of the action taken and the reasons therefor shall be a matter of public record, available to all having a legitimate interest in the work done. The requirement that such records should be kept would in itself constitute a powerful deterrent upon improper action. Moreover, the existence of such records is absolutely essential if we are to have the facts regarding the prevalence of crime, its character, and the action taken in regard to it which are so urgently needed if the whole problem of the administration of justice is to be properly handled.

Remedial Action. To a certain extent the defects that have been pointed out in the office of prosecuting attorney may be corrected by administrative action. There is no reason why the several prosecuting attorneys offices should not install and operate a proper record system, or, better still, why a standard or uniform system of records should not be worked out and adopted for all such offices in a state or even for the country as a whole. Action in this way, however, would but partially meet the requirements of the situation. Conditions can never be satisfactory until there is an entirely new conception of the character and responsibilities of this office. In the consideration of the general responsibilities of the state for the administration of the law it has been pointed out that the one fundamental reform required is that there shall be created by each state a real department of justice in substitution for the existing office of attorney general. If, as has been recommended, responsibility for the administration of criminal justice were concentrated in this department and made a state function, the several prosecuting attorneys' offices, which are now offices of the local governments, would become subordinate agencies of this department and collectively constitute its field establishment. There is little likelihood, however, that any such radical change will be adopted in the immediate future. The problem, in its practical aspects, therefore, is one of determining what improvements can be made under a system where the administration of the criminal law is entrusted almost wholly to agencies of the local governments.

Viewing the problem from this standpoint, it would appear that the same action that has been recommended in reference to the conversion of the office of attorney general into a department of justice, to the end that there shall be one officer having general responsibility for seeing that the laws are duly enforced, should be taken in reference to the office of prosecuting attorney. To state this in another way, in each municipality or other political subdivision, the prosecuting attorney or other corresponding officer should have entire responsibility for and direction of all administrative agencies having for their function the enforcement of law. He should be the minister of justice for that jurisdiction. The argument in favor of this action has been excellently stated by Mr. Alfred Bettman of the Cleveland Survey in an address before the St. Louis Bar Association, March 30, 1925.[11]

[11] Reproduced in the *American Bar Association Journal*, July, 1925, pp. 455-60.

The main trouble, he said, is that the apparatus with which, in our urban and metropolitan communities, we attempt to prosecute crime is hopelessly uncoördinated and disjointed; that too often the prosecuting or district attorney (or Circuit Attorney as he is called in St. Louis) is simply one part of this disjointed, uncoordinated apparatus, instead of being the chief executive and director general of a systematized and coördinated prosecution of crime in his community. . . . The ultimate success in the trial of a case turns generally upon the detection and presentation of evidence while that evidence is fresh. As a rule, however, the prosecuting attorney whose office will ultimately try the case, has no systematic contacts with the police or other detecting departments previous to the time when the case reaches his office for presentation to the grand jury or for trial; and often, as in Cleveland, the police department is a city department and the prosecuting attorney is a county official and they are wholly independent of each other, or, if the county attorney be given a detective division, it is an extremely inadequate one. In other words, the process of preparation of the proof, and the processes of trying the case are so poorly coördinated that it is largely a matter of luck whether the evidence, when the time comes for trial has been well ascertained and well prepared.

In another place in his address he says:

His [the Prosecuting Attorney's] should be the position of chief administrator of criminal justice in his community. He should bear the same relationship to his community, to local and state criminal law, that the Attorney General of the United States bears in the nation to the federal criminal law. He should be the local minister of criminal justice in whom is concentrated the executive direction of dealing with crime so far as prosecuting agencies deal with crime, as well as the leader of the community in dealing with the problem of crime prevention through law enforcement. . . .

The prosecutor should be a student of the causes of crime in the community, an investigator, an analyst. He should treat his office as one of the social agencies of the city engaged in the treatment or suppression of those situations and conditions which are themselves violations of law and which create the breeding places of the grave crimes. Systematic coördination with the other social agencies of the city, particularly with those which come into contact with crime-producing environments should, therefore, be a part of the organization of the prosecutor's activities.

Much the most important change that would be effected in existing organization by making the prosecuting attorney a local minister of justice would be the placing of the police under his direction. In considering this feature it should be borne in mind

that the new office of the prosecuting attorney would be radically different from his old one. It would be a department, corresponding to the other departments of the local government, embracing a number of bureaus or services, of which the police and the old office of prosecutions would be two of the more important, each with its responsible chief. The head of the department itself would be primarily an administrator whose most important duty would be to see that all the units under his direction were working in harmony and close coöperation. It would be more desirable that such an officer should be a specialist in penology, using that term in its broadest connotation as covering all that has to do with the detection of crime, the psychology of the criminal, the causes of crime, the treatment of offenders, etc., than that he should be merely learned in the law.

In harmony with this proposal are the two elsewhere made that the grand jury be abolished as an agency for general use in the prosecution of crime and that proceedings be inaugurated through information on the part of the prosecuting attorney, and that the office of medical examiner, as a subordinate agency of the prosecuting attorney's office, be created in substitution for the existing office of coroner.

The creation of a department of law enforcement of this kind would mean that there would be one man to whom the public would look for the enforcement of the law, and this man would have at his command all the agencies of the government through which to meet this responsibility. Until this action is taken it will be impossible to secure a system for the enforcement of law that will be thoroughly satisfactory.

Regardless, of any action that may be taken in respect to the change in status of the office of prosecuting attorney or the enlargement of its powers and responsibilities, a reform that should be made at once is the setting up of safeguards against the improper use of the large discretionary powers of the prosecuting attorney in respect to the *nolle prossing* of cases. It has been already stated that it is essential that the prosecuting attorney shall have this discretionary power to suggest the dropping of cases on the calendar. The least that could be required in the way of limitation upon the exercise of this power would seem to be that the prosecuting attorney should be required in all cases to set forth in writing, to

constitute a part of the public files of his office and of the court, his reasons for recommending the dismissal of the case, and that the judge should exercise to a greater extent his discretion in determining whether this request should be acted upon.

The existence of formal records giving all the essential facts regarding recommendations for *nolle prosses* and the action taken thereon will make it possible at any time to review the action of prosecuting attorneys and courts in respect to this important matter, and will thus set up at least a strong moral check upon improper action. The commissions of inquiry into the administration of justice in the United States have very generally urged such action be taken. The following provision of the draft outline of a code of criminal procedure of the National Crime Commission indicates the form that this action should take:

After an indictment has been returned or an information filed in a court of record, there shall be no *nolle prosequi* entered except on a written statement of the prosecutor, giving his reasons therefor. If, in the opinion of the trial court, such reasons are not sufficient to justify such action, the judge can refuse to enter such dismissal or he can make further investigations as to whether such case should be prosecuted. If the trial judge decides that such prosecution shall continue, he shall have authority, if he thinks the interests of justice require it, to appoint a special prosecutor to conduct said case.

The New York Crime Commission takes the same position. It says:[12]

While this state has for many years been singularly free from the serious abuses which are said to exist in other states by which cases are not pressed or "filed," merely upon the action of the district attorney or one of his assistants, and nothing further is heard of the case, it is desirable from the point of view of the better administration of justice that in all cases where the grand jury has found an indictment against a person and the district attorney recommends that the indictment be dismissed and the person not prosecuted, that the reason for such recommendation shall be reduced to writing and submitted to the court and acted upon by the court, and that the court's reasons for dismissing the indictment if it so decides, should similarly be reduced to writing and made a matter of public record.

[12] Report, 65 (1927).

CHAPTER XII

POLICE

Few things illustrate more clearly the original conception, in English-speaking countries, of the function of government in respect to the enforcement of the criminal law than the comparatively late development of any adequate public force having as its direct duty the prevention and detection of crime and the taking of the steps that will lead to the prosecution of those guilty of criminal conduct. Criminal offenses being looked upon, primarily, as ones resulting in private wrongs, it was held that it rested upon the persons thereby injured to discover the guilty person and to take the steps that would lead to his arrest and prosecution. Down until comparatively recent times the only public guardians of peace possessed by English-speaking communities were the officers known as sheriffs and constables; and, over great stretches of territory in the United States, these are still the only public peace officers.

Office of Sheriff. The office of sheriff is one of the oldest political offices in England or in the United States. Its origin dates back to the earliest Anglo-Saxon times. The sheriff was appointed by the King and was his direct representative to look after his interests in the local districts. Although one of his important duties was to act as guardian of the peace, he had many other duties, judicial, fiscal, and military. The Norman kings found this office in existence at the time of their conquest of England in 1066, preserved it, and added other duties. Gradually, with the development of the king's courts, the creation of the new military office of Lord Lieutenant, and the abolition of old local sources of revenue, the office of sheriff was shorn of most of its judicial, fiscal, and military duties. In time the office thus became one having only as its important functions the acting as chief peace officer for the county, and executive officer for the king's courts when functioning in the county.

This office was early introduced in the American colonies where, as in England, its incumbent was regarded as a representative of

the governor rather than as a local officer. The movement for democracy in the first half of the nineteenth century led to the general passage of laws transforming the office of sheriff into a local office and providing for the election of its incumbent by popular vote.[1] The prime duties of this office are those which it had in England; namely, of chief peace officer of the county and executive officer of the courts. The former is generally deemed to include that of custody of all prisoners and responsibility for their safe keeping. The sheriff is either in direct charge of the local jail or is responsible for the officer having such charge. The following description of the duties of the sheriff of Cuyahoga County, Ohio, will give a clearer idea of the nature and responsibilities of the duties of this office:[2]

The duties of the office [of sheriff] are determined entirely by statute. The sheriff is responsible for the safekeeping and welfare of all prisoners committed to his care; he is required to keep a record of and serve writs in all criminal and civil actions; to serve all insanity warrants, and summon all jurors for the various terms of the Court of Common Pleas, Probate Court and Insolvency Court. He is required to apprehend all prisoners charged with or suspected of crime and to attend criminal court with such prisoners. It is his duty to transport all prisoners from Cuyahoga County to the various state institutions to which they have been committed by the courts; . . . In addition to the state prisoners entrusted to his care, the sheriff has charge of federal prisoners placed temporarily in the county jail by the United States marshal, the Immigration Bureau and officers of the Army and Navy. The sheriff is also the chief police officer for the county and is charged with the preservation of the public peace. He is expected to enforce the law for the protection of birds, fish and game; to assist in enforcing the election laws; to suppress in the county the unlawful sale of intoxicating liquors; and to serve certain warrants for the Governor. In time of riot or disorder, his position becomes one of commanding importance. He is further required to advertise and sell real and personal property at public auction when directed to do so by the courts; to keep a record of all these transactions; to collect fees for various services, to pay them into the county treasury, and to make regular reports to the County Commissioners of the operation of his office.

[1] Rhode Island is the only state where this officer is non-elective.—Missouri crime survey, 59.

[2] The sheriff's office: report of the investigation made by the Municipal Association [of Cleveland] in the interest of economy and efficiency, Efficiency Series, Report No. 1, 1912.

From the standpoint of the administration of justice, the sheriff generally holds the three offices of chief peace officer of the county, chief officer of the local jail, and chief executive officer of the courts. It is only in his capacity as chief peace officer that we are here concerned. In his various capacities he has the assistance of subordinates, deputy sheriffs, constables, bailiffs, jailers, etc., the number of which varies according to the size and population of the county.

Rise of the Modern Police Force. The sheriff system is evidently one adapted only to rural communities, where conditions are relatively simple. From the police standpoint at least, it breaks down in places of dense population. Here there is need for a force of officers whose duties should be, not merely to intervene when a crime has been committed, but to maintain a patrol of the territory for the purpose of preventing the infraction of law, to detect infractions that have been committed, and to see that those guilty of such infractions are arrested and proceedings for their trial inaugurated.[3] Manifest as this need now is, adequate steps for the creation of such a force were only taken within comparatively recent times. The first police force to be established in England was the Metropolitan Police Force for London, established in 1832 by Sir Robert Peel. The origin of a uniformed police force through this act is still evidenced by the popular term applied to police officers of "Bobbies" or "Peelers." Eight years later, in 1839, the County Permissive Act authorized the creation of police forces in other parts of England. Not until 1856, however, was legislation enacted making obligatory the creation of a police force in every part of England.

In the United States, the first steps toward the creation of a regular force of guardians of the peace took the form of the creation of a force of night watchmen to patrol the streets at night and maintain order. Incidentally, they did certain other things, such as cry the hour of the night, and the state of the weather. In time provision began to be made for day watchmen as well. Boston was one of the earliest cities to do this, providing as it did in 1838 for six men to render this service. Other cities did the same. In most

[3] "The only possible remedy for the problem created by the inadequacy of the sheriff's office is a state police force."—Missouri crime survey, 71.

if not all cases the two forces of night watchmen and day watchmen were distinct. A series of mobs, riots, and burnings occurring in a number of the larger cities demonstrated the inadequacy of these forces. In 1844 New York passed a law providing for "a day and night police," to consist of eight hundred men under a chief of police, in substitution for its old watch system. In 1854 Boston provided for a similar force and other cities rapidly followed suit. The first uniformed police force in the modern sense was organized in the city of New York in 1853. The creation of police forces in the United States thus synchronized fairly closely with similar action in England.

The result of the creation in all of the cities and more important towns of the United States of local police forces was that the states made use of two agencies for performing the police function; the old office of sheriff in the rural districts, and an organized, uniformed police force in the cities.

Political Authority. The most important question to be answered in providing for a system of guardians of the peace is the political authority that shall undertake this task. A study of the development of police systems in the United States shows the following different policies that may be adopted: (1) The state may treat the police function as purely one of local government, and, acting upon this principle, delegate to its political subdivisions entire responsibility for the creation and maintenance of police forces within their respective jurisdictions; (2) the state may distinguish between the urban and rural political subdivisions, delegating to the former responsibility for the creation and maintenance of police forces, and itself undertaking the task of maintaining a force for the policing of the rural districts; (3) the state, while delegating to its political subdivisions and particularly to the cities, the duty of maintaining local police forces, may retain general responsibility for the work of such forces by providing that the heads of such services shall be appointed, and be removable, by the governor or some other state authority; or (4) the state may itself assume full responsibility for the performance of the police function throughout the state, and, to this end, create and maintain a state police force or state constabulary. Which of these several systems is the most desirable one, depends in large part upon the special conditions to be met.

System of Local Police. The first system adopted in the United States was that of treating the police function as exclusively one pertaining to the local governments. In the rural districts this function was performed by the locally elected sheriff assisted by deputy sheriffs and constables; and in the cities and towns by locally selected and administered police services. This is the system most generally prevailing at the present time. However, as will now be pointed out, it has undergone important modifications.

System of State Controlled Local Police. Almost from their first creation in the middle of the nineteenth century the municipal police system developed grave evils. In almost every city police administration was characterized by inefficiency, mismanagement, and often by gross corruption. It was a misfortune of the police system that its development took place at a time when municipal government was at its worst, and that the nature of their duties was such as to offer unusual opportunities for the practice of blackmail, the extortion of bribes, and the exercise of powers for personal gain or political ends. The police systems of the cities became not only the most corrupt of all departments of municipal administration, but the agencies through which those in power could control elections. In many cities the police force was used ruthlessly for partisan political purposes.

The apparent inability of the cities to reform their police systems led to the demand that primary responsibility for their control be taken away from the cities and vested in the state governments. In response to this, laws were passed in at least the more important cities whereby the state assumed the general direction and control of the police forces. In New York this first took the form, in 1857, of vesting general responsibility for the administration of the police forces of New York City, Brooklyn, and the Counties of Kings, Westchester, and Richmond in a Police Board, the members of which were appointed by the Governor. Later, in 1860, the selection of the board was vested in the legislature. The example of New York was followed in other states, and state boards were created in Maryland to administer the police system in Baltimore; in Missouri, for St. Louis and Kansas City; in Illinois for Chicago; in Michigan for Detroit; in Ohio for Cleveland; and in many other states for their important cities. Indeed, during this period, 1860 to 1890, the system of a state police board to have the direction of

police administration in the large cities became the generally accepted principle of organization.

This experiment proved a failure. It did not accomplish its main purpose, that of eliminating politics from police administration. As Mr. Fosdick, in his able study from which the foregoing facts have been drawn, says:[4]

> Indeed the evidence indicates just the reverse, the police department was merely lifted from one set of political influence into another. Title was transferred to a new group of political overlords. Control of the police was a prize to be fought for and owned—the legitimate spoils of victory. As we shall see in the next chapter, political considerations can enter through state management as readily as through municipal management and no mechanical machinery can be made proof against partisan practices if partisans themselves are set to run it.

The system of state administration of the police was always resented as a violation of the principle of local self-government. The only defense made of it was that it was necessary as a means of taking police administration out of politics. With its failure to do this, the principle of state administration has very generally been abandoned and a return made to the principle of leaving to the individual cities the direction and control of their police departments with the result that, of the ten largest cities in the United States, but three, Boston, Baltimore, and St. Louis, have police systems under state control.[5] In these, the head of the police department is appointed and is removable by the governor of the state. A number of other cities of secondary rank also have the same system—Kansas City and St. Joseph, Missouri; Fall River, Massachusetts; Lewiston, Maine; and a few cities and towns in New Hampshire and Rhode Island. In all or practically all these cases, though the police is thus under state control, the expense involved is made a charge upon the city treasury. The system is thus one where there is a municipal police department maintained by the municipality, but ultimate responsibility for its operation rests in the state instead of the municipal government. This is not a satisfactory arrangement. Fosdick's general conclusion is that:[6]

[4] Raymond B. Fosdick, American police systems, 101 (1920).
[5] *Ibid.*, 119.
[6] *Ibid.*, 127.

State control as a supervisory method possesses no inherent superiority. Without relation to the quality of the state government it guarantees nothing in the way of effectiveness. As a bare arrangement of organization it contains no greater promise of integrity than municipal control.

The Missouri Crime Survey, after concluding its study of state controlled municipal police, states emphatically that the system is a failure and that responsibility for the maintenance of such forces should be turned over to the city governments.

Action in the way of vesting control in the state having been generally proven a failure, the next effort to take the police out of politics took the direction of vesting the direction and control of the police in bipartisan boards; that is, boards composed of members representing both political parties. During the years from 1883 to 1900, this principle of organization was adopted by, or for, a large number of the important cities.

This experiment, like that of the transfer of authority to a state board, was a failure. Political considerations continued to dominate in the selection and promotion of policemen and in the administration of police affairs generally. The only difference was that the representatives of the two parties agreed among themselves in respect to the division of the spoils. It had the additional evil of dividing responsibility and weakening the board. As Mr. Fosdick points out:[7]

The conception of a multiple-headed executive, to which the board method of management easily lends itself, was foredoomed to failure. In its attempt to make a group of people jointly answerable for the supervision of exacting details of administration it violates the cardinal principle of effective control. Ultimate executive responsibility is not readily divisible among officers of equal rank and authority, nor can the burden of leadership be distributed among a group. This is the point of weakness in the board plan as related to municipal enterprise. Resulting from a confused attempt to apply legislative analogies to executive functions, it fails to develop the responsible leadership essential to successful management. Divided in its counsels, decentralized in its authority, with no unity or solidarity of action, it has gradually given place to a more effective method of control.

[7] *Ibid.*, 107.

One after another, American cities have realized the disadvantages that are inherent in the system and have abandoned it for the bureau type of a single executive. According to Mr. Fosdick:[8] in only fourteen of the fifty-two cities of over one hundred thousand population which had the board type of organization has that system been retained. In the others the change has been made to the department of police with a single executive at its head.[9]

This change in form of organization, while it contributed greatly to efficiency in administration, in itself did nothing in the way of taking the police out of politics. This end, in so far as it has been accomplished, has been the result of other action; the general improvement in political morality, the improvement of municipal government generally, and the adoption of the merit system in the recruitment and promotion of personnel.

State Rural Constabulary. With the development of police systems in the cities, but one phase of the need for police protection was met. More and more it became evident that a similar protection was needed for the rural districts. This became increasingly evident with the improvement of means of communication and the great development in automobile transportation. While the center of crime may be the cities, the rural districts, as well as the urban centers, are open to the depredations of the criminal class. Through the use of the automobile the criminal can ply his vocation within a wide radius. Against criminal acts in the rural districts the city police forces offered no protection, and the local sheriffs proved utterly unable to cope with the situation. The impracticability of the rural communities individually organizing police forces to give the needed protection being demonstrated, the only solution lay in the state undertaking this task.

Recent years have consequently witnessed the creation by state after state of police forces known as state constabularies. In taking this action, the states have been not a little influenced by the success of the Royal Canadian Mounted Police in giving police protection over a large area with a comparatively small force. The first step

[8] *Ibid.*, 108.

[9] The Missouri crime survey (p. 26) states that "The experiment with police boards has almost universally failed," and recommends the single head type of organization.

in the direction of creating a state police force of this character was made by Massachusetts, which, in 1865, provided for a small number of state constables. Later, this force was reorganized in 1879 as the Massachusetts District Police. Connecticut established a small force in 1903. Texas created its Rangers in 1901, Arizona its Rangers in 1903, and New Mexico its Mounted Police in 1905. In 1905 also, Pennsylvania created its State Constabulary. After a lapse of some years, other states have followed suit in creating state constabularies after the general model of that of Pennsylvania: New York in 1917, Michigan and West Virginia in 1919, New Jersey in 1921. In addition, a number of other states have created state officers for the special work of controlling automobile traffic.

There can be little doubt that this movement for the creation of state constabularies, for the policing of areas outside of the cities having their own individual police forces, will continue and one can easily foresee the time when, throughout the United States, there will be in existence a dual police system composed of local municipal police and state rural constabulary.

State General Constabulary. We have seen that, originally, in the United States the function of providing police protection was deemed to belong wholly to the local governments. From this position, the change is being made to one where it is recognized that this function is divided between the local municipalities and the state. It would be but one step further for the state to take over the entire function. In the case of no state in the Union has this been done, or indeed even proposed. It is of interest to note however, that this is the policy that has been adopted in our two most important dependencies—the Philippines and Porto Rico. The latter offers conditions not dissimilar from those obtaining in a number of our less thickly settled states. Here, after a trial of local police forces in the four chief cities, the system was abandoned and the Insular Government took over the entire policing of the island through an insular constabulary. This change was made while the present writer was one of the officers of that dependency, and he can testify to the beneficial results that followed. With a force of but seven hundred or eight hundred men, the island enjoys an exceptionally efficient police system and at a cost much less than would be involved were the system one of local police forces. The

great advantages of this system are: that it is possible to secure for this force men of a much higher capacity than could possibly be secured by the cities; that the men can be used not only for ordinary patrol duties, but can be assembled for meeting any trouble of an organized character such as occurs in the case of strikes or disturbances of like nature; and that, by making service in the force a permanent career with promotion for merit, a high *esprit de corps* can be developed.

While it is impossible to predict developments in the United States it is quite possible now that the start has been made in the maintenance of a state police force, that these forces will not only be increased in strength, but that their duties will be added to and their territorial jurisdictions extended. The time may arrive when they will be the chief agencies for performing police duties, though the larger cities will probably always have need for special agents for the enforcement of local ordinances.

Status of the Police. Second only in importance to the question of the extent to which the police shall be a direct agency of the state, or be agencies of the latter's political subdivisions, is that of the status that the police shall have in the administrative organization of the state and its political subdivisions. As has been pointed out in the two preceding chapters, the most important action required for putting the whole work of the enforcement of the criminal law upon a satisfactory basis is the creation in each state and in each important city of a department of law enforcement which will have the charge and direction of all agencies made use of in performing this function. At the present time this function is divided among a number of independent agencies, the two most important of which are the office of prosecuting attorney and the police. In view of these difficulties that are everywhere in evidence as the result of this division of responsibility and duties, it is little short of remarkable that more serious consideration has not been given to the advantages of putting these two services under a common direction. The close relations that these two services have with each other in the handling of the general problem of the prevention, detection, and prosecution of crimes are evident. The system that exists in many cities of placing the administration of police, fire prevention, and health matters in a general department of public safety should be abolished and the alternative plan adopted

of making the police one of the subdivisions of a department of law enforcement, which will embrace, in addition to this service, the office of prosecuting attorney and the office of medical examiner which, as will shortly be shown, should be created to take over the work of the existing office of coroner.

Internal Organization of Police Service. Though the present work does not aim to give any detailed consideration of the internal organization and procedure of the agencies discussed, it is desirable, in the present case, to consider, at least briefly, one or two of the important questions involved in providing for the performance of the police function. Of these the most important is that of the character of the provision that should be made for the general direction and control of the service.

From the first creation of police forces in the middle of the nineteenth century down to the present time, the organization of the police force has given rise to trouble. It has already been pointed out in the account of the development of police services in the United States that for years the favored type of organization was that of the board or commission. The motive for the adoption of this type was the desire to take the police administration out of politics, and it was thought that this could be done by vesting control in a board composed of representatives of the two parties. This policy, as has been pointed out, proved a failure. The objection to the board type of organization, and the reasons for its failure are excellently set forth by Mr. Fosdick in his study from which we have so often quoted. He says:[10]

Another difficulty to which the police board lends itself is even more serious. The members of a board, in the absence of definite administrative plans, are continually tempted to encroach upon the proper functions of the chief. The theory of the board form of management, whether in business or government, is that it creates a deliberative council, presumably representative of various points of view, concerned primarily with policies of operation and procedure and the maintenance of general regulative oversight. In the application of its rules and policies to specific cases it has no direct or immediate interest. These things are matters of detail for which its business executive or superintendent is solely responsible. This distinction in function between a deliberative or regulative body

[10] *Ibid.*, 145-47.

and its executive arm furnishes the only possible justification for the existence of a board. Without it nothing is left but an uncoordinated executive of many heads. When, therefore, a police board infringes upon the proper activities of the chief and attempts itself to handle the detail of administration, it undermines its only basis of support.

Unfortunately, most of the police boards in the United States are in this situation. Neither in law nor in practice has their true function been defined. Indeed, the laws have often loaded the boards with duties which by no process of reasoning can properly belong to any deliberative body. Even in those departments in which the prescriptions of laws and ordinances are not definite or detailed there is little attempt at clear-cut differentiation, and the distinction between the board's duties and the chief's duties is a vague, uncertain line, varying from week to week and even from day to day, dependent largely upon the activity and attention of the commissioners and their interest in particular cases. Often the chief's proper functions are deliberately raided by the board because, ignorant of the formulation of constructive policies or the principles of administration, it hastens to lay hands upon certain routine affairs whose nature it understands. While holding the chief responsible for the management of the department, it nevertheless appropriates enough of his functions to render him practically powerless. The most trivial details of police business come before it for determination. It spends hours in deciding whether a given patrolman was off his beat as charged by his sergeant. It will take days to determine whether the chief's recommendation for the dismissal of a drunken officer is justified. Most of its time is given to the consideration of details that would not be considered for a moment by the board of directors of a business concern. In some cities the police boards so far usurp the functions of the chief that they even exclude him from their deliberations, as if what they did with his men was none of his affair.

The Crime Commission of New York State, which made an exceptionally careful study of the problem of police administration, reported that "of all methods employed for police control the administrative board has proved least successful." [11]

Due to the evils to which it led this type of organization has been very generally discarded in favor of the bureau or department type, where the function of overhead administration is vested in a single officer, commissioner of police, or chief of police. According

[11] Crime Commission of New York State, Report to the Commission of the Sub-Commission on Police, 20 (1927).

to Mr. Fosdick[12] but seventeen of the sixty-three cities of the United States having a population in 1915 of one hundred thousand or over have retained the board type of organization: in all the others the police system is under the direction of a single officer.

While there is no doubt that this change has resulted in a great improvement in police administration, and that most, if not all, students of public administration will endorse the characterization of the limitations and weaknesses of the board type as given by Mr. Fosdick, there is nevertheless much to be said in favor of the form of organization making provision for a board, provided the function and duties of this body are clearly defined as relating only to matters of a policy-determining, quasi-legislative, and quasi-judicial, character, and that it is made definite that no powers shall be exercised by it having to do in any way with purely administrative duties. So defined, the duties of the board will relate exclusively to the performance of the quasi-legislative function of framing the police regulations, traffic regulations, and the like, the investigation of complaints regarding the manner in which the laws and police regulations are being administered, the trial of commissioned officers against whom charges are brought, and possibly the promotion of officers in the higher grades. There is an element of danger in permitting a chief of police on his single authority to frame the important body of rules known as policy regulations. It is right and proper that he should draft them in the first instance, but they should be passed upon by some other authority. It is not satisfactory to have the police administration investigate complaints that are brought against its own action. It is feasible and desirable that the police administration should consider and take the necessary disciplinary action in cases of misconduct by police officers of the patrolman or sergeant grade, and, in respect to such cases, the board should have no authority except possibly on an appeal that might lie where the action proposed is the dismissal of a man from the force for misconduct. Where the charges relate to the conduct of an officer of higher rank, it is a question whether the tendency for members of an organization to protect their colleagues is not such as to make it difficult to secure proper action, and whether the matter cannot be better handled by a superior agency such as the

[12] *Op. cit.*, 137.

police board. The writer can only say that he has had personal familiarity with a police system having the board type of organization where the distinction between the functions of a board and the administration represented by the chief of police was properly drawn and that the system gave in practice excellent results.[13]

Though, as has been pointed out, Mr. Fosdick is a strong advocate of the departmental type of organization, he holds that the direction of the department should not be vested in the chief of police. According to him the department should have as its head a civilian officer, who should have general charge and responsibility for police administration, and that the chief of police should be one of his subordinate officers, with duties relating exclusively to the direction of the uniformed force. This system is analogous to that of the War Department, the head of which is a civilian Secretary of War having general responsibility not only for the uniformed force but for all other matters of general administration. This position is set forth by Mr. Fosdick in his report made for the Cleveland Survey:[14]

The Department of police should be in charge of a single civilian administrative head to be known as director of police. The director should be appointed by the mayor with full responsibility for administering the police service, and should have the exclusive right to name his own immediate assistants including the chief ranking officer of the uniformed force to correspond to the present chief of police. Such appointments should be terminated at the will of the director. It should be the director's duty to lay down a policy and program for police work, and to see that such policy is carried into effect by his subordinates. Under this arrangement the officer who develops the policies of police service will be subject to public reckoning, since his appointment and continuance in office depends on the mayor, who is subject to election. Undivided responsibility and authority would be reposed in a single officer at the head, and the line of responsibility and authority should continue downward direct and unbroken.

Such a director should be chosen from outside the professional ranks of the department, just as the director of public safety has always been chosen. The management of police business demands as able an administrator as can be obtained. Indeed in a city like Cleveland, and in many cities of lesser size, the task of police

[13] The Insular police force of Porto Rico.

[14] Criminal justice in Cleveland, 18-19.

administration is so great that the best man obtainable is none too good and in an endeavor to find him, no search can be too thorough. That such a leader can be found in the ranks of a police force is in the highest degree improbable. The officer who has walked his "beat" as a patrolman, investigated crime as a detective, and managed the technical routine of station house activity as lieutenant or captain, is not fitted by this experience to administer the complex affairs of a large police department. The chances are rather that he is unfitted for the task. Lacking in administrative experience, with scant appreciation of the larger possibilities of his position, often indeed without imagination or resourcefulness, he has little chance of success, and it would be unwise and cruel to saddle him with the responsibility. If police management were merely a matter of assignments, promotions, and discipline; if it had to do only with the ordering of a well-defined routine, any capable man who himself had been through the mill might be well adapted to handle it.

But the task, particularly in large cities, is so much broader than routine, and involves activities of such vital consequences, that only a high order of creative intelligence can cope with it. The director must deal with community problems in the large. He must be familiar with the underlying social forces which are responsible for the need of police service. Constantly before him must be the conception of the department as an agency for the prevention of crime, and the consequent relation of his work to all activities, social, economic, and educational, operating to that end. He must be able to interpret public opinion, to be a community leader, and, above all, he must be qualified to inspire a great force of policemen. In addition he must have a thorough understanding of the principles of administration.

With this position the Sub-Commission on Police of the Crime Commission of New York State takes sharp issue. In its report on police administration it points out that, whatever may be the differences of organization of the police system in the cities of the states, all without exception provide for the vesting of the real power of control over the police force in a non-permanent, non-technical administrative head usually known as police commissioner; while the immediate direction of the uniformed force is entrusted to a chief of police, who, in most cases, enjoys complete security of tenure. Regarding this system, the report says:[15]

So it comes about that the police departments of these cities have not one, but two, masters—a commissioner of public safety

[15] *Op. cit.*, 9 and 17.

and a chief of police. Clearly each cannot be master. One must be subordinate to the other. An attempt is made to avoid the difficulties inherent in the situation by giving the commissioner the power of general direction and control of appointment, promotion and discipline. To the chief is reserved only the shadowy power of day-to-day supervision, such as the making of assignments, special details, transfers, and the like. By such means it is anticipated that the technical experience of the chief of police may be profitably employed.

The practical operation of this plan is the same in the state of New York as in the other jurisdictions where it has been attempted. First-hand investigation discloses that with few exceptions the police departments were divided into two camps, with the chief and the commissioner engaged in almost daily conflict.

The conclusion arrived at by the commissioner is that it is unwise to confuse the control and direction of the police service with that of direction of other activities, such as fire protection, building inspection, etc., in a general department of public safety with a commissioner at its head; that the desirable system is one where the police service constitutes a distinct organization under the sole direction of a chief of police.

As between these two systems the writer is in favor of the second. Incidentally this system facilitates the placing of general responsibility for police administration under a department of law enforcement as is elsewhere recommended.

Recruitment and Promotion of Personnel. Limitations of space prevent any examination of the many special factors involved in securing an efficient internal organization and administration of a police department. It may be stated, however, that there is substantial agreement on the part of students of the problem that the system of recruitment and promotion of personnel should be on a strictly merit basis; that special tests should be employed in order to determine merit; and that provision should be made for something in the nature of a school for the training of the new recruits. In respect to the important matter of promotions Mr. Fosdick holds that the final decision should rest with the director of the department and not with the civil service commission, as is advocated by some. Regarding this, he says in his report for the Cleveland Survey:[16]

[16] Criminal justice in Cleveland, 42.

It is recommended, therefore, that the matter of promotions be put squarely up to the director of police. He should be enabled to make use of the civil service commission as a staff or agency equipped to make certain limited measurements. But he should be allowed to place his own valuations on the tests made by the commission and make any other tests he may see fit in order to arrive at his decisions regarding promotions. Under such an arrangement the civil service commission might be asked to conduct examinations which would really amount to qualifying examinations based on certain minimum qualification standards. The police head would then add to these results the estimates of a candidate's worth, based on lines not covered by the civil service examination.

It is further recommended that there be established a board to be known as a board of promotion, consisting of three to five members of the higher ranks in the department. It should be the duty of this board to make recommendations for promotion to the director of police after thorough investigation and examination or series of examinations as may seem necessary. . . .

So long as the civil service commission in Cleveland is permitted to impose its own standards of personal fitness for police work, good discipline in the police department cannot be attained. Neither the chief of police nor the director can do away with the weak links in the department's chain under the present arrangement, whereby final authority in matters of discipline is given to an outside body having no connection with police work and no intimate appreciation of its problems.

The remedy for strengthening the morale and improving the discipline of the department lies in transferring final authority in matters of discipline from an uninformed, irresponsible, politically appointed civil service commission to a single responsible, expert administrative head of the police force. As far as its disciplinary functions are concerned, the civil service scheme has been fully tried in Cleveland, and we submit that it has been found wanting. It is recommended, therefore, that full powers of disciplinary action be vested in the director of the department of police, and that a trial board, composed of officers of the professional force, be designated by the director to try delinquent members and submit findings, with recommendations to him. The director should have the power to accept, reject, or modify the recommendations of the trial board.

Police Records and Statistics. As in the case of other agencies having to do with the administration of justice, there is imperative need for the maintenance by police departments of careful and detailed records of all cases coming before them, and, on the basis of such records, the rendering of reports which will reveal the essential

facts regarding the movement of crime and the activities of the police. Such records are needed for both administrative and general information purposes. The most essential information needed regarding persons arrested for crime is their previous criminal record. Without such information it is impossible intelligently to exercise judgment in respect to the pushing of the prosecution, or the fixing of the sentences, if conviction is had. And, without full information regarding the number of complaints filed, the number of arrests made, the character of the offense, and personal data regarding those charged with such offenses, it is impossible to secure answers to such important questions as the movement of crime; that is, whether crime is increasing or decreasing, the particular offenses responsible for such increase or decrease, the character of persons, judged by such criteria as age, sex, color, and race, responsible for crimes committed, etc. These data are especially important, as they furnish the basis for all subsequent statistical considerations of the results of prosecutions for crime. It is hardly necessary to say that it is desirable that the record and statistical systems of the several cities and state should be uniform as far as feasible, so that accurate comparisons between conditions in different jurisdictions may be made and consolidated statements prepared. The most effective way of attaining this end is for the national government, acting through the Department of Justice, to take the responsibility of bringing together the representatives of the more important police departments with a view to an agreement upon the character of the records to be kept by all police departments and the manner of presentation of the statistical data to be secured from such records, or for the national organization of chiefs of police to undertake this task.[17]

Bureaus of Identification. Provision of means by which those suspected or accused of crime may be identified and their previous criminal records, if they have such, determined is an essential feature of an efficient system of criminal law enforcement. The technology of identification through such devices as photographs,

[17] The Detroit Bureau of Governmental Research has in preparation a comprehensive report on criminal statistics, the expense for which is provided by a special grant of $50,000, and which is being made on behalf of the committee on standardization of police crime statistics of the International Association of Chiefs of Police.

finger prints, etc., has reached a high development. Progress in the way of organizing special services for the operation of an identification system is, however, very backward in the United States in comparison with European countries. It is evident that the problem here presented is one that cannot be solved by local police departments acting independently. As the professional criminal classes, constituting those with whom the police departments are chiefly concerned, readily move from one jurisdiction to another, identification records must be of a character that will cover a corresponding territory. Fully to meet the needs of the situation there should be an identification service for each important city, for each state, and for the entire country, with working relations such as will permit any service readily to avail itself of the records of the other services. It is impossible to state how many local police departments have adequately organized identification records. Up to the present time but thirteen states have organized state services of criminal identification.[18] The laws providing for these services are in many cases inadequate. Some do not even make it obligatory on the part of the local police departments to supply the state service with copies of photographs and finger prints. No uniformity exists in respect to the status and functions of these services. A great deal, therefore, still remains to be done not only in the way of creating state identification bureaus in states not now having such services, but also in putting the operation of these services upon a proper basis. In need hardly be said that if the recommendation elsewhere made for the creation in each state of a real department of law enforcement is adopted the criminal identification service should constitute one of its important subdivisions.[19]

[18] Louis N. Robinson, Criminal statistics and identification of criminals, *National Municipal Review*, December, 1927. The thirteen states having state identification services with the years when such services were created are: New York 1896, Massachusetts 1905, California 1918, Iowa 1920, Nebraska 1921, Ohio 1923, Washington 1923, Michigan 1925, Minnesota 1925, North Carolina 1925, Oklahoma 1925, Utah 1927, and Rhode Island 1927.

[19] Much the most important action taken in recent years in the way of providing for a proper system of criminal records and statistics is the passage by the State of New York, in pursuance of recommendations of its Crime Commission, of the act of April 30, 1926, providing for the creation of a central bureau of criminal identification with large powers and duties in respect to the securing and compiling of criminal records and statistics, and the subsequent enactment on March 31, 1927, of an act creating a department of correction as one of the great executive departments of the state,

Finally, there is urgent need for a strong central criminal identification bureau to be maintained and operated by the national government. Until 1923 the Department of Justice maintained a criminal Identification Division at the Leavenworth Penitentiary. In that year the division was moved to Washington, where it functions, in a way, as a central criminal identification bureau. It has acquired the records of the International Association of Chiefs of Police and does what it can with its limited resources in the way of cooperating with state and local prosecuting services. However, it is far from having the scope and development that it should have.

Specialization in the Police Function. Up to the present time we have considered the police problem solely from the standpoint of the need for a force of agents which shall have the duty of enforcing the criminal laws, strictly speaking. With the steadily expanding scope of the operations of government there is a corresponding increase in the number of statutes and ordinances of a regulative character which it is the duty of the state and its political subdivisions to enforce. Most of these statutes and ordinances contain penal clauses making violations of their provisions a penal offense and providing for the imposition of penalties in the way of fines and imprisonment upon those guilty of such infractions. Examples of such laws and ordinances are those regulating the operation of factories and workshops, the sale of food products, the creation of nuisances, etc. Especially important are the regulations governing traffic on the city streets and highways, the enactment of which has become necessary as the result of the automobile.

When the scope of governmental operations was comparatively narrow it was quite feasible to entrust to a single police force the duty of detecting and bringing to prosecution offenders against all classes of law. With the increase in the variety of enactments to be enforced, the question is presented whether this policy can be indefinitely maintained; whether it is not better to provide for special police forces for the performance of particular classes of duties. A beginning in this direction was early made in the creation of special inspection forces, such as factory, mine, building, and

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and providing that one of its divisions shall be a division of criminal identification, records, and statistics, in which shall be concentrated all the duties in respect to the maintaining of criminal identification and other records and the compiling and publication of criminal statistics.

food inspectors, who had police powers in the sense that they were authorized to make arrests in the case of persons violating the laws the enforcement of which was entrusted to them. This policy of creating special police forces may well be extended.

The Question of a National Police Force. The national government has never had a police force, strictly speaking. It has been compelled to make provision for a number of forces having for their duties the detection and prosecution of violators of federal laws. Among such forces may be mentioned the special agents of the Treasury Department having for their function the detection of infractions of the customs and internal revenue laws, the counterfeiting of money, etc.; the postal inspectors, with the duty of detecting violations of the law governing the use of the mails; and the Bureau of Investigation of the Department of Justice, having in charge the detection of violations of anti-trust and certain other federal laws. To these may be added the forces recently created for the enforcement of the prohibition and anti-narcotic laws. In the Coast Guard, the prohibition agents, and the immigrant inspection service, the national government has now in effect federal police forces, though their duties are of a specialized character. These forces, and many others having for their duty the enforcement of federal laws, are, it will be noted, attached to the special departments having in charge the administration of the laws to be enforced. This scattering of responsibility in respect to the performance of the police function has its undoubted advantages. At the same time the need is increasingly felt for a force with general police powers in respect to the enforcement of federal laws, or at least a more effective correlation of the activities of the several forces now in existence. Particularly is the need felt for a unified border patrol, corresponding to that performed by the Coast Guard at sea, for the enforcement of laws directed against the infraction of the customs laws, the immigration laws, the illegal entry of intoxicating liquors and narcotics, etc.

CHAPTER XIII

OFFICE OF CORONER

Responsibility for the detection and the inauguration of proceedings for the enforcement of the criminal laws rests, it has been seen, primarily upon the police and the office of prosecuting attorney. In cases where the death of a person has resulted under circumstances raising the question of the responsibility of some other person for such death, use is made in England and the United States, of yet another agency, the office of coroner, for inquiring into the case; and, where the evidence warrants, of taking the action that will result in the arrest and holding for trial of the person believed to be responsible for the death of the deceased.

Origin and Functions. This office is one of the oldest of English and American judicial institutions. It certainly has had a continuous existence since the twelfth century, and evidence exists that its origin goes back much further. In the early days, as the name indicates, the coroner was the direct representative of the crown. His functions were to investigate all cases of sudden or violent death, to protect the interests of the crown in respect to such matters as treasure-trove, to take the place of the sheriff, when for any reason the latter could not act, or to coöperate with him, and to perform the duties of a magistrate for the trial of both civil and criminal cases. At a comparatively early date, however, the functions of the coroner were restricted solely to that of holding investigations, or inquests, to use the technical term, in cases of sudden or violent death or when death has taken place under "suspicious" or other circumstances that would seem to make it desirable that the cause of death should be inquired into. In the performance of this function, the office of coroner still constitutes an important agency of the government for the handling of such cases. When, upon investigation, the coroner believes that the cause of a death should be inquired into, he makes use of a jury specially summoned by him for that purpose, and, in conducting

the inquiry with such jury, he has the general powers of a judge to summon witnesses, and, at common law, had the power to punish for contempt. In England today, such jury must consist of at least twelve men and their verdict charging a man with responsibility for the death inquired into has the same effect as an indictment found by a grand jury. Notwithstanding this fact, it is usual for all such cases to be brought before the grand jury and, if the latter fails to return an indictment, action, as a rule, is not taken upon the coroner's inquisition.[1]

This institution was taken over from England by the American colonies and has been made a part of the judicial machinery of practically all of the states. It has undergone, however, certain modifications, the most important of which are in respect to the size of the jury employed by the coroner, and the classes of deaths which it is the duty of the coroner to investigate. In all cases, it is believed, moreover, the verdict of the coroner's jury does not have the effect of an indictment in the sense that the accused is put upon trial upon such return. Its effect is merely to hold the accused for action by the grand jury, and whether the accused shall be tried or not depends upon the action of that body. The grand jury, moreover, can take jurisdiction and return an indictment when the coroner's jury has failed to hold anyone responsible for the death of the deceased inquired into by it.

The duties of the Coroner, as that office now exists in the United States, have been described as follows in a recent exceptionally thorough study:[2]

> His (the Coroner's) most important duty is the investigation of deaths in which an element of violence may be suspected. To such deaths, have been added, either by custom or by specific legal enactment, those due to accident, suicide or septicemia from undetermined causes; deaths of persons who have not been attended by a duly licensed practitioner of medicine; and in certain localities deaths in which the cause, as certified by the physician, does not appear clear, the investigation in such cases being for the purpose of obtaining more accurate vital statistics. . . .

[1] G. G. Alexander, The administration of justice in criminal matters, 99-100 (1911).

[2] The coroner and the medical examiner, by Oscar T. Schultz and E. M. Morgan, Bulletin, National Research Council, 1928.

But this is only one of the coroner's functions. As a court he does the work of attorney and judge in bringing out the testimony of witnesses. This requires all the skill of a practiced trial lawyer and the poise and good sense of an experienced judge. For as a court the coroner must decide not only the cause of the death but also what person, if anybody, is responsible for it. And that is not all. As a magistrate he is to initiate steps for the apprehension of any accused. In short, he is expected to perform all those most vitally important functions of a bureau of criminal investigation up to and including the identification of the person causing the death.

There are variations from this system in the several states. Particularly do many states require a smaller jury than originally required, six being not an unusual number, and in some cases no use at all is made of a jury. To a considerable extent, also, the coroner is not required to investigate industrial accidents causing death, such duty being intrusted to other agencies such as railroad commissions, industrial commissions, and the like. A general feature which it is important to note is that the coroner does not hold a formal inquest in all cases. He first makes what may be termed a preliminary investigation and only summons a jury for a formal inquiry when circumstances are such in his opinion as to render such a proceeding desirable.

Proposed Abolition. It is difficult to study the operation of the office of coroner as one of the agencies for the enforcement of the criminal law without reaching the conclusion that, whatever may have been its justification in the past, it no longer serves any useful purpose. The first objection to the system is that it entails a diffusion of responsibility, where concentration of responsibility is desirable. Secondly, as a matter of economy and efficiency, the work now done by the coroner can be much better done by the office of prosecuting attorney. Thirdly, all studies of the office of coroner lay stress upon the fact that the office is one that requires two distinct qualifications on the part of its incumbent, those of the medical specialist and those of one thoroughly familiar with legal principles and procedure. This combination of qualifications it is difficult to find in the same person, and, in point of fact, is rarely possessed by American coroners. These officers for the most part are elected by the people and their technical qualifications for

the position are rarely given proper consideration by the people when so voting. In a properly organized prosecuting attorney's office, officers meeting both of these requirements would be found. In large cities at least, the prosecuting attorney's office would contain a division, in charge of a competent technician, and provided with adequate facilities, in the form of a laboratory or otherwise, for making inquiries into the cause of death; and the prosecuting attorney himself, or his deputy, would be more competent to handle the legal phases and the work of securing evidence regarding the probable author of the crime than the coroner can possibly be, except in unusual cases.

Students of the subject and commissions of inquiry have thus reached the conclusion that the time has arrived when this office should be abolished and other provision be made for performing its work. Thus, W. F. Dodd, one of our most competent students of judicial administration says:[3] "The work of the coroner as an aid in the administration of criminal justice has with the change in social and industrial conditions become useless." The exceptionally thorough study of county government in Iowa made under the direction of Professor Benjamin Shambaugh concludes its study of this office with the following:[4]

In Iowa the office [of coroner] is in most counties, of little value and should be consolidated with some other office. Cases now reported to the coroner's office should be placed in the hands of the county attorney who could then make the necessary investigation and employ competent physicians to make autopsies and scientific investigations. In this way the investigations in cases involving possible crimes would be centralized and coördinated in the hands of the one official who must in the end prepare and present the evidence to the grand jury and the courts. Responsibility would be more readily fixed and the verdicts of these preliminary juries would be more useful in the following court trials. Cases in which the coroner acts as the sheriff are so rare to be negligible. There seems to be no good reason why these duties could not be performed by any peace officer acting directly under the orders of the district court.

The Missouri Crime Survey takes the position that the character of this office should be greatly modified and ultimately be abolished,

[3] State government, 317.

[4] County government and administration in Iowa, Applied History Series, IV, 293 (1925).

provision being made for a medical examination system, similar to that of Massachusetts and New York described below. As regards the lack of utility of an inquest conducted by the coroner in Missouri it has the following to say:[5]

A very careful examination was made of the records of all the homicide cases mentioned above. The purpose of this examination was to determine whether the inquests conducted in these characteristic instances served any useful purpose in the process of fixing responsibility for the crime and of preserving testimony which otherwise might be lost. Our general conclusion is that in no considerable number was the inquest of any value at all in these respects.

The Sub-Commission on Police of the Crime Commission of New York State stated that:[6]

Everywhere at our hearings there was an unanimity of opinion that the office of coroner should be abolished, and concludes with the recommendation that this action be taken in all counties of the state and that the duties of this office be entrusted to the prosecuting attorney who shall appoint his own medical officers and have jurisdiction over autopsies.

The Cleveland Survey also recommends[7] that the office be abolished and that provision be made for the performance of its duties similar to that made in Massachusetts and New York.

This is also the action recommended by the Governor's Committee on Consolidation and Simplification of Virginia.[8]

An especially strong criticism of the coroner's office is that made by the Commissioner of Accounts of New York City, as the result of a special investigation made by him of it. Of it he said:[9]

The elective coroner in New York City represents a combination of power, obscurity and irresponsibility which has resulted in inefficiency and malfeasance in the administration of the office. With constant temptation and easy opportunity for favoritism and even

[5] Missouri crime survey, 90-91.
[6] *Ibid.*, 5 and 42.
[7] P. 473.
[8] County government in Virginia, 52 (1927).
[9] Report on Special Examination of the Accounts and Methods of the Office of Coroner in the City of New York, by Leonard W. Wallstein, Commissioner of Accounts, City of New York, 82 (1915).

extortion, with utter lack of supervision and control, and without the slightest preparation and training to create in the coroner's mind a scientific and professional interest in the performance of his duties, the present system could not have been better devised intentionally to render improbable, if not impossible, the honest and efficient performance of the important public function entrusted to his office. . . . The abuses disclosed by this investigation have been found time and again in this city and previous attempts to remove them by the abolition of the coroner's system have been defeated from purely selfish political considerations. The present coroner's system cannot be continued in this city except as a public scandal and disgrace. It should be abolished immediately.

Of still greater force is the conclusion reached by the study of the coroner's office made under the auspices of the National Research Council, from which we have already quoted. After pointing out that a coroner in order properly to perform his duties has need of a large staff of technicians, pathologists, microscopists, toxicologists, chemists, and the like, with adequate laboratory facilities, the report continues: [10]

On the other hand, visualize the coroner as a poorly paid, untrained and unskilled individual, popularly elected to an obscure office for a short term, with a small staff of mediocre ability and with inadequate equipment; then the inquiry (why the coroner system is not satisfactory) is not only impertinent but foolish. And the latter is a fairly accurate visualization of the conditions in most counties in most of the states of this country, and of parts of England. For in some thirty-five states the old coroner system exists without substantial change, save that in a few of them the jury is abolished. In four others, the justice of the peace performs the function of the coroner; and it is common knowledge that the average justice of the peace presents the minimum of intelligence and competency in the judicial system. In three other states, the investigating official performing the coroner's duties acts on the order of a court or of the prosecuting attorney; in four or five states only, is a medical officer put in charge of the investigation of the physical cause of such death, and a legal officer in charge of the rest of the inquiry. Where the coroner's system prevails, inadequate equipment is the rule. Even in the mother country, from which we derived it and which has had hundreds of years to perfect it, if it be capable of perfection, facilities are far from good. . . . From data obtained in the course of this investigation from thirty-eight states and the District of Columbia, it appears that special

[10] *Op. cit.*, 11-13, 86-87.

facilities for medicolegal postmortem examinations are the exception. . . . Provisions for toxicologic examinations are in general even less satisfactory. . . . Elsewhere (other than in New York and Chicago) there are no definite provisions for such work. . . . Investigations into the operation of the coroner's office in large urban centers have disclosed its utter inadequacy for modern conditions. . . .

Our own investigation into the conduct of the coroner's office in the communities selected for study, as well as the previous reports from other localities, gives clear evidence that even under the best of conditions the work demanded of the coroner is improperly done. The faults are inherent in the system, and are not necessarily those of the individual who may happen to function as coroner. The satisfactory coroner is such in spite of, and not because of, the system under which he works; if to the faults inherent in the system are added those of an inefficient official, then the results are lamentable and subversive of justice. How completely the office fails to meet the demands made of it by modern civilization was most forcibly expressed in 1914 by Joseph DuVivier, then assistant district attorney for New York County, who used the following words:

"A dispassionate study of the office leads one to the inevitable conclusion that it is an institution of government wholly unsuited to the needs of the present day. It is obviously expensive and clearly inefficient. In some cases it is positively dangerous to thus entrust untrained men with important work. In a word, I know of no better illustration of the saying of Goethe than 'Nothing is more terrible than active ignorance.'

"The coroner does nothing that must not be done over again. No reliance can be placed on anything that he has done, nor can he be trusted to do anything right. Every case in which there may be criminal responsibility must be watched. The body of the deceased is barely cold before the experienced prosecutor begins to guard against the probable mistakes of the coroner—the shifting of the furniture of the scene of the crime, the unskilled handling of witnesses, the insufficient identification of the body at the autopsy, the careless identification of the bullet, or knife, or poison, or the clothes worn by the deceased; the danger of newspaper publicity, the observance of the technical requirements of an antemortem statement, the injury from unguarded and unrestricted cross-examination of the people's witnesses and the many dangers in every homicide case of importance."

Office of Medical Examiner: Massachusetts and New York. In two states, Massachusetts and New York, the office of coroner has been abolished and provision been made for the new office of

Medical Examiner to which is entrusted those parts of the duties of the old office of coroner having to do with the determination of the cause of death of a person dying under suspicious circumstances.

The Massachusetts law providing for this action was passed in 1877.[11] This law provides that the Governor, with the advice and consent of the Council, shall appoint for terms of seven years "able and discreet men, learned in the science of medicine" to serve as medical examiners for the several counties, and, when the counties are divided into districts, associate medical examiners to serve in such districts. It is the duty of these examiners to view the dead bodies of those persons, and those persons only, who are supposed to have died by violence, to take charge of the body, and if upon such view and examination, he considers an examination necessary, upon getting the written authorization of the prosecuting attorney, mayor, or selectmen of the district, town, or city, to make an autopsy in the presence of two or more discreet persons whose attendance he may compel by subpœna. Before making this autopsy, it is his duty to call the attention of the witnesses to the appearance and position of the body and to "carefully record every fact and circumstance tending to show the condition of the body and the cause and manner of death with the names and addresses of said witnesses." When necessary, he may employ a chemist to aid in the examination of the body for the purpose of determining the cause of the death. He must then file with the prosecuting attorney a report of such facts and the results of the autopsy if one is performed, in which he shall certify his opinion as to the manner and cause of the death of the deceased.

If the medical examiner certifies that, in his opinion, the death of the deceased was due to the act or negligence of another, it then becomes the duty of the court or trial justice to hold an inquest from which all persons not required by law may be excluded. The court before holding such inquest may appoint an officer qualified to serve criminal process to investigate the case and to summon witnesses. At the inquest, the prosecuting attorney, or his representative, may be present and examine the witnesses. It is the

[11] General Laws 1877, ch. 38. For a copy of this law, see Criminal justice in Cleveland, 696.

duty of the magistrate holding the inquest to file in the superior court for the county in which the inquest is held a written report setting forth "when, where and by what means the person met his death, his name, if known, and all material circumstances attending his death and the name if known, of any person whose unlawful act or negligence appears to have contributed thereto," and, if a person is charged by such report with the commission of a crime, to order his arrest.

It will be seen from the foregoing that the medical examiner performs the duty of the coroner in respect to viewing the body and determining whether the circumstances are such as to render it desirable that an inquest shall be had and that the inquest when ordered is held by a court with the prosecuting attorney participating. The advantages of this system over the old coroner system, as set forth by Dr. George Burgess Magrath, Medical Examiner of Suffolk County, Massachusetts, in a communication to the author of the Cleveland Survey, are as follows: [12]

(1) The separation of medical and judicial functions and the delegating of each to appropriate officials.

(2) The giving to the medical investigator the primary and full jurisdiction over the body of the decedent, thereby insuring him ample opportunity to observe conditions or circumstances tending to show the manner as well as the cause of death. These often include facts susceptible of recognition and proper interpretation by a medical examiner only.

(3) The economy incidental to the use of existing courts which dispenses with the coroner's court and jury.

(4) The placing where it belongs, in the hands of a medical man, the duty of determining promptly the cause of death, whereby crimes against life may be immediately brought to light and the appropriate judicial and police authorities notified thereof; whereby also deaths from injury other than that incidental to the act or negligence of another, as well as deaths from so-called natural causes, may be recognized as such with equal promptness, without unnecessary publicity and without the use and incidental expense of a court or coroner's jury.

(5) The opportunity existent in an appointive position of selecting therefor physicians qualified by special training and experience.

[12] Criminal justice in Cleveland, 470.

On April 14, 1915, New York passed a law,[13] modelled on that of Massachusetts, abolishing the office of coroner and creating in its place the office of medical examiner. An interesting account of the new system and its advantages is given by Dr. Charles Norris, Chief Medical Examiner of New York City, in a paper comparing the two offices.[14] In this paper he says:

Unlike the coroner's office, the medical examiner's office was not given quasi-judicial powers, but was vested with sufficient authority to administer oaths and take affidavits, proofs and examinations as to any matter within the jurisdiction of the office. The judicial functions formerly vested in the coroners were, under the medical examiner's act transferred to the proper legal authorities, namely, the magistrates and the grand jury. Prisoners are now held by the magistrates, and the defendants are indicted by the grand jury upon presentation of the facts by the district attorney from the reports furnished by the medical examiner, the police and witnesses.

The judicial functions of the coroner's office are now more satisfactorily and quickly handled by the legally trained magistrates and by the grand jury under the guidance of the district attorney. In other words the judicial functions of the coroner's office are redundant and have no proper place.

The correct determination of the cause of death is designated as medical jurisprudence, the science which correlates our medical knowledge to the purpose of the law. Thorough equipment in medicine and surgery must be supplemented by a knowledge of fire arms, the effect of bullets on the human body, recognition of powder marks and burns, etc. Familiarity with the biological methods employed in testing suspected blood, semen and other stains; practical knowledge of botany in the examination of dust and foreign material upon the clothes of suspects and in the examination of the intestinal contents for particles of food, that is, plant seeds and fibers of animal and vegetable origin; an acquaintance with flora and fauna of waters, namely, diatoms, etc., may be of great assistance in the microscopic examination of the contents of the lungs and stomach of persons supposed to have been drowned; and again, the determination of the freezing point and the differences in the salt content between the blood of right and left side of the heart may be of use to confirm or negate the diagnosis of drowning.

[13] Laws of New York, 1915, ch. 285. For a copy of this act see Criminal justice in Cleveland, 703.

[14] The medical examiner versus the coroner, *National Municipal Review*, August, 1920.

Entomology also may be of considerable assistance in establishing the date of death through the cadaveric flora and fauna.

This incomplete summary of the duties of the pathological expert serves to emphasize the point I wish to make. That the officer whose duty it is to make such examinations which have as their one and single aim the determination of the cause of death and a correct and analytically interpretative analysis of the surrounding circumstances attending, must be a physician by education, technically and practically trained in these branches. No lay or professional man other than a well-trained pathologist as above defined possesses the requisite, natural or legal qualifications to discharge properly the duties of such an office.

In these laws of Massachusetts and New York is to be found the solution of the problem of the coroner's office. Of the system provided by them, the study by the National Research Council says: [15]

The New York experience under the medical examiner system as compared with the New York experience under the coroner system and as compared with the existing system in New Orleans, San Francisco and Chicago, leaves no room for doubt that from the viewpoint of the administration of criminal justice, there is no shadow of excuse for continuing the antiquated coroner system and that as a means for determining the cause of death the medical examiner system is adequate and satisfactory.

The only further suggestion that the present writer has is that if the office of prosecuting attorney is erected into a department of law enforcement with full responsibility for the enforcement of the criminal law, the office of medical examiner should be made one of the subordinate units of such departments and as such be under the general direction and supervision of its head.

[15] *Op. cit.*, 78-79.

CHAPTER XIV

THE GRAND JURY

The first step looking to the prosecution of a person accused of infraction of the criminal law of a serious character is to subject the accused to a preliminary examination. This examination in England and the United States is far from a searching one such as takes place in France, under the inquisitorial system, before the *juge d'instruction.* It has for its purpose merely the determination whether, in cases of offenses below the grade of felonies, the accused shall be proceeded against in the courts, and, in the case of felonies, whether the accused shall be held for a further more thorough examination. This further examination, in the case of persons accused of offenses of the grade of felonies, is made by a body known as a Grand Jury which has no exact counterpart in the systems of criminal procedure of countries other than England, the United States and other English-speaking countries whose judicial systems are based on the common law as it developed in England. Due to this, and to the important part it plays in the administration of criminal justice in the United States, it is desirable that its character and operations should be considered with especial care.[1]

Historical Origin. It is impossible to appreciate the rôle of such an institution as the grand jury, or to appraise its merits, without a knowledge of how it came to be such an important feature of our system of criminal administration. It has been repeatedly pointed out that in early times in England the commission of a

[1] The question may be raised as to the consideration of the grand jury as one of the agencies of the administrative branch having to do with the enforcement of the criminal law instead of as a part of the judicial branch. It is true that the grand jury is selected under the general direction of the court, is instructed by and reports to that body. From a functional standpoint, however, it clearly has to do with the administrative matter of placing persons in accusation rather than the judicial one of their trial. It is further both logical and desirable to consider its work in connection with that of the prosecuting attorney who in many instances has practically the same powers of accusation.

crime was looked upon as a personal matter between the author of the crime and the person injured by his act. Steadily, however, the idea developed that the commission of a crime was an offense against the peace and security of the state and that it was to the interest of the state to proceed against the offender. The greatest advance in this direction took place under the reign of Henry II (1154-1189). As a feature of his policy of strengthening his control over judicial administration, Henry adopted the policy of making use of a procedure known as an "inquest," which had been employed by his predecessors and the church in securing information generally, to discover crime and those responsible for it. At first he called upon the entire body of freeholders of the county to make known what crimes had been committed and the persons suspected of such crime. As Maitland puts it:[2]

> Under the Assize of Clarendon (Henry II) royal justices are sent throughout England to inquire by the oaths of the neighbors of all robberies and other violent misdeeds; those who are accused, *presented,* indicted by the sworn testimony of the neighbors, by the juries of the hundreds and vils are sent to the ordeal. This is an immense step in the history of criminal law. A crime is no longer regarded as a matter merely between the criminal and those who have directly suffered by his crime—it is a wrong against the nation and the King as the Nation's representative. This procedure by indictment the King keeps in his own hands; it is a specially royal procedure; those who are thus accused of crime must be brought before the King's own justices.

Later this system was modified by imposing the duty of making known and accusing, *i. e.,* indicting, persons suspected of crime upon a select body of representatives of the community. This body came to be known as a grand jury. It was composed of from twelve to twenty-three persons who were sworn accusers in that it was their duty, acting under oath, to accuse those persons who they believed to be guilty of crime, or, at least, of whose guilt there was sufficient evidence to warrant their arrest and trial. This system has continued with little modification as regards its principle and essential character down to the present day.

Reception of the Grand Jury System by the United States. This system was in full force at the time of the founding of the

[2] Constitutional history, 109-10.

American colonies and was introduced in them as an important feature of the common law that was generally received by the colonies. As in the case of the petty jury, the grand jury was looked upon by the colonists as one of the bulwarks of their liberties. Upon their separation from England, the colonists very generally made the use of this system a matter of constitutional obligation. The federal Constitution provided that:[3] "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." Similar provisions were incorporated in the constitutions of the original thirteen states and in most of the constitutions of the other states later admitted to the Union.

Function and Operation. In its general aspects the grand jury system is the same throughout the United States. Differences exist, however, in the several states in respect to such features as the manner of selecting the jury, the qualifications of persons entitled to serve as jurors, the right of exemption from jury service and, as will later appear, to a less extent in respect to its size. Much the most important feature of the grand jury system is the manner in which it acts in performing its duty. This can be obtained from the following unusually interesting description of the workings of the grand jury system in the District of Columbia:[4]

Immediately upon the organization of the grand jury the district attorney visits them and explains their duties somewhat more in detail than the court has done in its charge. In jurisdictions where the grand jury work is light the district attorney will attend in person, but in large cities and important federal districts where a grand jury is constantly in session, an assistant, specially charged with that duty, will attend instead.

On the first day the district attorney usually places one or two clear cases before the grand jury. The attorney first explains the law, defining the crime and pointing out its elements. He also outlines the facts. The first witness is then called in. The witness may have been sworn by the clerk of the court; if not, he is sworn by the foreman. The latter has the oath written out and at first

[3] Fifth Amendment.

[4] Jesse C. Atkins, The grand jury, *Georgetown Law Journal*, June, 1914.

he reads it rather haltingly, but he soon learns to administer it fluently and impressively. The witness is then examined in the ordinary way by the district attorney and after he has concluded the foreman and the jurors ask such questions as they desire. The first witness is usually the detective or other officer who has prepared the case, and he explains the entire case to the jury. There is frequently considerable confusion in the questioning, the degree of which depends upon the ability of the foreman to control his associates. Sometimes the foreman will insist that all questions be asked through him; at other times the juror will first address the foreman before putting his questions. As the jurors become accustomed to their duties, however, any friction disappears, and each juror asks his questions with but little confusion. During the first few days the jurors are keenly alive to their responsibilities, and each asks many questions; a simple case consuming much time, but they very soon learn to refrain from asking unnecessary questions. Frequently there are one or two members of the jury who thoroughly enjoy occupying the floor, and who insist upon asking some questions of each witness, much to the disgust of their brethren.

* * * *

At the conclusion of all the evidence, the district attorney will sum up the case briefly. He then retires and the jurors discuss the matter among themselves as long as they wish and then take their vote. If they think a *prima facie* case has been made out, they vote to present or indict and the clerk prepares and the foreman signs a paper called a presentment. This is in fact no more than a notification to the district attorney that they have decided to indict and a request to prepare the formal indictment. Frequently the indictment has been prepared in advance, and when this is done the foreman signs the indictment at the time of the vote. If less than twelve vote to indict the charge is said to be ignored and this fact is noted upon the minutes, and upon the indictment, if one has been prepared.

* * * *

When the indictments are completed, they are signed by the district attorney and sent to the grand jury. The clerk checks them over to see that they agree with his minutes, the foreman signs his name under the endorsement "A true bill" and the entire body carries them into open court. The clerk, after calling the roll, inquires if they have any communication to make to the court. The foreman responds in the affirmative and hands the indictments to the clerk, who examines them hastily as to form. The jurors are then excused—permanently, if they have finished their duties or their terms have expired; temporarily otherwise.

* * * *

The records of a common law grand jury are simple in the extreme. The clerk keeps a book in which he records the attendance of the jurors and of the witnesses. The purpose of the first record apparently is to fix the compensation of the jurors. The second record gives the caption of the case considered, the names of the witnesses heard and the action, whether indictment or ignoramus. No other record is kept by the jury. It is true that a stenographic report of the testimony is frequently kept, but unless made so by statute this is no part of the jury's minutes and a defendant is not entitled to inspect the transcript.

The district attorney and his assistants have the right to appear before the grand jury during the examination of witnesses, and, in fact, up to the time of the voting. Indeed, in some cases it is said that the attorney may remain during the voting, but must keep silent. The practice, however, is in accord with the better view that he should retire while the vote is being taken. Whenever the grand jury testimony is reported, it is done by an assistant or clerk of the district attorney.

The jurisdiction of the grand jury is very broad. The injunction of the oath is that the jury shall inquire into such matters as shall be given them in charge or otherwise come to their knowledge. There has been considerable discussion over the extent of the jurors' power. It is agreed that they must inquire into all cases where the accused has been held by a committing magistrate for their action. It is also agreed that the court may direct the jury to inquire into a matter. In fact a special grand jury is frequently impaneled for the purpose of investigating a matter of great public interest when it is probable that a crime has been committed, but only careful inquiry by a grand jury can develop the facts. The right of the prosecuting attorney to lay cases directly before the grand jury without a preliminary hearing is denied by some authorities, but in some jurisdictions it may be exercised only with the leave of the court. However, in the federal courts the matter is entirely within the discretion of the prosecuting attorney.

Dispute has arisen over the right of the jury to originate investigations. It is agreed that if perjury is committed before them, or if investigation of one crime incidentally discloses the commission of another, they may present, but their power to originate cases otherwise is vigorously denied. The weight of authority is in favor of the existence of the inquisitorial power, as it is called. So far as federal grand juries are concerned, the matter was set at rest by the Supreme Court in Hale v. Henkel, 201 U. S. 43-61. There the court said (pp. 65, 66):

"We deem it entirely clear that, under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formerly drawn up, but that

the grand jury may proceed, either upon their own knowledge, or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to appraise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them." . . .

The hearing before the grand jury is *ex parte*. The defendant has no right to testify or to be present and usually his witnesses are not heard. The grand jury is purely an investigating body and is not charged with finally determining whether the accused is guilty. It is concerned only to know whether there is a *prima facie* case and whether the accused should be put to his trial before a petit jury. For this reason the amount of evidence submitted to the grand jury is usually far less than that given to the trial jury. It is enough if the grand jurors have probable cause to believe that the accused committed the crime. It is not necessary that they hear all the witnesses. . . .

Not only the defendant but all other persons are excluded from the grand jury. . . . This does not apply, of course, to the district attorney, his assistants and the bailiff. . . .

* * * *

It goes without saying that only legally admissible evidence should be received before a grand jury. The district attorney is usually careful to see that the law is obeyed in this respect. Whenever incompetent evidence does get in the district attorney is scrupulous to advise the jurors that they must disregard it and base their judgment entirely upon the legal evidence. Interesting questions arise when illegal evidence is received. While there is some contrariety among the decisions, the better rule is that if there was any legal evidence before the grand jury, the court will not inquire into its sufficiency, nor quash the indictment because some illegal evidence was also received.

The district attorney is the legal adviser of the grand jury. For all practical purposes he decides questions of law for them. True they have the right to ask the advice of the court, but this right is rarely exercised. The responsibility of the district attorney is a grave one. He is not only prosecutor, but counsel for the accused and judge as well. After weeks or months of intimate association, the jurors often unconsciously seek to ascertain his view and to govern themselves accordingly. Sometimes they do not hesitate to ask directly whether the district attorney thinks an indictment should be found. It is therefore frequently a difficult matter to avoid influencing them on the facts. The prosecutor's duty is thus described by Mr. Daniel Davis (Davis' Precedents, 21):

"The least attempt to influence the grand jury in their decision upon the effect of the evidence is an unjustifiable influence, and no fair and honorable officer will ever be guilty of it. It is very common, however, for someone of the grand jury to request the opinion of the public prosecutor as to the propriety of finding any intimations upon the subject; but in all cases to leave the grand jury to decide independently for themselves. It may be thought that this is too great a degree of refinement in official duty. But the experience of thirty years furnishes an answer most honorable to the intelligence and integrity of that body of citizens from which the grand jury is selected; and that is, that they almost universally decide correctly. This is the natural effect of justice and truth upon minds left uninfluenced and unembarrassed by the conflicting opinions or arguments of others."

To this statement it should be added that it is the duty of the court upon the impaneling of a grand jury to address it for the purpose of instructing it in its powers, duties, and methods of procedure. The grand jury can at any time ask further instructions from the judge regarding its powers and duties. This right, however, is not often availed of.

Evaluation of Merits. Having obtained an idea of the manner in which the grand jury system originated and its present character, it remains to attempt to evaluate it as a part of the American machinery for the administration of criminal justice.

In doing this, one should keep in mind the task that this institution is called upon to perform. This task, stated in its simplest form, is to determine those persons against whom the evidence of guilt or serious crime is sufficient to warrant their being put upon formal trial. The interests here involved are two: that of the government, in the performance of its duty of prosecuting crime; and that of the person against whom the commission of crime is charged. To be satisfactory, the institution having the responsibility of sending persons to trial should be of a character that will adequately protect or serve both of these interests. The grand jury, therefore, should be examined from both of these standpoints.

Starting with the interests of the government in the performance of its task of enforcing the criminal law, the question presented is whether the grand jury is an efficient aid to the legal division of the administrative branch in formally charging persons with crime and bringing them before the courts for trial. In answering this

question essential features of the system must be noted. The first is that the original idea that it was the duty of the grand jury, on its own information and initiative, to determine what crimes had been committed, and who were their probable authors, has, under modern conditions, but little force. It originated at a time when the government had not assumed the positive duty of detecting and prosecuting crime such as it has at the present time. It is only within comparatively recent times that governments have provided themselves with police forces for the detection of crime and the office of public prosecutor to assume responsibility for proceeding against those who have been guilty of infractions of the criminal law. The development of these two agencies, and particularly, the latter office, has entirely changed the nature of the problem. Primary responsibility for both the detection and prosecution of crime now rests upon the government as represented by these two agencies. The grand jury has become but a secondary agency to coöperate with the public prosecutor in the discharge of his duty. Only to a comparatively slight extent does the grand jury consider cases other than those brought before it by the public prosecutor. It is the latter officer who, in all but a few instances, determines, in the first instance, those whose guilt shall be examined into, and who gets track of the witnesses and marshals the evidence. Furthermore, he is the one who acts as the legal adviser to the grand jury, assists it in the examination of witnesses and, though he must refrain from any direct advice to the grand jury in respect to its action, it is inevitable that great weight will be given to the attitude assumed by him; indeed, the mere fact that he brings a case before the grand jury indicates that his position is that an indictment is justified. This is evidenced by a practice that generally prevails of his drafting the indictment all ready for signature by the grand jury before the latter has considered the case.

Under these conditions, the query is legitimate as to whether the intervention of a body of laymen to pass upon the action of a trained and technically qualified officer, acting under a permanent responsibility, serves any useful purpose. There are many who believe that it does not.

Judge Olson of the Chicago Municipal Court writes:[5]

[5] *Journal of the American Judicature Society,* December, 1922.

In 95 per cent of the felony cases the grand jury cannot do any good whatever; it is merely a useless drag on justice. It puts the state's witnesses to a considerable trouble; it enterposes delay and increases the chances of the accused to escape conviction. In twenty-seven states means have been provided for prosecuting ordinary felony cases without the grand jury. It has proved entirely successful. . . . Worst of all, this useless and perfunctory grand jury business, imposed under the old constitution, takes up so much time that it interferes seriously with the genuine inquisitorial business of the grand jury. Little time is left for investigating such offenses of a serious public nature as ballot frauds, conspiracies to wrongfully increase the price of commodities; conspiracies to obstruct justice; to injure business and trade; to bribe jurors and legislators; to do acts injurious to the public safety and so forth.

W. F. Dodd points out that the grand jury is likely to operate in a perfunctory manner doing little more than approve the proposals of the prosecuting attorney. He writes in his work on State Government:[6]

The grand jury acts under the direct supervision of the court but it is ordinarily by law the duty of the official prosecuting officer to prepare and submit proposed bills of indictment and to aid the grand jury in its activities. In many large urban communities the grand jury, because of its lack of independent means for the investigation of crime, has become the " rubber stamp " of the official prosecuting attorney. The grand jury was a useful instrument for the direct detection of crime when employed in a rural community, and composed of a group of people drawn from that community and possessing personal knowledge of crimes that may have been committed therein. The grand jury ceases to be an effective instrument for the presentation of accusations against persons accused of criminal offenses when it is drawn from a large and thickly settled community, and when its members can have little knowledge of the crimes committed in that community, and little opportunity of making investigation with respect to such crimes. However, if the official prosecuting attorney is entirely relied upon as a means of presenting accusations, this official may occasionally hesitate to act because the accused is powerful and influential or is a friend of the official prosecutor. There are some cases in which a body of representative men drawn from the country as a whole may be better fitted to act than a prosecuting officer or the court itself; but such cases are infrequent and do not require the continuance of the grand jury as the chief means of making accusations and of bringing to trial persons accused of crime.

[6] W. F. Dodd, State government, 312.

In an exceedingly interesting paper Mr. R. Justin Miller, Professor of Law at the University of Minnesota, reproduces a large number of excerpts from letters from prosecuting attorneys and others to the effect that the grand jury is, if not a positive obstacle to the effective prosecution of crime, at least one serving no useful purpose.[1] Among these opinions, the following are typical:

I would say that there are a number of reasons why a presentment by the county attorneys would be better than an indictment by a grand jury, one of the strongest being that at least in the smaller counties where there are not over two regular terms of court each year, it would speed up very materially the disposition of criminal cases, for the court could adjourn from time to time and call the jury back for the trial of an important criminal case at any time between the two regular term days (County Attorney, Red Lake Co., Minn.).

I am of the opinion that the grand jury system is a useless and cumbersome portion of legal procedure (Attorney General, Utah).

The grand jury is a cumbersome body and a somewhat expensive body and in a majority of the terms of court at which they are called upon to act, there have resulted cases of not great moral turpitude involved and the county attorney is far better able to determine whether a certain person shall be prosecuted (County Attorney, Isanti Co., Minn.).

I feel that the system is cumbersome, expensive and out of date (County Attorney, Waseca Co., Minn.).

To sum up: the objections to the grand jury, from the standpoint of the prosecution, are: that it is in the nature of a fifth wheel; that real responsibility for the bringing of criminal charges is in fact exercised by the prosecuting attorney, the grand jury doing little or nothing more than follow his sugestions; that it complicates by just so much the machinery of criminal administration; that it entails delay which is an evil in itself; that it renders prosecution more difficult through important witnesses getting beyond the jurisdiction of the court, or through memory of facts becoming weakened by lapse of time; that it entails unnecessary expense to the government; and that it imposes a great burden upon the citizens called upon to render jury service.

[1] Information or indictments in felony cases, *Minnesota Law Review*, VIII; republished in *Journal of the American Judicature Society*, December, 1924.

It is not sufficient to show that the grand jury is not an aid to the prosecution, or even that it is a positive drag and a source of avoidable expense and delay, to establish a case for its abolition. It must also be shown that it does not render a desirable service from the standpoint of protection of persons from being unjustifiably forced to defend themselves in court against charges of which they are innocent. There are many who will admit that this institution presents all of the disadvantages that have been enumerated, from the standpoint of the prosecution, but will hold that these disadvantages are more than offset by the protection that it affords to the innocent from being improperly accused and forced to defend themselves in court. It is difficult to see how this contention can be maintained. On the contrary, the two most fundamental features of the grand jury system—that it sits in secret, and that its proceedings are *ex parte,* only evidence for the prosecution being heard, and no opportunity being afforded to the accused to defend himself—take away from the accused the two greatest protections available to him. Under the alternative method of accusation, where the public prosecutor acts by information upon his own responsibility, the accused has an opportunity to establish his innocence and a safeguard against arbitrary offensive action that is not afforded by the grand jury. Judge Baldwin puts this excellently in the following statement:[8]

The intervention of a grand jury is also often the necessary cause of delay alike prejudicial to the state and to the prisoner. It can only be called in when a court is in session by which it can be instructed as to its duties and to which it is to report its doings. Months often elapse in every year when no such court is in session. For this reason in case of a poor man under arrest on a charge of crime, who cannot furnish bail, it would often be much better for him were his liability to be brought to trial to be settled promptly by a single examining magistrate. At the hearing in that case also he has a right to be present and to be heard. Before a grand jury he has no such right.

In most states the great majority of indictments are against those who have already been committed on a magistrate's warrant to answer to the charge should an indictment be found. The accused thus has two chances of escape before he can be put on trial for the charge against him; one on a discharge ordered by the committing magistrate, and one by the refusal of the grand jury to

[8] Simeon E. Baldwin, The American judiciary, 238-39.

return a "true bill." A grand jury is more apt to throw out a charge as groundless than a single magistrate. He feels the full weight of undivided responsibility. If he err by discharging the prisoner he knows that he may let a guilty man go free untried. If he err by committing him for trial, he knows that if innocent the jury are quite sure to acquit him. He acts also in public. The whole community knows or may know the proofs before him and will hold him to account accordingly. On the other hand the grand jury act in secret. The prosecuting attorney if admitted, does not remain while the jurors are deliberating over their decision. No one outside knows who may vote for and who against the return of an indictment. Every opportunity is thus afforded for personal friendship for the accused or business connection with him to have its influence. Judges know this and in their charge often emphasize the importance and gravity of the duty to be performed.

Probably the best evidence that the grand jury is not an essential feature of judicial administration is to be found in the fact that no country other than those whose judicial systems are derived from the common law of England make use of it; that in England itself, where it took its rise, it has largely fallen into disuse and its entire abandonment is urged, and that in many of the American states the alternative method of procedure by information, that is, by accusation laid by the prosecuting attorney, without the intervention of the grand jury, is now largely employed with no evidence that it has been productive of other than good results.

The Committee on Law Enforcement of the American Bar Association, a sub-committee of which visited England to study criminal procedure in that country, in its report in 1923, declared that, though the grand jury was retained in England, its action was little more than perfunctory, responsibility for the bringing of accusations being with the public prosecutor. It said:

It appeared that the indictments had been previously prepared in all cases that were to be submitted to the grand jury. One of the reasons for the celerity of criminal proceedings in England lies in the fact that the functions of the grand jury are in most cases largely formal. Indeed there is strong support for a movement to abolish the grand jury entirely. No public prosecutor appears before the grand jury and no minutes of the proceedings are taken. Within three hours after the retirement of the grand jury, forty-nine indictments were returned and the entire work of the grand jury for the month was completed in two days.

The British Royal Commission on Delay in the Law Courts, which reported in 1913, recommended the abolition of the grand jury. During the World War, as a war measure, the use of the grand jury was temporarily abolished. Regarding the cancelling of this order the Law Times of London, in its issue of January 7, 1922, said:

By Order in Council made last month the Grand Juries (Suspension) Act, 1917 came to an end and during the present year and thereafter, if no steps are taken by Parliament, this obsolete method of wasting time and money will again form part of our criminal procedure. Since 1917 we have heard no suggestion of any miscarriage of justice due to the suspension of the functions of grand juries but we have heard of the saving of much time and money due to their temporary disappearance.

Restriction, Modification, or Abolition. The use of the grand jury, though general, is by no means universal in the United States. The following, taken from Bulletin No. 10 prepared for the Illinois Constitutional Convention, in 1920 gives in brief compass the constitutional status of the grand jury in the several states.

Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia, and Wisconsin have no constitutional provisions requiring indictments by a grand jury. The statutes of these states, however, require or permit grand juries. The constitutions of all other states contain provisions requiring or permitting indictments by a grand jury in criminal cases, or in certain classes of criminal cases. In some of these states, indictment by a grand jury is optional, other methods being provided to replace the indictment. A few states require indictment by a grand jury only in capital cases where the punishment is by imprisonment for life. In several states the grand jury may be abolished, and in some states the number constituting a grand jury has been fixed at less than the common law number.

In twenty-five states constitutions require indictment for certain crimes. Nearly all of these states require indictment only for felonies, but the constitutions of Arkansas, Nebraska, New Jersey, South Carolina, Tennessee and West Virginia require indictment for all or some misdemeanors, as well as for felonies. Connecticut requires an indictment only for those crimes in which the punishment may be by death or imprisonment for life. The Louisiana constitution requires an indictment in capital cases, but in other cases the accused may be held to trial on information.

The constitutions of Colorado, Nebraska, North Dakota and Wyoming provide that the legislature may change, regulate or abolish the grand jury. The constitution of Nebraska permits the legislature to provide for holding persons to answer for criminal offenses on information of a public prosecutor. The Iowa constitution permits the legislature to provide for holding persons to answer for any criminal offense without the intervention of the grand jury. The constitution of Indiana contains a provision that the legislature may abolish or modify the grand jury system. The constitutions of Alabama, Arkansas, Mississippi and Delaware permit the legislatures to dispense with the grand jury in misdemeanors and to authorize such prosecutions before justices of the peace or in inferior courts.

The constitutions of Arizona, California, Idaho, Missouri, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington provide that cases may be prosecuted by information as well as by indictment. An examination and commitment by a magistrate is a preliminary requirement to the filing of an information in Arizona, California, Idaho, Montana, Oklahoma and Utah. The constitution of Louisiana which requires an indictment in capital cases, permits information in all other cases.

The constitutions of a number of states specify the number that shall constitute the grand jury. When this is specified the number required to find an indictment also is usually fixed by the constitution. The following table shows the number required to find an indictment in the states in which these numbers are specified in the constitutions:

State	Number composing the grand jury	Number necessary to return a verdict
Colorado	12	9
Iowa	5-15, as legislature may provide	..
Kentucky	12	9
Louisiana	12	9
Missouri	12	9
Montana	7	5
Ohio	To be determined by law	To be determined by law
Oklahoma	12	9
Oregon	7	5
South Carolina	18	13
Texas	12	9
Utah	7	5
Wyoming	12 (may consist of)	9

The number of grand jurors in no place is more than the maximum at common law. The tendency has been to decrease the number of grand jurors. In Montana, Oregon and Utah only seven are required and five of the seven may return a verdict. In those

states in which the constitution fixes the number of grand jurors at twelve, nine may return a verdict. In no state is a unanimous verdict required.

In several of the states in which information and indictment are concurrent remedies, a grand jury can be called only upon an order of the judge of a court having power to try and determine felonies. A provision to this effect is found in the constitutions of Missouri, Oklahoma, Arizona, Montana, Idaho and Utah. The Utah constitution provides "no grand jury shall be drawn or summoned unless in the opinion of a judge of the district, public interest demands it." The Arizona constitution provides: "Grand juries shall be drawn and summoned only by order of the superior court." The constitutional provisions relating to convening of grand juries in Missouri, Montana and Idaho are similar to those in Utah and Arizona. The constitution of Oklahoma provides that the grand jury shall be convened by the judge upon his motion, or shall be ordered by the judge upon the filing of a petition by one hundred resident tax payers of the county. Michigan, Kansas, Washington, California, and South Dakota have constitutional provisions which permit an infrequent use of the grand jury.[9]

Michigan probably presents the best example in the United States of a jurisdiction where little or no use is made of the grand jury and prosecution upon information filed by the prosecuting attorney is found to work with complete satisfaction. Alan Johnston Jr., Managing Director of the Baltimore Criminal Justice Commission writes:[10]

Although there is in the law of Michigan provision for the Grand Jury, the indictment function is seldom employed in Detroit and Wayne County. Information is to the effect that such is the case throughout the whole state. All the judges having criminal jurisdiction have power to make inquiries in the nature of inquests by Grand Juries and not infrequently "sit on the Grand Jury." As a matter of practice, Grand Juries of twenty-three men are rarely called and when so are called only upon the order of the court. Not more than one Grand Jury has been drawn in Detroit in the last fifteen years. When a Grand Jury is drawn it is universally for the purpose of investigating matters such as political irregularities or a criminal condition about which there has been widespread complaint.

* * * *

[9] In 1900 Missouri amended its constitution so as to provide that prosecution might be by information as well as by indictment.

[10] Report of Alan Johnston, Jr., on Consolidated Criminal Court of Detroit, Baltimore Criminal Justice Commission, 1923. Mimeographed manuscript.

This procedure has been in operation in Michigan so long that no one here ever thinks of a Grand Jury as having any part in ordinary criminal practice.

Modern opinion is tending more and more to the position, either that the use of the grand jury shall be entirely done away with, or that the information may be employed as an alternative method of putting a person in accusation. In 1925, the Executive Committee of the American Bar Association, the American Institute of Criminal Law and Criminology and the Association of the American Law Schools requested the American Law Institute to undertake the preparation of a model outline code of criminal procedure. The latter organization, in meeting this request, made an exceptionally careful study of the practical workings of the grand jury and sought, through the use of a questionnaire, to obtain the opinion of the bench and bar regarding the relative merits of accusation through a grand jury indictment or by information by the prosecution attorney. The results obtained were almost uniformly in favor of the information as the only method, or, at least, one that should obtain concurrently with that of proceeding through the use of a grand jury. To quote from an article by one who collaborated in the work:[11]

From the answers to the inquiries and from other investigations it seemed to be clearly established that prosecution by information, while less expensive, is more expeditious and efficient than prosecution by indictment. At the same time convincing reasons appeared why the grand jury should be retained for investigating purposes and certain exceptional situations.

Another important change that is rapidly being made is that of doing away with the archaic technical wording of the indictment document which so often led to new trials on account of the difficulty of drafting it in strict conformity with the principles supposed to govern its wording. The law passed by California in 1927 which provides that " no indictment, information or complaint is insufficient, nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantive right of the

[11] Edwin R. Keedy, The drafting of a code of criminal procedure, *American-Bar Association Journal*, January, 1929.

defendant upon the merits" is an illustration of the action being generally taken. And the draft code of criminal procedure of the National Crime Commission, just mentioned, provides that the indictment need do nothing more than set forth the nature of the offense charged.

The new code of criminal procedure adopted by Louisiana in 1928, among other important reforms, provides that all crimes other than murder may be prosecuted by bill of information without the intervention of the grand jury, and that the indictment shall be in the simplified form of merely setting forth the nature of the offense charged.

General Summary. In the foregoing pages the attempt has been made to study the grand jury in all its possible aspects; its historical origin, the undoubted services rendered by it as a device superior to those preceding it for determining the persons who should be put upon trial for criminal offenses, and as a means of protecting individual liberty during a period when oppression by rulers and their officers was a real danger, and its practical working at the present time from the standpoint both of the prosecution and the accused. It is difficult to review this statement without reaching the conclusion that, whatever may have been true of the past, conditions are now such as to render it advisable to discontinue its use as the normal or prevailing method of formally placing in accusation persons believed to be guilty of crimes of a serious character.

First, and in some respects most important of all, the grand jury no longer conforms to the modern theory of the location of responsibility for the detection and prosecution of crime. This responsibility, instead of being vested in the community, now attaches directly to the state. Furthermore, the state, as a logical consequence of the possession of this new responsibility, has developed, in its official police force and public prosecutor, agencies for discharging its responsibility that were not in existence at the time that the grand jury took its rise. Both the initiation of criminal proceedings and the most effective means of determining probable guilt have, as a matter of fact, passed out of the hands of the grand jury into those of other agencies, the police and the public prosecutor, and the former has been relegated to a secondary position as a mere agency for registering decisions otherwise reached.

Secondly, as a necessary consequence of this changed condition of affairs, the grand jury has become a body that no longer serves any useful purpose, but is a positive drag upon the administration of criminal justice. It divides responsibility, complicates by just so much the machinery and procedure of criminal administration, adds to the burden of the public prosecutor, entails delay, increases expense, and is productive of hardship to witnesses and those called upon to serve as jurors.

Finally, not only does the grand jury no longer meet a need as a device for protecting the individual against official oppression, since that need has passed away with the abolition of autocracy, the establishment of an independent judiciary, and the development, through constitutional guarantees and otherwise, of other more effective means of protection, but, due largely to the *ex parte* and secret character of its proceedings, too often is responsible for sending to trial persons who, under a proper system of careful preliminary examination, could establish their innocence of the charges preferred against them.

Nowhere have these features been more effectively set forth than in the Cleveland Survey. As this statement represents conclusions reached after an exceptionally careful investigation by persons of the highest competence, it is worth while to reproduce it in full. It reads:[12]

The present situation raises, however, a deeper question as to the appropriate place of the grand jury in the administration of justice in a modern community. To what extent does the grand jury, as now used in Cleveland, perform a necessary and useful part? At the present about 90 per cent of the felony cases receive two preliminary examinations. This means that, previous to the actual trial of the case, the witnesses appear and testify at two separate times and places; that the time and energy of two successive prosecutors are enlisted in each case; that the clerical work is doubled and the executive work, such as that of bailiffs, is doubled. This duplication, while it places an added strain upon an already overburdened machinery, does not itself demonstrate the uselessness of this double hearing. But the fact that the case is going before another preliminary tribunal has the effect, as has been stated, of making the work of the first of these two tribunals casual and careless.

[12] Criminal justice in Cleveland, 211-12.

The grand jury was originally an assembly of the neighborhood for the purpose of starting the prosecution of crimes with which the neighborhood was familiar by observation or reputation. It antedated the modern system of police departments and prosecutors, who now have charge of the original institution of prosecutions. In the era of royal, baronial, or executive despotism and tyranny, the grand jury came to be looked upon as an institution which would protect the people against the deprivation of their liberties by feudal barons, kings and other oppressors. It is no longer needed as a bulwark of our liberties, as the trial courts and juries, together with other community institutions, are quite capable of protecting us against executive tyranny or persecutions. Generally the grand jury does little more than rubber-stamp the opinion of the prosecutor. It is almost exclusively dependent upon him for its knowledge of the law, and for its information on the facts it is almost entirely dependent on his zeal and willingness. There will always be instances in which the inquisitorial powers of the grand jury are necessary for the initial discovery or proof of a violation of law, and in which, just as at present, the prosecution will be begun before the grand jury. At times it is needed to institute inquiry into the acts of public officials themselves, being presumably more independent of the accused officials than other organs of the administration of justice. For these situations the grand jury, both regular and special, continues to have a special and valuable function for which it should be maintained. But where the prosecution is begun in a court of preliminary examination, if that examination be conducted in a careful and orderly way, there is, with rare exception, nothing valuable for the grand jury to do, and the duplication of preliminary hearings produces the inefficiencies which have been noted in this report. In short, one preliminary examination is enough. If the preliminary examination demonstrates the justification for a trial, the prosecutor should then file an information in the county court and the case be submitted at earliest practicable moment to the trial court and jury.

This proposal is by no means revolutionary. As long ago as 1825 Jeremy Bentham, in his "Rationale of Judicial Evidence" asserted that the grand jury, as an institution, had then been useless for fully a quarter of a century. The discussion has been going on ever since. For almost a century Connecticut has been using the prosecutor's information instead of the grand jury's indictment as the normal mode of prosecution; and eighteen states have constitutional or statutory provisions for abolishing the system of double preliminary examinations.

In holding that the time has arrived when the grand jury should be abolished, attention should be called to the fact that, concurrently with such action, steps should be taken to strengthen the

present inadequate preliminary examination. This can be done by requiring the prosecuting attorney to conduct examinations analogous to those prosecuted by the *juge d'instruction* under the French system or ensuring a careful, instead of a perfunctory, examination before the committing magistrate. The whole effort should be directed toward providing for but one preliminary examination before the trial, but having this examination a thorough one through which the accused will have full opportunity through his own testimony or through the production of witnesses in his behalf to make such defense as he may desire at that time.

The Grand Jury as a Political Institution. In the foregoing, consideration has been had of the grand jury as an agency for the formulation of accusations of the commission of crimes by private individuals. Throughout its history the grand jury has, however, had another important function, that of serving as a citizen agency for the investigation of the conduct of affairs generally by public officers. Acting upon its own initiative, but more usually under direction of the court, it has the right to conduct investigations into, not so much the guilt of an individual for a particular crime, as the administration of the law generally or the administration of a particular law and particularly into the conduct of public officers. These investigations may result in the presentment of public officers or others for the commission of crimes, or merely in a report setting forth the results of its investigations with recommendations as to the action which in its opinion should be taken. Often a special grand jury is summoned and empaneled for this purpose.

There can be no doubt that the grand jury constitutes a valuable institution for this purpose. It provides one of the most effective means possessed by the electorate for exercising control over public officers. A condition frequently arises where a public officer abuses the powers of his office, or fails to discharge them with due energy and faithfulness. Redress in many cases cannot be secured, since the officers responsible for taking or not taking action are the ones whose acts are under question, or they are subject to the authority or influence of such persons. For such cases no equally effective means of action has been developed as that afforded by a grand jury composed of representative citizens, free from all political or governmental influence, and able to conduct in secret a

careful inquiry. As an article in the Journal of the American Judicature Society has stated:[13]

> There are times when an inquisitorial body is needed for criminal law enforcement. When there are charges of boodle being used to influence legislatures or city councils, or to corrupt the voters of a district or a state; when public officials are banded together to violate the law; when powerful industrial or political interests conspire to defeat justice—then it may well be that prosecutors will fear to do their duty and need to have the aid of a body of citizens, acting temporarily in an official capacity, to carry the responsibility of accusing powerful and malignant interests. The grand jury, under such conditions, affords a safe and secret agency before which individual witnesses may come and safely disclose what they know. . . . It is plain that the grand jury has a worthy function to perform and should not be abolished wholly. It can be extremely useful to the court when properly employed. The trouble is that we arbitrarily require its use in every kind of felony case, when it can be useful in not more than one case in a thousand.

The position that has been taken that the time has come for the abolition of the grand jury applies, therefore, only to its existence as a means for the placing in accusation of individuals in the ordinary course of administering criminal justice. It is highly desirable that it should be continued as a citizen agency for the exercise of general inquisitorial powers in respect to social conditions and the conduct of public officers. The two functions are quite distinct. It is possible to discontinue the use of the grand jury for the first function while retaining it as an agency that may be occasionally invoked as need therefor arises. In this connection it is of interest to note that in at least one state, Oklahoma, the constitution provides that should the judge fail to provide for the empanelment of a grand jury on his own initiative, he can be compelled to do so by the filing of a petition signed by one hundred resident taxpayers of the county. This would seem to be a desirable provision, since the conduct of the judge himself may be in question or he may be subject to such political or other influence as will deter him from taking action.

[13] October, 1920; "Grand jury reform," p. 77

CHAPTER XV

THE ACCUSATORIAL AND INQUISITORIAL SYSTEM OF CRIMINAL ENFORCEMENT

In the chapters immediately preceding an account has been given of the agencies made use of in the United States for the enforcement of the criminal law. In order fully to appreciate the manner in which this machinery operates it is desirable to supplement this account with a consideration of the general principles followed by the government in seeking to determine responsibility for the commission of crime and formulating charges against those believed to be so responsible. This is especially desirable, since, as will be shown, this principle is fundamentally different from that followed by most non-English-speaking communities. The two systems resulting from the use of these two divergent principles are known as the Accusatorial and the Inquisitorial.

The Accusatorial System of English-Speaking Countries. Historically, as has been pointed out, the original attitude of the state toward crime was not unlike that of its present attitude toward infractions of private law; namely, that the issue was primarily a private matter between the person suffering injury or loss as the result of the crime and the person believed to be guilty of such offense; and that the state's responsibility was limited to providing means by which the injured party might secure redress without resorting to physical violence. The interest of the state, it was held lay, not so much in seeing that justice was done between individuals, or in punishing crime, as in protecting itself through the repression of disorder and acts of violence. To this end it found it expedient to restrain injured parties from seeking to secure redress by acts of personal violence, and to compel them to make use of facilities provided by itself.

Though there has been a steady evolution away from this position to one where it is held that the commission of a crime is an offense against the state, and that it is the affirmative duty of the state to proceed against the guilty party, the old idea that the person

primarily concerned is the one that suffered injury or loss as the result of the crime still persists in the system made use of in the initiation of criminal proceedings. This system is described as "accusatorial," since it contemplates that in each case there shall be a personal accuser who will come forward and charge with the crime the person to whom the circumstances point as probably guilty. The accuser is normally the one who has suffered injury or loss as the result of the crime. Where there is no one who is sufficiently interested to take this action and where the arrest is made by a policeman or other public officer on his own initiative, such officer is looked upon as the accuser and takes the place of the private accuser. It is true that, after the accusation is once made, responsibility for subsequent action and the entire expense of the proceedings rests with the state. Yet the idea persists throughout the whole proceedings on the assumption that the proceeding is in the nature of a judicial duel between the two parties, the accused and the accuser, with the state acting as the authority to see that justice is done between them. This is evidenced by two things: by the refusal or failure of the state in many instances to initiate criminal proceedings, and, if initiated, to continue the prosecution, when the private person who has suffered injury or loss neglects or refuses to take action; and by the giving of a sort of special character to the accuser as the "complaining witness."

One of the consequences is a tendency on the part of the government to be lax in the prosecution of crime that does not involve great moral turpitude, and especially acts of violence. The state, thus, does not show great concern when the crime results merely in a personal pecuniary loss, as, for example, in cases of embezzlement. If the injured party is satisfied with restitution of the property taken, or if for sentimental or other reasons, he is unwilling to prosecute, the state is not likely to push the matter. This attitude on the part of the state has the injurious effect of lessening the deterrence of crimes of this character, since persons contemplating such crimes know that they have a chance, if their crime is discovered, of avoiding punishment by making restitution or appealing to the sentiments of the injured persons.

Consistent with the principle underlying the accusatorial system, the first step in the inauguration of criminal proceedings is a formal complaint made by one individual against some other indi-

vidual of the commission of an offense against the criminal law. The individual making the complaint may be either the person injured, a policeman, or other peace officer, and, in theory at least, any other person having knowledge of the affair. This complaint, to quote G. Grover Alexander,[1] " is the egg out of which all subsequent proceedings are hatched." Ordinarily this complaint does not have the status of a formal charge of the commission of a crime until it has been passed upon and accepted as such by the prosecuting attorney and, when the offense charged is a serious one, is supported by an affidavit. Where the complaint is a policeman, the affidavit is issued almost as a matter of course if the facts stated show that the crime has been committed. If the complaint is made by a private person it is inquired into more closely by the prosecuting attorney and, if the offense is a minor one, the prosecuting attorney may persuade the complainant that it is inadvisable to institute proceedings.

Though, after the complaint is made and affidavit issued, the government takes charge, the complainant still occupies an important position as complaining or prosecuting witness, and his failure to appear when the case is called for trial usually results, in petty cases at least, in the dismissal of the action for " want of prosecution." It is hardly necessary to say that the bringing of a criminal charge is a serious matter, and unless done with adequate cause it may lead to serious results. The person falsely charging another with a criminal action renders himself liable to a civil action for damages if the person charged is acquitted and it appears that there was no reasonable ground for making charge.

The next step in the prosecution of the accused is to ensure his presence to answer the charge that has been made against him. The normal method is the issue by a magistrate or judicial officer of what is known as a " warrant of arrest," directing the seizure or " arrest " of the accused and the keeping of him in custody until his release is ordered. Though, theoretically, the formulation of the complaint and the issue of the warrant of arrest should precede the arrest proper, actually there are many cases where, in order to avoid the escape of the offender, or for other reasons, an arrest is first made and the charges or complaint are later formulated. The

[1] The administration of justice in criminal matters, 20 (1915).

law relating to the right to make an arrest without a warrant is an interesting one. Under the common law, which for the most part still governs this matter, under certain circumstances, a person may be arrested without the issue of a warrant either by a public peace officer or by a private individual. In point of fact, the common law makes no distinction between the right of a public officer and a private individual to make an arrest. Either can make an arrest without a warrant: (1) When a crime has been committed in his presence; (2) when a felony has been committed (not merely believed to be committed) and the person making the arrest has reasonable grounds for believing the person arrested is the offender; or (3) when a "hue and cry" ("stop thief") is raised. To quote Judge Baldwin on this matter:[2]

Any private individual may, by night or day, arrest without warrant one whom he sees committing a felony or a breach of the peace or running off with goods which he has stolen. If he knows that a felony has been committed and has reasonable grounds for suspecting that it was the act of a certain person, he may arrest the latter, although without personal knowledge of his guilt.

A sheriff, constable, or other peace officer may arrest without warrant any one whom he has reasonable ground for suspecting to be guilty of a felony, although it may turn out that no such felony was ever committed. For any ordinary misdemeanor he could not, at common law, arrest without a warrant, unless he personally witnessed the wrongful act or was near enough to hear sounds indicating what was being done.

In practice, officers of local police arrest freely on mere suspicion and with no personal knowledge either that any offense has been committed or that, if any, the person taken in charge was connected with it. The only risk which they run is of an action for damages, and that is slight. If one were brought and they showed that they acted in good faith and not wholly without cause, the amount recovered would probably be very small, and in any case it would be difficult to collect a judgment against one of them, as they are generally men of small means.

If the arrest is made prior to the filing of a complaint and execution of an affidavit, these formalities must immediately be taken after the arrest is made.

[2] Simeon E. Baldwin, The American judiciary, 227-28.

The failure of the common law to distinguish between the right of a public officer and of a private individual to make an arrest is due to the fact that this law developed at a time when the government did not have a police force such as is now possessed by all modern governments. Due to the rise of such services, the exercise of private individuals of the right to make arrests has almost completely disappeared. To such an extent is this true that few persons now know that this right exists. It is, of course, a more serious affair for a private person to make an arrest, since the right of a person improperly arrested to bring an action for damages for improper arrest can be more easily enforced against a private person than against a police officer, since the latter is usually a person without property to satisfy a judgment secured against him, and because a jury, in assessing damages for unlawful arrest, would undoubtedly view the offense of unlawful arrest more seriously when the arrest was made by a private individual than where made by a public officer believing that he was acting in the discharge of his official duty.[3]

As a usual thing, the warrant of arrest must be an order for the arrest of a particular person under certain circumstances. However, the warrant may be what is known as a "John Doe warrant"; that is, for the arrest of a person unnamed, or even a general warrant for the arrest of unknown persons. Issue of warrants of the last named character, however, are forbidden by the Fourth Amendment of the federal Constitution and by most of the state constitutions.

Within recent years another method of securing the presence of the accused to answer the charges that have been made against him has been developed. There are many cases of a petty character where there is no danger that the offender will escape and a mere order to appear will meet all the needs of the situation. Such, for example, are the numerous offenses against traffic regulations and other local police ordinances. To resort to arrest in such cases is inadvisable for a number of reasons. Such action imposes an undue hardship upon the offender, whose offense is often merely of a technical character; it throws an avoidable burden of work upon the police, and it gives rise to the necessity for bail, if incarceration

[3] The right of a policeman to make an arrest is, however, broader than that of a private citizen.

is to be avoided. More and more, the practice is now developing of handling such cases by the mere issue of what is known as a "summons," that is, an order directed to the accused to appear before the court and answer the charges but not carrying with it the seizure of the person or the arrest of the accused. One of the desirable reforms in the system of criminal procedure in the United States is the formal authorization by law of the use of summons in place of warrants of arrest, since in many cases this form of action is not expressly authorized by law, and the larger use of this method of securing the attendance of the accused. To quote the Cleveland Survey on this point:[4]

The field of criminal justice in the modern American state and city has come to include, however, a large number of misdemeanors committed by persons who are permanent residents, engaged regularly and habitually in a lawful occupation, have respectable friends in the city and a social status worth preserving, and for whom departure from the city would be a greater punishment than that provided by law for the offense. Sunday ordinances, violation of health, smoke, building and nuisance ordinances, traffic cases not involving injury to persons, license ordinances are examples of municipal misdemeanors of this type; automobile offenses not involving injury to persons or theft, labor, health, building and factory regulations, laws regarding minors, license laws, election laws are examples of state misdemeanors. The use of the process of arrest in such cases is a waste of effort and an unnecessary drain on overburdened resources. The process of summons, such as is used in civil cases would be just as effective.

The argument in favor of the use of the summons in place of the arrest has also been excellently stated in a recent study of criminal administration in the United States as follows:[5]

Notwithstanding the changes in the scope and character of our penal law we have generally retained in this country arrest as the only means of bringing the accused under the jurisdiction of the court. In England the summons has been in force for lesser criminal offenses for many years, and it is now often employed in cities in this country in case of the violation of police ordinances. Its use should be very much extended. The process of arrest is justified

[4] Criminal justice in Cleveland, 203.

[5] Charles Kellogg Burdick, Criminal justice in America. Address before the St. Louis Bar Association, April 6, 1925; reprinted in *American Bar Association Journal*, April, 1925.

to prevent the escape of the accused. Its use is not necessary for this purpose when the accused has an established place in the community, except in cases of the more serious felonies. For other crimes, unless process is directed against those of bad or questionable social status, summons should be substituted for arrest and this should be especially true with regard to our multitudinous police regulations. A liberal use of the summons would relieve the pressure upon our police forces and would help to obviate the evil of the criminal bail bond. It would also prevent congestion in our jails by making each summons returnable at a time when the hearing could be had promptly. Such practice would, finally, relieve those accused of lesser offenses of much unnecessary hardship and annoyance, and would make it possible to arrange a separate calendar for minor offenses in which the summons might be used.

In petty or misdemeanor cases, the truth or the validity of the charge is usually determined by immediately sending the accused before the proper court for trial. In more important cases, and especially in those of the grade of felonies, several other steps intervene before this action is taken. The first is that of holding what is known as a " preliminary examination." The feeling rightly exists that no one should be subjected to the ignominy, trouble, and expense of defending himself against a serious criminal charge until an opportunity has been given to him to show that the charge is unfounded. In all the states, it is believed, the law provides that, unless such examination, is waived, the accused shall be brought immediately, that is, within twenty-four or forty-eight hours, before a magistrate for the purpose of having the charge inquired into. If, at this hearing, the charge is found to be unjustified he is discharged. If his innocence is not clearly established, he is held for further action. Usually this action is to hold him for action by the grand jury.

In the United States, this preliminary examination is likely to be of a summary and perfunctory character. Often it is waived by the accused, either because be believes that there is no likelihood of his being discharged, or because he believes that it will be detrimental to his interests to make known his defense at this time. When held, the magistrate often hears only the policeman who has made the arrest and the accused, though the latter has the right to have witnesses called and examined in his defense. In England, it would appear that the preliminary hearing is of a much more formal

character. Witnesses are called and examined and the proceeding partakes more of the nature of a trial of the charge. Even then, however, the hearing has for its purpose not the determination of the guilt of the accused but merely whether there is a sufficient *prima facie* case to warrant holding the accused for further action. One reason why this examination is of a more serious character in England than it is in the United States is that there many cases are sent to trial without the intervention of the grand jury, while here for the most part, trial is only had after the charge has been passed upon by that body after the preliminary examination, and a true bill or indictment has been found against him.

As has been pointed out, the holding of the accused as the result of the preliminary examination does not of itself mean that he will be tried for the offense charged against him. It merely means that his case will be presented to the grand jury, and whether or not he will be sent to trial depends upon the action of that body. If the grand jury decides that prosecution should not take place it " ignores " the charge, in which case the charge is dismissed, though such action does not preclude a subsequent grand jury from reversing this action, though this is rarely done. If it holds that the accused should be tried it returns an " indictment " against him, and he is tried upon this indictment.

As has been pointed out, it is possible in some jurisidictions for action by the grand jury to be dispensed with, use being made of a formal charge by the prosecuting attorney known as an " information," a procedure which it has been held in preceding pages should always be permitted if not made the exclusive one for formally preferring criminal charges.

One other step has to be taken in order to perfect the formalities required in placing a person in accusation for the commission of a felony; namely, bringing him before the court and there reading the charge that has been made against him and directing him to make answer to it. The operation of bringing the prisoner before the court and reading the charge against the accused, which is performed immediately after the perfecting of the indictment, presentment, or information, is known as his " arraignment; " and his reply, which takes the form of declaring that he is " guilty " or " not guilty," is known as his plea. Both of these operations are of a purely formal character. The arraignment has for its purpose to

make known to the accused in a formal manner the nature of the charge that has been brought against him; and the plea, to determine whether the accused desires to make any denial of or defense to the charge. In case the plea is "not guilty" there is no disclosure by the accused of the nature of the defense that he intends to set up against the charge.

The Inquisitorial System of France and Other Latin Countries. In marked contrast with this accusatorial system is the system employed in France and on the continent of Europe, and generally known as the Inquisitorial System. The principle underlying this system is that all infractions of the criminal law are offenses against the state rather than against an individual and that responsibility rests directly upon the state to take the necessary steps to apprehend and determine the guilt of the responsible person. There is here no idea of a judicial duel between an accuser and the accused. The only interests recognized are those of the government whose laws have been violated and those of the accused whom the circumstances indicate as responsible for the violation. The procedure of initiating criminal proceedings in France and the countries that have adopted the French system is in strict conformity with this principle and differs fundamentally from that employed by the English speaking countries.

Upon a crime being committed in France, the government, acting through the public prosecutor, immediately assumes charge and undertakes a detailed examination of all the circumstances of the crime and of the persons connected therewith for the purpose of determining who are the probable guilty parties. In making this investigation the public prosecutor has the aid of an officer known as *juge d'instruction,* who has no counterpart in the American judicial system. This officer, of whom there is a large number located in the several judicial districts, is appointed by the President of the Republic for a term of three years, usually upon the nomination of the chief public prosecutor (*le chef du parquet*). He is usually selected from among the judges of the tribunal of first instance or from among the class of non-titulary magistrates known as *juges suppliants.* When a crime is committed, it is the duty of this officer, acting under the direction of the public prosecutor, to proceed to the place of the crime and to make a thorough investiga-

tion of all the circumstances of the crime, and, when the circumstances point to the probable author, to determine whether there is sufficient evidence to warrant his arrest and trial.

To quote from an interesting description of the system of Criminal Procedure of France as given by Professor James W. Garner:[6]

The function of the *juge d'instruction* is to discover whether there is sufficient evidence to justify the indictment and trial of the accused. To that end he has large power in respect to the issuing of warrants; he may, accompanied by the prosecutor and the clerk of the court, visit the scene of the alleged crime, and make a personal investigation of the place and the surroundings; and the law gives him an extensive power of search. He may make domiciliary perquisitions, subject only to the restriction that the power must be exercised during the day time and in the presence of the accused. This power extends even to the seizure of letters in the post office . . . . He may, of course, summon any and all persons who have knowledge of the crime or of the circumstances under which it was committed to appear and give their testimony . . . . The examination takes place in the chamber of the judge and is secret. . . . . The law of 1897 was the first to introduce any substantial modifications in the code of 1808 so far as the procedure of the preliminary examination is concerned. It provided, as has been said, that the accused should be examined in certain cases within twenty-four hours following his detention; that he should be entitled to counsel who should have the right to be present at the examination and with whom the accused might fully communicate; that he should be informed of the charges against him; that all *pieces* relating to the charge should be communicated to him upon his demand; and that he should be confronted by the witnesses and then only in the presence of his counsel. The law makes it the duty of the examining magistrate to inform the accused of his right to refuse to make a declaration and of his right to counsel and in case of his inability to employ counsel to see that a defender is provided for him. His attorney, however, while entitled to be present at the examination is not allowed to speak without the permission of the judge, but in case of refusal that fact must be entered on the record. He is present, not to assist at the examination, but to watch over the proceedings, to see that no unfair advantage is taken of his client by means of ambiguous or misleading questions and to make suggestions regarding the desirability of expert or other special investigations. . . . The state's attorney is not allowed to be present at the examination, partly because it was feared that the presence of opposing counsel might lead to debates which would

[6] Criminal procedure in France, *Yale Law Journal*, February, 1916.

interfere with the conduct of the examination, and partly, no doubt, because it was felt that the interests of the state would be sufficiently looked after by the judge who under the inquisitorial system, is not always an impartial arbiter. The examination of the *juge d'instruction* is thorough and searching, often covering the whole past life of the accused.

The results of this examination are embodied in a report drawn up by the examining magistrate and, this report, together with all physical exhibits, is placed at the disposition of the chamber of accusation (*chambre des mises in accusation*), which is the indicting body when the crime is of a felony grade, and later at the disposition of the judge presiding at the trial of the accused.

The distinctive features of this system, in contrast with the accustorial, are that it contains no recognition of the principle of a judicial duel or contest between an accuser and an accused, that it is based squarely upon the principle of the state being the party interested in detecting and prosecuting crime, and that it involves the making of a searching examination by a trained professional investigator immediately upon knowledge of the crime being received. As a writer on the French system has put it:

The fundamental theory of this form of procedure is that the pursuit and punishment of criminals is of great interest to society. Consequently society has the right to commence a criminal process. This it may do, not necessarily by accusing someone of a crime, but by making an investigation to determine whether a crime has been committed, or whether a certain person has committed a crime.

Therefore, the judge, acting not as an arbiter between two persons, but as the representative of society, commences such an investigation, and if he finds incriminating evidence, he prosecutes the suspected person.

His decision need not be based only on the evidence brought before him by the accuser, if there be one, and by the prisoner, but he may collect evidence himself.

Theoretically his position is as impartial as in the procedure of accusation. But as frequently there is no accuser, and as he has to conduct the prosecution, the tendency is for the judge in the procedure of investigation to become biassed against the prisoner.

The examination is considerably different from the procedure of accusation. It is secret, written uncontradictory. The process is no longer one between personal adversaries. It is the trial of the prisoner before a judge who is impartial but who represents society

which is the great opponent of the prisoner if it is proved that he is guilty.

The process is not contradictory because no opposing parties appear in the course of it. It is secret because it is in theory only an enquiry conducted by the representative of society and this inquiry can be all the more searching if made in secret. It is written also because it is an inquiry the only object being to gather as much evidence as possible and to have it on record as a basis for judgment.

Comparison of the Two Systems. It is difficult to make a comparison of these two systems for determining whether a crime has been committed and its probable author without recognizing the superior merits of the inquisitorial system. This superiority is manifested both in the principle upon which the two systems rest and in the procedure employed. As regards principle, the unqualified acceptance by the inquisitorial system that violations of the criminal law are primarily offenses against the state and that the prosecution of these offenses is wholly a matter of state action, is undoubtedly the correct one. The retention under the English and American accusatorial system of the idea of an accuser represents an inheritance from an old and primitive system of jurisprudence. In respect to methods, a system under which a thorough investigation is at once made into all the circumstances of the case by a trained investigator who has ample powers and is required to collect and preserve all material evidence and to embody his findings in a formal written report, is certainly superior to one where little more is done than to make a superficial inquiry with a view to determining whether a more thorough examination should later be made. As Professor Garner, in the article already quoted from, says:

> Nevertheless, when all is said against the methods of the French *juge d'instruction* that can be said, it must be admitted that the principle of the inquisitorial system is logical, scientific and based on common sense and that there are not lacking American lawyers, who rarely mention the French system except to criticize, who see much to approve in the principle if not in the method by which the French judge endeavors to get at the truth.[1]

[1] In a note Professor Garner quotes Mr. F. R. Coudert, who was familiar with both systems, as favoring the inquisitorial, and Mr. William H. Taft as approving the working of this system in the Philippines.

It should be noted that the superiority of the inquisitorial system lies not merely in the strengthening of the hands of the government in the discovery and prosecution of crime, but in protecting the interests of the accused. Under this system the accused, if innocent, is at once given full opportunity to establish his innocence and to avoid the odium of an indictment and subsequent trial. Under the accusatorial system, the idea is stronger that if the accused is innocent his innocence is to be established at the trial. There can be no question that many cases go to trial in the United States which, under the inquisitorial system, would be settled by the discharge of the accused as the result of the searching examination of the *juge d'instruction.* In no small degree, the objection to the inquisitorial system on the part of Americans and Englishmen is due to its name and its association with the rise of this method in conjunction with torture by the medieval church. This prejudice is but another example of the injurious effect of historical facts that have no relation to present-day conditions.

No great difficulty is presented in transforming the American system into one where all the advantages of the French system may be secured, provided recognition of such advantages is once secured and we are willing to adopt the principle of concentrating responsibility for the enforcement of the criminal law in a single agency. As is elsewhere pointed out in the consideration of those offices, it is the opinion of those who have given most thought to the subject that both the grand jury and the office of coroner, with the coroner's jury as independent agencies no longer serve any useful purpose; that as unnecessary agencies they unduly complicate the processes of the administration of criminal justice; that they are the occasion of avoidable expense and delay, and that they should consequently be abolished. In the consideration of the office of prosecuting attorney and of police it has also been shown that it is desirable that the police should be made a subordinate agency of the office of prosecuting attorney. The result of taking these several steps would be the concentration in the office of prosecuting attorney of complete responsibility for the enforcement of the criminal law and the direction and control of all the agencies that have to coöperate in that work; in a word, the erection of that office into a real ministry of criminal justice such as it should be. Under this

system, the prosecuting attorney would have charge of the investigation of all criminal offenses, the determination of the charge that should be brought, the collection of the evidence, the conduct before the proper magistrate of the preliminary hearing and the presentation of the case when tried in court. Not until we are willing to recast our system for the enforcement of criminal justice in some such way as this can we have that efficiency in the performance of this primary function of government that conditions so earnestly demand.

PART III

JUDICIAL ORGANIZATION

CHAPTER XVI

THE JUDICIAL FUNCTION[1]

In the chapters immediately preceding consideration was given to the function of the executive to prevent infractions of the law, and when such preventive measures fail, to take such action, that those guilty of such infraction may be apprehended with a view to the determination of their guilt and their subjection to the penalties provided for by law. In all modern governments, in order to protect individuals from oppression, it has been thought wise to vest this function of determining guilt, or the rights of parties to civil controversies, and also the action that should follow from such determination, in agencies independent of those having the function of raising the question of guilt or civil rights to be adjudicated. These agencies are known as courts.

The function of the courts is generally described as that of adjudication. In performing this function, these tribunals perform a number of duties and do various things, some of which go beyond that of adjudication, strictly speaking, which it is important to distinguish if one is to obtain a clear idea of the part they play in the administration of the law. In popular estimation courts do little more than one thing: decide disputes. This however, is a superficial view. If one looks below the surface it will be found that, in deciding disputes, courts do a number of other important things. Analysis of their work shows that they in fact do, or may do, the following nine things:

1. Investigate and determine facts
2. Apply the law to the facts as thus determined
3. Determine and construe law
4. Prevent the infraction of law and the violation of rights
5. Advise the legislature and executive branch in respect to the law
6. Act as public administrative agencies
7. Administer property
8. Act as agencies to enforce decisions
9. Determine rules of judicial procedure

[1] This chapter is an elaboration of the chapter dealing with the judicial branch in the author's work, An introduction to the study of the government of modern states (Century Co., 1919).

Courts as Bodies to Investigate and Ascertain Facts. It is of prime importance to distinguish between the work done by courts in investigating and determining facts and that done in interpreting and applying the law to these facts. In probably the great majority of cases coming before the courts, whether of a civil or a criminal character, the law involved is clear and no legal issue is presented. In such cases the courts act as little more than fact-finding bodies. The desirability of distinguishing the fact-determining function of courts from their other functions is evidenced by a number of considerations. First is the fact that, in our own judicial system, not only has this function of determining facts been carefully segregated in the case of certain classes of controversies, but use is made of a special organ for reaching a decision in respect to such facts. This special organ is the petty jury. This jury usually consists of twelve men who are specially empaneled for each case to sit as a board for the hearing of the testimony, and, on the basis of such testimony, to find the facts. With questions of law, it usually has nothing to do; that falls within the province of the presiding judge.[2] Evidently an important question is here presented as to whether this policy of vesting the two functions of determining the facts and the law in separate bodies is a wise one and is justified by the results. The issues that are here involved go to the very foundation of our system of judicial administration. They have received and are receiving great attention and the literature regarding them is voluminous. The relative merits and demerits of this system will consequently receive careful attention in the pages that follow.

The desirability of distinguishing between these two functions is further evidenced by the growing practice on the part of American governments, national and state, of removing entirely from the

[2] In some states, in certain cases, the jury determines both the law and the fact, and, in criminal cases, fixes the penalty. There is a serious question as to whether this practice is a desirable one. The draft code of criminal procedure prepared by a committee of the National Crime Commission thus contains a provision that:

"In all jury trials only the question of guilt shall be decided by the jury and the trial judge may fix such punishment as may be authorized by law."

The Chicago Crime Commission found that the system in Illinois, where the jury fixes the penalty, has worked badly and has promoted the enactment of a law that will restrict the jury to the single function of determining the guilt or innocence of the accused.

courts the function of determining facts in certain important classes of controversies, and of vesting it in other agencies. Recent years have thus seen the rise of such bodies as the Interstate Commerce Commission and the Federal Trade Commission of the national government and public utility commissions of various sorts in the state governments, to which have been entrusted the duty of determining the facts regarding matters coming within their jurisdictions, which determination is declared to be *prima facie* binding or conclusive upon the courts, where provision is made that the action of such bodies shall be subject to review by the courts. This policy is significant as indicating the belief that the use of the courts as fact-finding bodies is, in many cases at least, not satisfactory, and that better results can be secured by entrusting this function to other agencies.

To a certain extent the difficulties that courts encounter in determining facts by proceedings in open court are recognized, and resort is had, in courts of equity at least, to the services of subordinate agencies or officers such as examiners in chancery, auditors, etc., to investigate and state complicated accounts and other matters. The findings of these officers are in no case binding or conclusive, but must be reported to the court for such action as it deems proper. The advantages and disadvantages of this system, and whether it should be further extended, are practical problems requiring consideration.

Much the most important feature of this fact-finding function of the courts is, however, the fact that courts in most countries, and especially in England and the United States, have developed a very special procedure for its performance. This procedure is to treat the inquiry practically as a duel, having the two parties to a controversy bring forward witnesses to testify in support of their respective contentions, and having the court itself reach a decision through a weighing of the testimony thus produced. The system, in a word, is one where the burden of bringing out the facts is thrown almost wholly upon the parties to the contest. The whole inquiry is given an intensely partisan character. Even the witnesses, whether they have any interest in the case or not, are supposed to be witnesses for one side or another. The court itself assumes little or no responsibility in respect to seeing that all available

evidence is produced. It makes no investigation itself and summons no witnesses. Furthermore, in carrying out this system of fact determination, it has formulated an elaborate set of rules to govern the parties in producing witnesses and subjecting them to interrogation. The court itself thus occupies practically a neutral position, confining its action almost wholly to seeing that the rules of the game are followed by the contestants.

This system is in marked contrast to that pursued by an administrative body in seeking to determine the facts upon which to base its action. Such a body itself determines the character of the facts deemed necessary in order to arrive at a proper decision. It provides itself with a staff of investigators, which, acting under its constant direction and supervision, secures the data needed. It calls upon the parties interested to produce the documents or other evidence that it desires. It does not tie its own hands by formulating rules of procedure to which it is bound to make its action conform in all cases. It thus takes direct charge of the inquiry and assumes full responsibility for its prosecution.

We have contrasted these two methods of inquiry, the judicial and the administrative, since there is evidently here presented a difference in method of the utmost significance. The making of a choice between them constitutes one of the problems which is presented in determining the organization and methods of procedure of the judicial branch of a government. Only by segregating this fact-determining function from the other functions performed by a court can the special character of this problem be made clear. Both of these matters, the extent to which the function of determining facts, in the first instance at least, should be taken away from the courts and vested in other agencies, and the procedure that should be followed by courts in determining facts, when this function is left with them, will consequently receive attention in subsequent pages.

Courts as Bodies to Apply the Law to Ascertained Facts. With the facts determined, the next step in the work of courts is to determine the action to be taken upon such facts. This is performed by courts in rendering what is known as decisions, or in giving judgments. In them the courts decide what is the application of existing law to such facts. In doing so, they may exercise a certain discretion, though the limits within which such discretion

may be exercised are usually carefully defined by the law. Here again, it is important to distinguish between the principles governing a court in the performance of this function and those governing a non-judicial body. It has been accurately stated that the function of a court is to administer law and not justice. The court is not a free agent. It cannot frame its decision in accordance with what it may believe will most nearly conform to absolute equity or justice in the particular case under consideration, nor can it give consideration to questions of political or social expediency. It is bound absolutely by the law. All that it can do is to declare what the law provides shall be done when a given set of facts is determined to exist. Administrative bodies are not bound in anything like the same way. They are much freer to make their decisions of a character more nearly conforming to justice or expediency. It is not intended by any means to convey the impression that the latter method is one that is superior to the former in the settlement of the classes of controversies coming before the courts. It is merely desired to point out that here is a choice of principles that constitutes one of the distinct problems of judicial administration. There have always been those who advocate the system of courts administering justice rather than the law, and in primitive communities this system has in cases given good results. It is the overwhelming opinion of jurists and students of jurisprudence that, under modern complex conditions, the system prevailing under which courts administer the law is the preferable one, if regard be had to general result rather than the results in the particular case in respect to which action has to be taken.

Courts as Bodies to Determine and Construe Law. In considering the function of courts as bodies to apply the law to particular cases, we have assumed that no issue is presented as to what the law is and its applicability to the case at bar. Unfortunately, there are many instances where this condition does not obtain. Laws necessarily must be general in character. In many cases they are so worded that it is difficult to determine their exact meaning. With constantly changing conditions, issues are presented which were not considered when the laws were framed. Laws are not always consistent with each other, and doubt often exists in respect to which of two provisions or which of two laws should govern in a particular case. It results from this that courts have the very im-

portant function of determining what the law is, what is its scope and meaning, and, when there is an apparent conflict between provisions of laws, which shall prevail.

This is a function of supreme importance in any country, but particularly so in England, the United States, and all other countries which have inherited from England her system of jurisprudence known as the "common law." In these countries, the law regulating the relations between individuals has been reduced to formal statutory form to but a comparatively slight extent. For the most part this law has come into existence as the result of a long line of decisions of courts in passing upon specific cases. Under the doctrine of what is known as *stare decisis,* the final decisions made by a court of last resort are, with rare exceptions, deemed to be of controlling force in all similar or analogous cases thereafter arising. Especially is this so when the same doctrine has been repeatedly made or affirmed by a long line of decisions. It results, therefore, that a great part of what is known as private law is to be found authoritatively expressed only in the decisions of courts, as embodied in the thousands of reports in which these decisions are published. Under these circumstances the function of courts in determining what the law is is a correspondingly important and difficult one. Growing out of this situation of affairs there has long been an acute controversy among students of jurisprudence as to whether courts are agencies for making law or merely declaring law. The issue is one which lends itself to many subtle distinctions into which we cannot here enter. It is sufficient to say that they do determine the law that exists at any given time.

This function of determining the law in its practical application, however, is one that must also be performed by courts in respect to that law which is in statutory form. Laws in this form are necessarily general in character. Thus, a law to safeguard individual workers from accidents, may and usually does, go little further than provide that all employers in dangerous trades and industries shall take due precautions to safeguard dangerous machinery, and so to conduct their enterprises as to ensure that their employees are not subjected to unnecessary or undue risk of injury. It is impossible to specify in detail in the law which industries shall be deemed to be dangerous, what machinery shall be safe-

guarded, and what regulations governing the work shall be enforced. The best that can be done is to insert such general definitions and provisions as will make clear the intent of the law. It thus devolves upon the courts to determine in each case whether the industry involved is, or is not, a dangerous industry within the intent of the law, whether the piece of machinery causing the accident is one that should have been safeguarded, and whether the regulations in force are adequate. The courts amplify the law and determine its scope and applicability to specific cases. In doing so they act in a quasi-legislative capacity, doing that which legislatures should do if they were able.

Another important way in which courts determine law is in resolving conflicts of laws. All laws are not of equal status or controlling force. Most laws emanate from bodies exercising only a delegated authority. It thus becomes necessary in many cases to determine whether the body exercising delegated authority has acted within the scope of its authority in enacting a certain law. The highest law in the United States is that contained in the constitutions of the United States and the several constituent states. Next in rank is that contained in the statutes enacted by Congress and the legislatures of the several states. Then follow the laws or ordinances of political subdivisions, such as municipalities, counties, etc. In the case of all of the subordinate bodies, the scope of their legislative powers is determined by the constitution or by the organic acts authorizing their estabishment and operation. Questions consequently arise as to whether laws enacted by such bodies are within the scope of their powers, and whether they are in conflict with provisions of the superior law. Manifestly, the power to determine questions such as these must be vested somewhere. In the United States the exercise of this power has been assumed by the courts. This assumption of power, however, has at times been criticized. It is claimed that, by so doing, the courts have placed themselves above the legislative branch and have made themselves the dominant organ in determining what legislation shall be had. It is pointed out that the authority so to act has not been expressly conferred upon them by the constitution and that in other countries the courts have assumed no such function. The issue here presented is an important one. Into its merits we cannot here enter. It is necessary, however, to recognize that in the United

States one of the most important functions performed by courts is that of passing upon the validity of laws or, to use the expression commonly employed, their constitutionality.

As a result of this exercise of the function of determining and construing law, the decisions of the courts do two distinct things: decide the issue and the action to be taken thereunder, and give the reasons upon which such decision is based. These reasons are known as the *rationes decidendi.* The decision proper represents the majority opinion of the judges participating in it. The *ratio decidendi* represents the individual judgments of the several judges, and may include a statement of the opinions of the minority who do not concur in the decision reached. The desirability of this system, under which dissenting opinions may be rendered and included in the decisions of the courts as published, has been questioned. Thus to quote from Judge Simeon E. Baldwin, one of our leading jurists:[3]

> Every instance of dissent has a certain tendency to weaken the authority of the decision and even of the court. Law should be certain and the community, in which those charged with its judicial administration differ irreconcilably as to what its rules really are as applied to the transactions of the daily business of life will have some cause to think that either the laws or their courts are defective or inadequate.

The reply to this is that if the laws are uncertain it is desirable to have that fact made known, and that in view of the fact that judges as well as others are fallible, it is possible that the doctrine of *stare decisis* can easily be carried too far. Permitting dissenting judges to note their dissent and give their reasons therefore, facilitates the correction of error. The question, however, is largely an academic one, since the system of dissenting opinions is firmly established in the United States and is not likely to be disturbed. Judge Baldwin is, however, right in urging that the right to dissent and file dissenting opinions is one that should be exercised by judges only when the issue is one of considerable importance.

Courts as Bodies to Prevent Infractions of Law and Violation of Rights. Another function performed by courts is that of serving as organs to prevent infractions of law and the violation of rights. Originally courts had no such function. Gradually, however, in

[3] Baldwin, The American judiciary, 269-70.

England and the United States at least, they took the position that it was not necessary that private parties should wait until their rights had been actually violated before they could appeal to the courts for protection; that if such persons had reason to believe that attempts would be made to violate their rights they could appeal to the courts and the latter would thereupon issue orders prohibiting such attempts or at least restraining their commission until the rights of the parties were determined. The orders so issued are known as "restraining orders" or "injunctions." Compliance with such orders is enforced by courts through their power of ordering the arrest and punishment by imprisonment or fine of persons who are guilty of disobeying their orders. This is known as the power to punish for contempt of court.

The power of issuing restraining orders and injunctions, of deeming persons guilty of disobeying them as guilty of contempt of court, and of imposing penalties for such contempt, is one which has been greatly criticized. There can be no question that in years past it has at times been exercised by courts in an unjustifiable manner, in controversies arising between employers and their employees. Courts have not been content to issue orders directed to particular, designated parties, but have issued what are known as "blanket" injunctions directed to all parties; that is, to the entire population of the country. This comes pretty close to the exercise of an arbitrary authority, aggravated by the fact that persons believed to violate such orders are not tried by ordinary process and with the use of a jury, but may be summarily found guilty and ordered punished at the uncontrolled discretion of the judge. Due to an appreciation of this fact, legislation has been enacted by the national government and certain of the states having for its purpose to restrict to some extent the powers of the courts to issue injunctions, and the courts themselves have come to exercise such powers as remain to them in a more conservative manner.

The extent to which this function should be vested in the courts and the manner of its exercise, still constitutes one of the unsettled problems of judicial administration in the United States.

Under this head may also be mentioned the power, elsewhere considered, of courts rendering so-called declaratory judgments, since the purpose of such judgments is to prevent parties from acting under misapprehension of their rights and thus giving rise to a violation of rights.

Courts as Bodies to Advise the Legislature and the Executive Branch in Respect to Legal Matters. Mention has previously been made, in connection with the consideration of means for lessening crime and civil litigation, of the right which has been conferred upon the supreme courts of certain of our states to meet requests from the legislature and the executive for advice regarding the legal aspects of proposed action. Recent years, as is elsewhere pointed out, have also witnessed the development in the United States of the system of charging the courts, acting through a representative body known as a judicial council, with the affirmative duty of examining into all phases of judicial administration and recommending the action required in order to put such administration upon a more efficient basis. Independently of these councils, the superior courts in a few states are required to submit annual reports making recommendations for the improvement of judicial administrative conditions. This function is one that it is desirable should receive a great extension.

Courts as Administrative Agencies. Notwithstanding the emphasis that is laid upon the separation of powers in the United States, there are not a few cases where duties primarily of an administrative character are conferred upon the courts. Thus, the first provision for the organization of what is now the Steamboat Inspection Service took the form of a provision that United States district judges should "appoint from time to time one or more persons skilled and competent to make inspections of . . . boats and vessels and of the boilers and machinery of the same"; and at the present time the members of the Board of Education of the District of Columbia are appointed by the Supreme Court of the District of Columbia. The most important administrative duty now being performed by the federal courts is the naturalization of aliens. Other duties of an administrative character which are at times performed by courts are: the granting of licenses and the performance of marriage ceremonies, etc. The following quotation gives other examples where the courts have had conferred upon them duties which are usually left to administrative action:[4]

Some administrative officers are directly appointed by the courts. In Connecticut, states' attorneys are appointed by the Superior

[4] W. F. Dodd, State government, 284.

Court; and local prosecuting officers are removable by judicial action in Connecticut, Massachusetts and New Hampshire. The Attorney General of Tennessee is appointed by the judges of the Supreme Court. The laws of a number of states expressly provide for the removal of locally elected officers through judicial action. An Iowa law provides that the county attorney, sheriff, mayor, police officer, marshal, or constable may be removed by the district court, or district judge upon charges made in writing and hearing thereon for neglect of duty, misconduct or maladministration, corruption, extortion, conviction of felony or intoxication. Provision for the removal of public officers through judicial action has, indeed, tended to become common in state legislation. Such provision has frequently been considered by, or is found in connection with the enforcement of state prohibition acts.

This practice of throwing upon the courts duties of this character is very questionable. Apart from doing violence to the general principle of the separation of powers, it runs counter to the principle of making definite responsibility for administrative action. It is entirely proper, indeed desirable, that provision should be made for an inquiry into the conduct of administrative officers such as the district attorney, in which the accused should be given full opportunity to be heard, but such hearing should be had by an administrative agency making use of the judicial method of inquiry, and responsibility for taking action should rest with the administrative superior of the accused. In this way only can the responsibility of the latter be definitely established. Further objections to this system are that it tends to throw the courts into politics and to add to the work of an already overburdened judiciary.

Courts as Bodies to Administer Property. In many cases where the ownership, use, or rights of property are in dispute, courts will take over the administration of such property pending a final adjustment of the points at issue. This occurs especially in the settlement of the estates of deceased persons and in the operating of corporations which have failed to live up to their financial obligations. In these cases the court appoints an administrator or receiver to take over the property and administer it subject to its orders. Work of this kind is done by courts on a vast scale. There have been times when a considerable portion of the entire railroad mileage of the country have been in the hands of receivers thus appointed and controlled by courts. For all practical purposes

the courts in these cases exercise the functions and duties of boards of directors. The receivers themselves are but officers of the courts; they have no authority other than that granted to them by the courts, and their acts must be approved by them. In handling such property the courts seek, if possible, to adjust all outstanding differences, to settle all outstanding claims, and, as soon as solvency is established, to return the property to its owners. Where this is not possible they order the winding up of the affairs of the corporation, the sale of its property, and the distribution of the proceeds to the persons entitled to them.

This function of administering estates and of managing undertakings unable to meet their financial obligations is an exceedingly important one, and presents problems of administration requiring careful consideration. There is a question whether the work called for by this function cannot better be done by administrative agencies whose work is of a character to give them specialized knowledge and competency for the supervision of the operations involved.

An example of where responsibilities of this kind are discharged by an administrative agency is furnished by the system for the supervision of national banks by the national government. Under this system the Comptroller of the Currency has power when, as the result of his examination a bank is found to be financially involved, to take over the administration of its affairs until they are straightened out. In respect to financially embarrassed public carriers, the responsibility for taking action might be entrusted to the Interstate Commerce Commission, or, preserving the present system of having the courts determine when the appointment of receivership is warranted, of entrusting to that body the subsequent work of designating the persons to act as receivers and supervising the manner in which they perform their duties.

Courts as Bodies to Enforce Their Decisions. The doctrine of the separation of powers, pushed to its logical conclusion, carries with it the necessity that each of the three great branches of government shall have the power, through its own agents, to do those things that are necessary in order to perform its duties and to put into effect its conclusions. In practice, such complete independence of the several branches is not feasible, and the joint or coöperative

action of two or more branches is at times required in order fully to put into effect its determinations. It is nevertheless desirable to recognize that the doctrine of the separation of powers has in view the giving as far as possible of power to each branch, acting independently of the others, to enforce its decisions.

This doctrine is of special importance in the case of the judicial branch, since one of its functions, is to determine and construe the law and to see that the law, as construed by it, is obeyed by officers of the government as well as by private individuals. This function it cannot fully perform as regards officers of the other branches if it is dependent upon the services of officers or agencies of such branches to enforce its determinations.

From the earliest time in England, and continuing down to the present time in both England and the United States, the courts have assumed or have had conferred upon them the exercise of those powers essential to the performance of their normal functions. These powers, for the most part, are exercised by a court through the issue of what are usually known as " writs," which are in effect orders addressed to the executive officer of the court, the marshal or sheriff, or to private individuals over whom the court has or desires to take jurisdiction, to do a certain thing. The more important of these writs or cases where the court exercises its powers are as follows:

When an action is brought before a court the first step necessary is to secure the attendance in person, or through a legal representative, of the person against whom the action is brought. In a criminal action, the defendant is usually already in the custody of the prosecuting branch and is produced by it in a court as a warrant for his arrest and production has already issued. Where this is not so, the court can itself direct the issue of the necessary warrant of arrest. Such a warrant is known as a " bench warrant." In a civil suit the court issues a " summons," which is served by the sheriff or marshal upon the person sued directing the latter to appear and make answer to the complaint. Should he fail to do so, judgment may be given against him " by default " without any formal trial of the case.

The next step in the exercise of compulsory powers by the court is in respect to the securing of the evidence needed for the determination of the facts. The court can compel the attendance of

any witness within its jurisdiction by the issue of what is known as a "subpœna," which is served by the sheriff upon the person whose attendance is desired, directing him to appear and testify. A person failing to obey such order can be held by the court to be guilty of contempt of court, his arrest by the sheriff can be ordered, and such punishment can be imposed upon him by the court, either in the way of fine or imprisonment, as it deems proper. When the production of a document or written evidence is desired, its production can be ordered in the subpœna, which in such cases is known as a "*subpœna duces tecum.*"

After the trial is completed and the decision rendered, the question is presented of enforcing this decision. Here a marked difference of practice exists as regards the criminal and civil cases. When the penalty is imprisonment the prisoner is turned over to the administrative authorities, who then have responsibility for seeing that the sentence is duly served. When the penalty is fine the same procedure is followed unless the fine is at once paid. As will later be shown, the administrative authorities, moreover, have in many cases a wide discretion in respect to lessening the time of sentence according to the conduct of the prisoner, releasing the prisoner on parole, or giving him a complete discharge through the grant of a pardon. The exercise of the right to pardon is a purely executive act. There is some question, however, as to whether the judicial branch should not be in charge of, or at least participate in, the administration of the parole system that may be established. This is a matter which will receive later consideration.

In civil cases the principle is followed of the court itself, through its own officers, taking the action that is required to secure the enforcement of its decisions. Where the defendant does not at once comply with the order of the court, the latter issues to its sheriff the necessary order to do what is required to ensure compliance therewith. This may take the form of a "writ of execution" directing the sheriff to seize and sell the property of the defendant for the satisfaction of the judgment, a "writ of ejectment" ordering the sheriff, forcibly, if necessary, to eject the defendant from the real estate which he holds but which the court finds should belong to the complainant, or other writs according to the nature of the remedy found by the court to be appropriate. Compliance with these orders is secured through two things: first, the authority that the executive officer of the court has, when acting under the

direction of the court, to use the force necessary for the carrying out of his orders in the way of seizing the person whose arrest is ordered or seizing the property required for the satisfaction of a judgment; and second, the authority that the court has to arrest, if necessary, and order punished by fine or imprisonment persons found in contempt of court through a refusal or failure to obey an order of the court.

This authority of the sheriff to use force in carrying out his orders might not be effective but for one other fact: namely, that of his power to swear in as his deputies or assistants any persons of whose assistance he has need in executing his orders, or, in extreme cases, to summon what is known as a "*posse comitatus*," that is, the whole power of his county or such part of its able-bodied inhabitants on whom he may desire to call. Failure on the part of any person to respond to the summons of the sheriff is a legal offense calling for punishment by the court. There is, finally, the authority which the court or the sheriff has to evoke the aid of the executive branch, which through its police force or, in last resort, the military forces, can bring to bear all of the force necessary to ensure compliance with orders of the court.

A power of the court which is of special importance is that of compelling the production in court of anyone under arrest, or deprived of his liberty through imprisonment, confinement in an institution for the insane, or in any other way, for the purpose of determining whether he is legally held. This power is exercised through what is known as a "writ of *habeas corpus*" which is an order addressed by the court to the officer or other person having the custody of the person confined, directing him to produce such person in court and to show cause why he should not be given his liberty. It need hardly be said that the power to issue and enforce such writs constitute one of the greatest guarantees of individual liberty to be found in our political system.

Mention has already been made of the function of court to prevent the violation of rights through the issue of restraining orders or injunctions. Closely allied to this power is that of the issue of orders known as "*mandamuses*," ordering something to be done. Another writ is that of "*certiorari*," which is an order addressed to a public officer or inferior judicial tribunal directing that it send up the papers or record in a specified case so that the court may

take action in respect to it or review the action already taken. It is not the purpose here to attempt anything like a complete description of the various kinds of writs or orders that may be issued by courts. All that it is desired to do is to make clear the power of the court to order those things that are necessary in order that it may perform its functions.

Generally speaking the whole situation in respect to the authority of the court to issue orders for the carrying out of its determinations and to compel compliance with such orders is entirely satisfactory, and little or no trouble is encountered in handling this phase of judicial administration. Almost the only difficulty that ever arises is where the two branches of government, the judicial and the executive, come into conflict through the issue of orders by a court to an executive or administrative officer which the latter is disinclined to obey. Especially is this so when the order is addressed to the Chief Executive. There is an exceedingly interesting history of the attempt by federal courts to compel action by the President and by state courts to compel action by the governor. The issue here involved has never been settled in a satisfactory manner. Due to the fact that this question is a constitutional one that can only be adequately handled by a student of constitutional law, no attempt is here made to consider it. Important as it may be from a constitutional standpoint, it affects only rarely the general problem of the administration of the law.

Courts as Bodies to Determine Rules of Procedure. A final capacity in respect to which courts act is that of determining, in part at least, the rules of procedure that shall govern the manner in which proceedings shall be had in them. Originally, at common law, this function of determining rules of judicial procedure was one having little or no limitations. In the United States however, this function has been largely assumed by the legislative branch. The results have been almost wholly bad, and vigorous efforts are now being made to have this function restored to the courts. This proposal is a matter of such importance that it is made the subject of a special chapter in which the matter of rules of procedure is taken up for general consideration.

CHAPTER XVII

CLASSES OF COURTS

Whatever may be the extent to which the theory of the separation of powers may be carried, all countries have found it desirable to make provision for special tribunals to which shall be entrusted the adjudication of disputes and the determination of the guilt or innocence of those charged with infractions of the criminal law. Room exists, however, for a wide difference of practice in respect to the character of the tribunals for which provision is thus made. The most important feature is the extent to which the policy is adopted of vesting in a single system of judicial tribunals the handling of all cases of questions requiring adjudication, or of creating separate, and more or less independent, tribunals for the handling of specific classes of cases.

Administrative and Judicial Courts. Probably the most marked difference between the judicial systems of the countries of Continental Europe and those of England, her Dominions, and the United States is that, in the former, the adjudication of all matters having to do with the enforcement of public law, using that term to designate the law governing the organization and operations of the administrative branch of the government, is entrusted to a special set of courts known as administrative courts, while, in the latter, the handling of these matters in theory at least, is, entrusted to the ordinary courts constituting the judicial branch, politically speaking.

Important as is the question of the relative advantages of these two systems, any adequate consideration of them would take us too far away from the major purpose of this study.[1] All that is feasible is to indicate the notions that have led to the adoption of such widely divergent systems and some of the more important consequences resulting therefrom.

The prime motives leading to the creation by the countries of Continental Europe of special systems of administrative courts are:

[1] For a general consideration of the two systems, see A. V. Dicey, The law of the constitution, and F. J. Goodnow, Comparative administrative law.

first, the desire to give to the administrative branch untrammeled powers for the performance of its duties; and, second, the belief that differences arising in connection with the enforcement of administrative law can be more promptly and efficiently handled by a set of tribunals specially created for the purpose. In these countries, the expression "separation of powers" has quite a different significance from what it does in England and the United States. There the matter of prime importance is that the administrative power shall be wholly vested in the administrative branch and not be shared by the judicial branch. To continental Europeans the system existing in the English speaking countries, whereby acts of administrative agents may be reviewed and definitely controlled by the judicial branch, means not only the negation of the principle of the separation of powers, but also the vesting of final authority in respect to many acts of administration in the judicial instead of the administrative branch. Furthermore, and apart from this matter of principle, they hold that differences arising in connection with the enforcement of administrative law are of so special and technical a character and involve to so large an extent matters of public, as well as individual, rights, that they can only be efficiently handled by tribunals presided over by persons who are specialists in this field and making use of special rules of procedure.

In the English speaking countries, the whole problem of administration is approached from a different standpoint. The emphasis is placed upon the protection of individual rights rather than efficiency in administration. Combined with this is the deep-rooted belief, which finds its justification in the manner in which individual liberty and the protection of personal rights against the arbitrary and tyrannical action on the part of rulers were secured, that it is to the courts that the citizen must look for protection against oppression. Hence, the Continental system, under which individual rights as affected by administrative action may not be taken to the ordinary courts, is believed to present more dangers and to offer fewer safeguards against oppression than is afforded when such action may be taken. Only to a slight degree, if at all, is the claim made that this is as efficient a system for the determination of controversies arising in the conduct of administrative affairs as that of the Continental system of special administrative courts.

Viewed historically, this position cannot but be supported. It is difficult to see how individual liberties and personal rights could have been secured in a more effective manner. Yet the question is, whether, with changed political conditions, the arguments in support of this position have now the same validity that they had when conditions were radically different. The whole problem of the protection of individual rights is different in a government popularly controlled from what it is in one resting upon the principle of autocracy. In a popular government all branches of government in the final analysis, are, in the hands, and subject to the control, of the citizen body. Inherently, there is no reason why a system of special courts for the adjudication of administrative controversies cannot be set up that will present the same safeguards against arbitrary action on the part of administrative officers that is afforded by the ordinary judicial tribunals. In point of fact, it is the general testimony of those who have given special study to the administrative court system of Europe that these tribunals have furnished as effective protection of private rights as is given by the courts of England and the United States.

It is, furthermore, a matter of significance that, in the United States at least, the necessities of administration have led to the creation of numerous special tribunals for the adjudication of administrative controversies that possess many, if not all, of the characteristics of the administrative courts of Europe. Prominent among such tribunals in the national government are the Court of Claims, the Court of Customs and Patent Appeals, the Board of Tax Appeals, not to speak of such quasi-judicial bodies as the Federal Trade Commission, the Interstate Commerce Commission, and the like. The extent to which the handling of special classes of controversies has been entrusted to administrative or quasi-administrative, quasi-judicial bodies has already been commented upon in the chapter dealing with administrative adjudication. To an increasing extent the power of purely administrative officers to adjudicate claims or at least to take action affecting private rights has been strengthened. Examples are the power of the Postmaster General to exclude matter from the mails, the power of the Secretary of Labor to pass upon the right of persons to be admitted as immigrants to the United States, and the authority vested in the Comptroller General to settle claims in favor of or against the United States.

There are certain objections to the grant of such large authority to purely administrative officers and the undue multiplication of special tribunals of a quasi-judicial character. It may well be that the time has arrived when this whole question of means which should be provided for the adjudication of administrative controversies should be reexamined and careful consideration given to the devising of a systematic scheme of administrative courts analogous to that possessed by France, Germany, and other European countries. Strong arguments in favor of such action are the increasing complexity and technical character of administrative operations, which bring with them the need for specialized knowledge for their proper handling, and the urgent need for lessening the burden of the ordinary courts, thus permitting them to handle matters of private litigation more promptly and efficiently. That existing conditions in the United States, even from the standpoint of the protection of individual rights, are not satisfactory and that much can be learned from a study of the European system of administrative courts, is testified to by our leading students of the subject. In an address before the American Bar Association, President Frank J. Goodnow says:[2]

> The result of our investigation would seem to be, then, that although under the American law individuals may be more than amply protected in their rights against unconstitutional legislative action, they are very largely left to the tender mercies of administrative discretion in the case not only of their privileges, but as well of the rights recognized as theirs by the constitutional bills of rights. American law has not as yet devised effective remedies against administrative discretion. Nor has it provided a system of administrative procedure in these matters which assures to the individual a hearing before orders are issued, compliance with which involves the incurring of great expense. . . .
>
> The unfortunate position in which our people are thus placed is one in which they should not be placed. It is due to the primitive character of our legal system. In both England and on the Continent the change in social conditions which has taken place in the last century has resulted in the adoption of proper administrative procedure and of adequate judicial remedies. A study of the recent development of the administrative law of Europe would reveal the fact that we have much to learn as to the protection of private

[2] Goodnow, Private rights and administrative discretion, Report, American Bar Association, 1916.

rights from countries like France and Germany, which we are accustomed to consider as not particularly solicitous for individual liberty. The law of these countries has not, it is true, subjected in any large measure legislative discretion to judicial control. It has, however, given to the individual a protection against the arbitrary exercise of administrative discretion for which we look to our law in vain.

What has been said is particularly true of the French law, which has, through the recent decisions of the Council of State—the highest of the special administrative courts—the peculiar contributions of France to the science of administrative law—a remedy against administrative action which surpasses in effectiveness any remedy which can be found in other legal systems.

Civil and Criminal Courts. In analyzing the problem of the enforcement of law, the distinction was drawn between public law, private or civil law, and criminal law. In the preceding section consideration has been given to the question of the extent to which it is desirable to set up special tribunals for the adjudication of public, or, more strictly speaking, administrative, law. Much the same question is presented in reference to the providing of machinery for the handling of civil and criminal controversies. So distinct are the tasks of adjudicating these two classes of controversies, whether viewed from the standpoint of the ends sought or the nature of the proceedings of adjudication, that there would seem at first sight to be an overwhelming argument in favor of keeping the two tasks distinct and vesting their performance in separate tribunals. In practice, however, this is only partially done. Throughout the United States, and the same is more or less true of other countries, it is the general practice to make use of the same court, viewed as an organization unit, for the trial of both civil and criminal cases. In acting in this dual capacity the courts, however, make a clear distinction between sitting in one capacity and in the other. This they do either by sitting, now as a civil court and now as a criminal court, or by having separate divisions of the court handle the two classes of cases. The result is that, though there is but a single tribunal from the organization standpoint, from the operative standpoint this single institution acts precisely as though it were two separate units. Substantially the same segregation in the handling of the two classes of cases is thus secured as would be obtained were provision made for distinct tribunals. In some cases, the segregation is an institutional as well

as an operative one, as where provision has been made for special police courts or municipal courts having criminal jurisdiction only.

The arguments in favor of the existing system, as opposed to one of two completely separate sets of tribunals, are that, in the case of the courts of first instance at least, there is often not enough business to warrant the maintenance of two separate tribunals, and, in the case of superior courts, a more effective use of personnel can be had where judges may be assigned to the two classes of cases according to the pressure of work to be done. In one respect, however, the present system is susceptible of improvement as regards the manner in which it operates. Most important trial courts are manned by a number of judges and the work is done by the court sitting in sections presided over by the individual judges. The prevailing practice is for the judges to be assigned to the several sections, or divisions as they are more usually termed, by a process of rotation. The result is that the same judge will be sitting part of the time in charge of the division trying criminal cases and part of the time in trying cases in the division trying civil cases. Greater efficiency would undoubtedly be had, as far as the volume of business permitted, if the judges were given definite assignment either to the civil or the criminal divisions and thus put in a position where they could acquire a more highly specialized knowledge and skill. If this were done, all of the advantages inhering in the system of specialized tribunals for the handling of special classes of cases would be had in combination with the advantages of having a single tribunal from the organization standpoint. It may be that the existing system of rotation is more congenial to the judges, because it gives diversity to their work, but personal preferences should be subordinated to the general good.

Before leaving this subject mention should be made of the problem of handling those classes of cases which involve infractions of both the criminal laws and individual rights, as, for example, in cases of assault where the offender may be proceeded against criminally and sued for damages by the injured party. In the United States, each of these cases constitutes a separate action, the one to be prosecuted in the criminal court and the other in the civil court. To avoid the necessity for two separate proceedings, the French system permits the question of the award of personal damages to be adjudicated in connection with the trial for

the criminal offense. This system appears to work with satisfaction, and it may be that it could with advantage be incorporated in our procedure.

Common Law and Equity Courts. One of the most characteristic features of the judicial system of England and those countries which have derived their political institutions from England, the British Dominions and the United States, is the extent to which the administration of civil law has been vested in the two distinct classes of tribunals known as courts of common law, or more simply courts of law, and courts of equity, or, as they are sometimes designated, courts of chancery.

As is well known, the courts first to develop in England were those known as common law courts. These courts came to be characterized by extreme formality. There was a particular form of action for each offense and each violation of a right against which the suitor sought redress. In time, this organization and procedure became so rigid that cases constantly arose where the courts were unable to provide the redress that conditions demanded. To meet this situation, the practice developed of persons, believing their rights to be violated or threatened and finding it impossible to secure redress or protection in the courts, appealing directly to the crown, which according to the medieval theory, was the fountain of justice and could act even where the constituted courts could not.

In the Fourteenth Century, the crown began the practice of referring such petitions to his chancellor for action. As the volume of petitions increased, this officer in turn found it necessary to set up special tribunals to act for him. Thus, in time, there came into existence a separate set of judicial tribunals known as courts of chancery or of equity. These courts were not bound by the rules governing the old common law courts, and worked out their own methods of procedure and methods of granting relief. The result was that England in time found itself equipped with two distinct sets of courts. This dual system was imported from England into the United States and became one of the prime characteristics of the American judicial system.

This is not the place to enter into any detailed account of the distinction between these two sets of courts as regards either their jurisdiction, organization, or procedure. It is sufficient to state that the leading features distinguishing the two courts are: that the

court of equity does not have jurisdiction when an adequate remedy may be had in a court of law; that while a court of law can only give relief after a right has been violated by an award of damages or otherwise, a court of equity can intervene when a violation of a right is only threatened and prevent such violation by a restraining order or by ordering the specific performance of a contract; and that in respect to procedure, a clear distinction in a court of law is made between questions of law and of fact, the former being decided by the judge and the latter by a jury, use of which is had in the conduct of the proceedings, while in a court of equity no use is made of a jury and the judge decides issues both of fact and law.[3]

Orginally, there resulted from this evolutionary process, not merely two classes of law, two classes of remedies, and two modes of procedure in adjudicating controversies, but, as has been stated, two sets of judicial tribunals. In England, the latter feature has largely been eliminated by the Judicature Acts, beginning with that of 1875, which unified the system of courts, though the distinction between legal and equitable remedies and legal and equitable procedure was still in large part retained. In the United States much the same thing has taken place. In most of the s t s t distinction between law and equity as regards adminis e cedure, and remedies that may be granted has been eli ro- the same court administers both bodies of law by a u d cedure. In New York this was effected by the revise tion of 1846. In most of the other states the same tri as both a court of law and a court of equity. In doing so, it keeps the two classes of cases distinct; that is, maintai. rate dockets for law cases and equity cases, and when hear. class sits as a court of law, making use of the procedure courts, and, when hearing the other, sits as a court of equity, and makes use of equity procedure. Or, when a court has a number of judges, one judge may sit as presiding officer in a division sitting as a court of law while another judge presides over another division sitting as a court of equity. There are thus two courts from the functional standpoint though there is but one tribunal from

[3] In some cases a judge in an equity court will make use of a jury to advise him in respect to issues of fact.

that of organization. In at least one state, New Jersey, there is an entirely separate court for the hearing of equity cases.[4]

This distinction between law and equity, which finds no counterpart in non-English speaking communities, cannot but be deemed to be an unfortunate feature of our judicial system. It is generally admitted that the division of the work of civil law administration between two sets of courts making use of different procedure and possessing different powers in respect to the power to grant relief, is an anomaly. Probably the greatest objection to this system is the complexity that it introduces in the system of judicial administration viewed as a whole. In its practical operation, the existence of the two sets of rules, two classes of remedies, and two courts is productive of trouble, delay, and expense. Cases frequently arise where it is difficult, even for the experienced lawyer, to determine whether resort should be had to one court or the other for relief. At times, the action is brought in one court, only to have it thrown out after trial by a superior court on the ground that it should have been brought in the other court. In such cases the whole proceeding has to be begun *de novo*. In other cases, the entire relief required by the circumstances cannot be given by either court, and two actions have to be prosecuted, one in a court of equity and one in a court of law. There are even cases where appeal is made to a court of equity to restrain action in a court of law. Such a system, as Judge Baldwin says,[5] is intrinsically illogical. Its development was due solely to historical accident. No country, starting with a clean slate and full powers of choice, would for a moment think of creating such a system. Courts of equity, when they first came into existence, rendered a great service in supplementing the law courts and broadening the field of redress open to those whose rights were threatened or had been injured. The need for the distinction has now passed away, however, and the time has come when this dual system should be abolished and provision made for a single set of courts having all of their powers of relief.

Both in England and the United States important steps in this direction have been taken. In England the work of fusion from

[4] For an excellent consideration of the merger of law and equity in the United States, see "Merger of Law and Equity under Codes and Other Statutes," by William F. Walsh, New York University Law Review, January, 1929.

[5] Simeon E. Baldwin, The American judiciary, 133.

the administrative standpoint is almost complete. In the United States this movement has lagged behind England. In some states conditions remain much as they were in the old days when the clevage between law and equity and their administration was complete. In others important steps have been taken along the path of reform marked out by England. The present situation in its general aspects cannot probably be better brought out than by reproducing the consideration of this subject by W. F. Dodd. He says:[6]

Both in England and in the majority of our states the distinction between the two sets of courts administering somewhat different types of legal rules has been done away with by statute. There remains in England and in these states a body of rules called the law of equity distinct from the rules of common law, but both sets of rules are now in England and in most of the states capable of being administered before the same judge and in the same case. The two sets of rules remain somewhat distinct, but their administration is merged. In a number of states, however, a sharp distinction is still maintained in the administration of the rules of equity and common law. Six states (New Jersey, Mississippi, Tennessee, Alabama, Delaware, and Arkansas) retain the old English plan of separate courts for the trial of equity cases. In these states, if one wishes a remedy that is given by the laws of equity he must go before a trial court that is independent of the courts administering the rules of common law. Here we find the old sharp distinction that existed in England before the merging of procedure under the two sets of legal rules. In more than one-fourth of the states the laws still provide for a sharp distinction between the administration of the rules of common law and the rules of equity but do not provide for separate courts for the trial of the two types of cases. In these states an individual seeking a remedy given him by the law of equity goes to the same court as that which administers the rules of common law; but he goes to that court as a court of equity. The same court administers two types of remedies but there is no merging of the two. The same individual in connection with the same transaction may desire relief involving the application of both types of rules but he must seek his relief before the same court in two separate independent proceedings and the one court is in fact treated as if it were two independent bodies.

What has been done in England and in certain of the states of the United States indicates what should be done generally. Chief

[6] W. F. Dodd, State government, 306.

Justice William H. Taft probably expresses the prevailing sentiment of students of jurisprudence in this country when he writes:[1]

A perfectly possible and important improvement in the practice in the federal courts ought to have been made long ago. It is the abolition of two separate courts, one of equity and one of law, in the consideration of civil cases. It has been preserved in the federal court, doubtless out of respect for the phrase "cases in law and equity" used in the description of the judicial power granted to the federal government in the Constitution of the United States. Many state courts years ago abolished the distinction and properly brought all litigation in their courts into one form of civil action. No right of a litigant to a trial by jury on any issue upon which he was entitled to the right of trial by jury at common law need be abolished by the change. This is shown by the every-day practice in any state court that has a code of civil procedure. The same thing is true with reference to the many forms of equitable relief which were introduced by the chancellor to avoid the inelasticity, the rigidity, inadequacy and injustice of common law rules and remedies. The intervention of a proceeding in equity to stay proceedings at common law and transfer the issues of a case to a hearing before the chancellor was effective to prevent a jury trial at common law long before our Constitution, and would not be any more so under a procedure in which the two systems of courts were abolished. Already under the federal code, there is a statutory provision which has not yet been much considered by the courts, by which an equitable defense may be pleaded to a suit at law. If we may go so far, it is a little difficult to see why the distinction between the two courts may not be wholly abolished, and the constitutional right of trial by jury retained unaffected.

Other Distinctions. A survey of the system of courts in the United States will reveal a number of courts bearing names other than the general ones of law, equity, and criminal courts. In the national government, for example, will be encountered the term "admiralty court." There is no such distinct court, the expression being used to designate a federal court sitting in a special capacity to hear causes arising under admiralty law. When so sitting these courts have much the character of distinct tribunals in that they are adjudicating a distinct body of law and making use of a special procedure in doing so. In the states, provision is often made for special courts, usually known as probate courts but often having some other designation, for the proving of wills and the handling

[1] Possible and needed reforms in the administration of justice in the federal courts, Report, American Bar Association, 1922, pp. 259-60.

of estates of decedents. Again, there have been created in recent years a large number of special tribunals such as children's courts, courts of domestic relations, traffic courts, morals courts, etc., for the handling of particular categories of cases. In some cases these are independent tribunals, though in most cases they are but subdivisions of courts of broader jurisdiction to which have been given special names in order to indicate the character of cases handled by them. As will be pointed out, one of the important steps required in the perfection of the court system of the states is the elimination of these tribunals as independent courts, while broadening the powers of the general system of courts to secure the advantages of specialization by setting up within their organizations as many and varied divisions for the handling of particular classes of cases as they deem expedient.

Mention, finally, should be made of the distinction between trial courts and appellate courts, and that between courts of record and courts not of record.

Trial courts, which are variously designated as courts of first instance, *nisi-prius* courts, etc., are those in which controversies are given their first full adjudication. Appellate courts, as their name indicates, are those having the function of reviewing and, if need be, of modifying or annulling the decisions of the trial courts. Though the distinction between these two classes of courts is clear, it should be noted that the same court is often given the powers of a trial court and an appellate court. In these cases, such courts are said to have original jurisdiction, which may be exclusive or concurrent with that of a lower court in respect to certain classes of cases, and to have appellate jurisdiction in respect to others.

Courts of record are those which are required to keep a full and complete permanent record of all cases tried by them and their disposition of them. They are usually provided with a recording officer known as clerk of court, whose record is the authoritative evidence of the proceedings and of the judgments rendered and cannot be impeached in any collateral proceeding. Error in the record can only be shown on a direct proceeding to correct it. Courts not of record are those courts which are not required to keep a record of this character. To a large extent this distinction coresponds to the distinction between petty and other courts. The courts of justices of the peace constitute the most important tribunals of this petty character.

CHAPTER XVIII

SYSTEM OF COURTS IN THE UNITED STATES

Having secured an idea of the nature of the judicial function and the classes of courts for which provision may be made, we are now prepared to consider more in detail the actual systems of courts which have been set up in the United States. No undertaking of any size can be efficiently and economically carried on unless it possesses an organization adapted to its needs. Indeed, it may be said that organization constitutes the very foundation upon which the whole system of administration must rest. Unless that foundation is a solid one, it is impossible to erect upon it a satisfactory superstructure of procedure. In entering upon a study of the organization of the courts in the United States we, thus, have to do with what is probably the most important single feature of our system of judicial administration.

System of Federal Courts. The most characteristic feature of the judicial machinery of the United States is that use is made of two distinct systems of courts, one operating as a part of the national government, and the other as parts of the governments of the constituent states.

The definition of the federal judicial power is contained in Section 2 of Article III of the Constitution, which reads as follows:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made or which shall be made under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of Admiralty and maritime jurisdictions; to controversies to which the United States shall be a Party; to controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This has been modified by the Eleventh Amendment, which provides that:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

As regards the system of courts through which this judicial power may be exercised the Constitution provides simply that:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

It will be seen from the constitutional provision just quoted that, with the exception of making provision for a Supreme Court, the creation of which is expressly ordained by the Constitution, Congress is free to create such a system of inferior courts as it deems best.

The system of courts that Congress has chosen to create has been one of evolution. Interesting as this history is, it is one into which we cannot here enter. At the present time the system is as follows:

District Courts. At the basis of the system are the District Courts. These are eighty-two in number, each exercising jurisdiction from the territorial standpoint, in one of the eighty-two judicial districts into which the country is divided. Though there are but eighty-two districts and eighty-two courts, provision is made for a total of 125 district judges, two, three, and even as many as six judges being assigned to those districts and courts where, on account of the size and character of the population, the judicial business is large. Where a court has more than one judge assigned to it, the court sits in "divisions," each division being presided over by a single judge. These courts are courts of original jurisdiction, and most of the cases arising in the federal courts are tried in the first instance in these tribunals.

United States Commissioners. In connection with the District Courts mention should be made of the United States Commissioners, which the judges of the District Courts are authorized to

appoint as aids to the courts in the performance of their duties. These officers, as pointed out by Judge Simeon E. Baldwin,[1] discharge substantially the same functions as justices of the peace in the judicial system of the states, except as regards the trial of petty cases. Their most important duties are those of issuing warrants of arrest of persons charged with offenses under federal law, of conducting the preliminary hearing of persons arrested by federal officers, of taking bail and of holding prisoners for the grand jury or trial. Use, however, is made of them for other purposes, of which particular mention may be made of the duty of serving as officers before whom testimony may be taken in certain cases.

Circuit Courts of Appeal. Next in rank above the District Courts, are the Circuit Courts of Appeal. These are nine in number, corresponding to the nine great circuits into which the country is divided. These courts are presided over by two, three, or four circuit judges, according to the amount of work to be handled. The judges are for the most part circuit judges specially appointed to that office, though district judges may be required to serve, and the judges of the Supreme Court may also sit in the circuits to which they are assigned. The amount of business to be handled by the Supreme Court, however, precludes its justices serving in this capacity in other than exceptional cases. When two or four judges sit, and they are equally divided in their opinion, the case may be certified to the Supreme Court for instructions or final decision. As indicated by their title, these courts do not have original jurisdiction but sit as courts of review in the cases which under the law may be appealed to them from the District Courts, and to a certain extent from such quasi-judicial tribunals as the Interstate Commerce Commission and the Federal Trade Commission. In many cases, their decisions are final; in others, a further appeal lies to the Supreme Court of the United States. The primary motive underlying the creation of these courts was to relieve the Supreme Court of the burden of hearing appeals, which, on account of their volume, it was impossible for that body to bear.

Supreme Court. At the top of the structure is the Supreme Court. As at present constituted, this court is presided over by nine

[1] Baldwin, The American judiciary, 151.

justices, a Chief Justice and eight Associate Justices. This court is primarily a supreme court of appeal, though the Constitution requires that it shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party. The last named cases are comparatively few and make almost no demand upon the time of the court. Due to the creation of the Circuit Courts of Appeal, competent to give final decision in the great bulk of cases, this court has become, in effect, one whose chief business is that of the trial of cases involving the construction or constitutionality of legislative enactments and other issues of general political importance.

Special Courts. In addition to the foregoing three classes of courts, which constitute the federal judiciary, strictly speaking, the national government has made provision for a number of other special courts, such as the Territorial Courts, the United States Court for China, the United States Court of Claims, the Court of Customs and Patent Appeals, and the United States Customs Court; for a number of quasi-judicial tribunals such as the Interstate Commerce Commission, the Federal Trade Commission and the United States Shipping Board; and for a number of tribunals which, though integral parts of the administrative branch, act in a quasi-judicial capacity and in respect to which it is difficult to say whether they should be considered as part of the federal judicial system or not. The leading example of a body of this character is the Board of Tax Appeals, created by the Revenue Act of 1924. Mention, for the sake of completeness, might also be made of the fact that the national government, from time to time, creates temporary tribunals for the adjudication of particular classes of claims in which it or its citizens are interested. Of this kind may be mentioned the Mixed Claims Commission, which is now engaged in adjudicating claims between the United States and Germany or their citizens, growing out of the World War.

In respect to most of these bodies, the position may be taken that they are not true courts but rather administrative bodies which make use of a judicial procedure in the performance of their duties, or, if courts, that they fall within the category of administrative courts rather than courts for the general administration of the civil and criminal law. The two bodies first named are, however

courts, in the fullest acceptation of the term. The Territorial Courts are the courts that have been set up in the dependent territory of the United States, the District of Columbia, the Insular Dependencies, the Panama Canal Zone, etc. These courts have a legal status entirely different from that of the federal courts, strictly speaking, since the power to create them is not derived from the judiciary article of the Constitution, but from other provisions, such as those granting authority to Congress to exercise exclusive legislative powers in respect to the district set up as the seat of government and to " make all needful rules and regulations respecting the territory or other property belonging to the United States." Due to their special constitutional status, Congress is not governed by the provisions of the judiciary article in respect to the manner of selection and the term of office of the judges of such courts. In the District of Columbia and the more important dependencies, such as Hawaii, Alaska, the Philippines, and Porto Rico, provision has been made for a system of local courts, or the dependency has been authorized to create such system for itself. In addition to these local courts, which correspond to the system of courts of the states, the national government has usually made provision for a federal territorial court, to which has been granted the jurisdiction of district courts, and which differs but little from those courts except as regards their status from a constitutional viewpoint.[1]

System of State Courts. The systems of courts possessed by the individual states, though differing in details, conform so largely to the same general plan that it is possible to characterize all of them at one time. In doing so, it should be borne in mind, however, that the description given is one of conditions generally prevailing and that there are important departures from this type in the case of individual states.

Petty Courts: Justices of the Peace, Police Magistrates, and Police Courts. Lowest in the hierarchy of judicial tribunals are the justice of the peace courts. These institutions, as is well known,

[1] For an excellent brief account of the federal judiciary, see Chapter XXIV, " The national judiciary," in Frederick A. Ogg and P. Orman Ray, Introduction to American government: the national government (2 ed., 1925). The existing law regarding the federal judiciary is to be found in the " Federal judicial code," enacted March 3, 1911, and subsequent amendments, and the code of laws of the United States and Supplement I (1928).

have had a long and interesting history dating back to the early days of the administration of justice in England. For the most part, the justices presiding over them are laymen, in the sense that they need not be and usually are not learned in the law as evidenced by having been admitted to the bar. They hold office, sometimes by election and sometimes by appointment, and their compensation is usually by fees.

In criminal matters the jurisdiction of these courts extends to misdemeanors and the violation of local ordinances. In respect to felonies they may act as committing magistrates; that is, they may hold preliminary examinations and, when the facts seem to warrant, hold the accused for hearing before the grand jury. As a feature of their criminal jurisdiction they have the power to issue warrants of arrest, and, with certain limitations, to accept bail. In some cases their decisions are final and in others an appeal lies to the court above.

In civil matters their jurisdiction extends to claims involving not over a certain sum. Where the amount involved is small; that is, usually not over $100, their decisions are usually final. In more important cases, an appeal lies to the courts above. Often, as regards such cases, they exercise concurrent jurisdiction with such courts, the parties having the option of bringing their cases in or having them removed to such court for trial. In all cases the trial is without a jury, and the courts themselves are not courts of record. In the rural districts there is usually but one justice of the peace court in a district; in the larger towns and cities there may be, and often are, a number of such courts, each acting independently of one another.

In the larger urban centers where the volume of petty offenses against the criminal law and local ordinances is large, provision has quite generally been made for the trial of such offenses by special officers known as police magistrates, or by a more formal tribunal, known as a police court. The latter may embrace a number of judges who preside individually over branches or divisions of the court. The character of these courts varies considerably in different cities. In some, they have only the criminal jurisdiction of justices of the peace, in others, their jurisdiction extends to more important cases, and use may be made of a jury, if demanded. In not a few cases, the mayors of cities and towns have the powers

of magistrates to try offenses against local ordinances and even petty misdemeanors. The existence of this power is rather remarkable in view of the emphasis generally put by the American people upon the doctrine of the separation of powers.

Courts of Intermediate Grade: County Courts, and Municipal Courts. Next in rank above the justice of the peace, police magistrates, and police courts, are usually to be found various courts which are of a distinctly higher grade than these petty tribunals but which do not have the general jurisdiction of the courts of original, general, trial jurisdiction next to be mentioned. In most of the states there are tribunals known as County Courts. These are often of a rather peculiar character, since, while they usually have a certain jurisdiction in respect to both civil and criminal cases, to a considerable extent their functions pertain to matters of county administration. In some cases, indeed, they are courts in name only. Where other provision is not made, these courts often attend to matters of probate, a class of judicial work that is largely administrative in character. In the thinly settled portions of the state, the handling of matters of probate is usually entrusted to the county courts or other tribunals exercising the same general jurisdiction. In more thickly settled areas, where the work is heavier, separate courts, known as probate courts, have in many states been created for this purpose. In Illinois, for example, in all counties having a population of less than seventy thousand, probate matters are handled by the county courts; in all other counties provision has been made for a separate probate court.

As will elsewhere be pointed out, whatever may have been the merits of the justices of the peace courts in a rural community, they utterly fail to meet the needs of the large centers of population. Due to a realization of this fact, there have been established, in a number of the more important cities, central tribunals, usually known as municipal courts, to take their place, and, at the same time, to take over much of the work that formerly fell upon police magistrates or police courts. The general jurisdiction of these courts is that of the tribunals that they have supplanted; that, namely, of offenses lower than the grade of felonies on the criminal side, and claims where the amount involved is small, usually not to exceed one thousand dollars, on the civil side. The creation of these

courts represents one of the most important moves to reform the American judicial system, and their organization and work will consequently receive special attention in a later chapter.

Courts of General, Original, Trial Jurisdiction. The two classes of courts that have been described have for their function to handle the great volume of petty cases, civil and criminal, the enforcement of local ordinances, and the transaction of such business as the probate of wills, the administration of county affairs, particularly as regards matters of elections, poor relief, and the like. Next above these is to be found the exceedingly important class of courts of general, original, trial jurisdiction. These courts are district or circuit courts, though often they bear some other name. They are known as courts of general, original, trial jurisdiction, since they have the broad authority to try all classes of cases, civil and criminal, except the most petty cases. Even in respect to these, they often have concurrent jurisdiction with justice of the peace and police magistrates courts. In other cases, an appeal lies to them from the decisions of such courts. It is in these courts that the great bulk of important litigation and criminal causes are tried in the first instance. Only to a limited extent are their decisions final, the defeated party having the right in most cases to have such decisions reviewed in a higher court.

Intermediate Courts of Appeal. The volume of appeals from such trial courts is often so great that it is difficult for a single supreme court to hear them. In many states this situation has been met by the creation of so-called intermediate appellate courts, to which most appeals from trial courts go in the first instance, and from which a further appeal to the supreme court can only be made in the more important cases. Not infrequently provision is made for several intermediate courts of appeal or for a single court to sit in divisions.

Supreme Courts. Finally, in all states, there is a single superior tribunal, with jurisdiction extending over the whole state, to which appeals lie in most cases from the decisions of the courts of general, original, trial jurisdiction. In all the states except one, New Hampshire, the creation of such a court is provided for in the constitution. These courts are usually known as supreme courts, though in some

cases they bear some other designation. Their function is to review the action of the lower courts and correct their errors, and to unify the law as laid down in the decisions of the several trial courts.

Special Courts. In addition to the system of general courts that has been described, many of the states within recent years have inaugurated the policy of setting up special tribunals for the handling of particular classes of cases, which, on account of their volume or special character, it has been thought can be better handled by tribunals specially organized for that purpose. The motives leading to the creation of these tribunals have been: the desire to lessen the burden of the regular courts, and to provide a special procedure believed to be better adapted to the classes of cases in respect to which they are given jurisdiction. Among the more important of these special courts are those for the trial of cases involving issues, other than divorce, affecting the family, which are usually known as domestic relations courts; those having to do primarily with the evil of prostitution, which are known as women's or morals courts; those handling cases of offenses by minors, known as juvenile courts; and those for the hearing of traffic cases, known as traffic courts. In a few cases, provision has been made for what are called night courts in order that immediate action may be taken on the cases of persons arrested at night, to the end that persons for whose arrest there is no adequate justification or whose offense is not such as to warrant confinement even for a single night can be spared that humiliation.

In some cases these courts are independent courts created by statute; in others they are but branches of a court of more general jurisdiction or courts sitting under special conditions.

Characterization of the Dual System of Federal and State Courts. The existence of this dual system of courts, with all the duplication of judicial machinery that it involves and the uncertainties of jurisdiction that arise under it, is commonly held to be one of the necessary consequences of the adoption by the United States of the federal form of government. Only in a restricted sense is this true. Germany and the Dominion of Canada furnish examples of countries having a federal form of government which have nevertheless made provision for a single system of courts. Though it would have been possible for the United States, in organizing its political system, to have done as these countries

did, it is generally held that it was an act of wisdom, viewing conditions as they then were, to have made provision for a system of federal courts distinct from those provided by the constituent states. Though this is so, it should nevertheless be realized that the dual system of courts now existing in the United States has the serious disadvantages of distributing the judicial power, complicating the machinery of administration, and adding to the expense of conducting this branch of the government. And it may well be that, under a radically different condition now obtaining, the continued maintenance of the system is no longer to be justified. The situation as it now exists is excellently shown in the exceptionally able, comparative study of the government of the United States and Canada by Professor Herbert Arthur Smith, which appeared a few years ago. In bringing to a conclusion his study of the judicial systems of the two countries, Professor Smith says:[8]

In closing this chapter a word of general comment may be permissable. The dual judicature of the United States is the most striking illustration of the theory upon which the whole Union rests. So far as my knowledge goes, it is unique in the world. The reasons for establishing it, such as they were, have long since passed away. If the constitution as a whole were to be rewritten at the present day it is almost inconceivable that this feature would be preserved. The historical reasons for its institution are intelligible, and in 1787 they were necessarily decisive. No state at that time would have consented to surrender its own judicial system, and at the same time no state would have believed that its own citizens could obtain equal justice in the courts of another. Similarly the federal government could not have trusted the state courts to administer federal and state laws with an impartial mind. Two complete and parallel systems, therefore, had to be created in order to meet both points of view. When the Australian Commonwealth was formed more than a hundred years later, the general lines of the scheme were drawn in deliberate imitation of the structure of the United States Constitution, but there was no attempt to reproduce the dual judicature. States jealousies were strong in Australia, and the states determined to retain the control of their own courts and the appointment of the judges. But it was never suggested that there should be a second system of commonwealth courts extending through the whole continent and competing for jurisdiction with

[8] Federalism in North America: a comparative study of institutions in the United States and Canada, 125-26 (1923).

the courts of the states. To the Commonwealth was entrusted only the general court of appeal. Australia, like Canada has acted upon the principle that all courts should exercise the full judicial authority of the nation and should administer all laws alike. Whether the United States will ever remodel her constitution in recognition of the passing of old enmities remains to be seen. The process of amendment is so complicated and the changes involved would be so far-reaching that no statesman of our time is very likely to attempt it. Yet it is undeniable that in the increased cost of justice and in the grave loss of judicial efficiency that flows from the conflict of jurisdictions the nation pays heavily for retaining in the twentieth century an institution based upon petty jealousies of the eighteenth.

Two methods of meeting this situation and of doing away with this duality of judicial systems are open. One is the adoption of the principle that primary responsibility for the administration of all law rests upon the national government, to be met through the extension of the present system of federal courts and territorial courts deriving their powers in the final analysis from the national government; and the other the adoption by the national government of the principle of restricting the original, trial jurisdiction of its courts to the narrowest possible limits permitted by the constitution and of making use of state courts for all matters except the few which, in accordance with constitutional provisions, or for reasons of a general or political character, should be finally passed upon by its supreme judicial tribunal, the Supreme Court of the United States.

The first method, though theoretically possible, is one beyond the bounds of practicality. Its adoption would mean the degradation of the states, in respect to the administration of the law to the status now occupied by the territories and dependencies of the national government. It could only be secured through an amendment to the Constitution. And no such amendment can be had until the American people are convinced that its federal form of government should give way to the unitary form. Any such change in respect to the political convictions of the American people is exceedingly remote.

If anything is to be done in the way of abolishing or minimizing the dual system of federal and state courts, the second method must be employed. In considering the possibilities of this method, the facts already given that the statement in the Constitution of the

judicial powers of the national government is merely a grant of powers, and that such powers need not be exercised by the national government unless it elects to do so, and that the only positive requirement of the Constitution in respect to the creation of judicial tribunals is that provision shall be made for a Supreme Court should be noted. As the result of these two facts, the national government if it so sees fit, can go a long way toward restricting the judicial organization, possibly going so far as to provide for but the single tribunal, the Supreme Court, and leaving to the state courts the trial, in the first instance, of all, or partically all, litigation whether arising under federal or state law. What can be done in this direction is illustrated by the restriction that has been placed upon the federal courts to try cases arising under the diverse citizenship clause of the Constitution. Under existing law, these courts may entertain actions of this character only when the matter in dispute involves the sum of $3000 or more. By raising this amount, it would be possible for Congress to compel all such actions to be tried in the first instance in the state courts, with such provision for an appeal to the federal courts as it might see fit.

There is now pending in Congress a bill introduced by Senator Norris, the Chairman of the Senate Committee on the Judiciary, and favorably reported by that committee, providing for the amendment of the federal judicial code so as to withdraw from the federal courts jurisdiction of all cases resting solely upon the diverse citizenship of the parties to the litigation. After calling attention to the fact that the district courts do not now have jurisdiction of such cases where the amount involved is less than $3000 the report of the Committee, in arguing for the bill, says:

> There is no logical reason why there should be any arbitrary distinction as to the amount in controversy. If there is any reason why the United States district court should have jurisdiction of a case between citizens of different states when the amount in controversy is over $3000 it would seem only just and fair that it should likewise have similar jurisdiction when the amount is under $3000; so the arbitrary fixing of the amount does not seem to be any logical reason for controlling the jurisdiction. . . .
>
> The only reason why this kind of jurisdiction was originally given to United States courts in preference to state courts was because it was believed that a prejudice would exist in state courts

against non-resident litigants. Whatever reason may have existed for this belief, it is certain that it has long since disappeared and there is no reason now why a non-resident litigant cannot get the same justice in state courts that is secured by residents of the state. . . .

A corporation doing business in one state may have all its property in that state and do all its business there; its stockholders may all reside there; but it is incorporated in another state. When it is sued it can have the case transferred to the United States courts. Its competitors in business, doing the same kind of business, in the same locality, not incorporated in a foreign state are denied this privilege. The result often is, particularly with corporations, that they are able to make litigation so expensive that their antagonists in the law suits frequently submit to unjust and unreasonable demands rather than go to the expense of litigating their rights in the United States courts. It means very frequently that the litigant must travel many miles and take his witnesses many miles to the place where the trial will be had, and in many other ways be subjected to annoyances and expense which often is a denial of justice. Moreover, if he takes an appeal, or, if he wins in the district court, and the non-resident party takes an appeal, he is confronted with a much larger expense than though the same appeal took place in the state court. He must employ attorneys to go perhaps hundreds of miles to argue his case in the court of appeals and, as a rule, must submit to delays and expense that would not occur if the case remained in the state court. There is no reason why an individual or a corporation doing business in a state should not subject himself to the courts of that state. There is no reason why such non-resident litigant should have the privilege of compelling his opponent in a law suit to go outside of his state to secure justice or to litigate a disputed question. . . . Many of the matters that United States courts are trying, arising entirely within the jurisdiction of a state, controversies coming up exactly the same as controversies arising between citizens of the same state would, if this bill becomes a law, be left to the state court for adjudication, and we know of no good or logical reason why the proposed bill should not become a law.

It is only proper to state that this bill meets with the opposition of many of the leaders of the bar and that the Committee on Jurisprudence and Law Reform of the American Bar Association is using its influence to prevent the passage of the bill. In its argument it takes issue with the Senate Committee on the Judiciary in respect to the lack of danger of the non-resident litigant meeting with prejudice in the state courts.[4]

[4] See editorial: "An unwise and dangerous measure," *American Bar Association Journal*, May, 1928.

This question of the distribution of responsibility for the handling of litigation between the federal and state courts has become, in recent years, a matter of far greater importance due to the enormous increase in business thrown upon the federal courts as the result of the extension of the regulatory powers of the national government and the passage of such acts as the liquor and narcotic acts. As is elsewhere pointed out, relief has been given to the Supreme Court through the passage of the act of 1925, which provides that in the great bulk of cases resort to that court can be had only through the process of certiorari, thus leaving it to the discretion of that court as to whether or not it will entertain an appeal to it from the lower courts. This act, however, does nothing in the way of relieving the district courts of their burden of work. Relief to them can come either through erecting the offices of United States Commissioners into courts analogous to state police courts for the trial of petty offenses, and especially those involving the handling of cases arising under the prohibition and narcotic acts, or entrusting the handling of these cases to the state courts. As between these two methods, the second is the one much to be preferred. As is pointed out by the authors of a recent study of the federal judicial system:[5]

Heretofore the area of federal police legislation has been extended with little consideration of the consequences entailed on the effective functioning of the federal courts in enforcing such legislation. The huge number of prosecutions under the Volstead Act has sharply challenged attention to the recent preoccupation of the federal courts with misconduct of an essentially local nature, widely different in its practical incidence from the kind of transactions which in the past have invoked the federal criminal law. Particularly in the large cities are the federal courts diverted from disposition of cases uniquely federal in character to the prosecution of offenses which theretofore have been left for state action. Liquor violations, illicit dealing in narcotics, thefts of interstate freight and automobiles, schemes to defraud essentially local in their operation but involving a minor use of the mails, these and like offenses have brought to the federal courts a volume of business which, to no small degree, endangers their capacity to dispose of distinctively federal litigation and to maintain the quality which

[5] Felix Frankfurter and James M. Landis, The business of the Supreme Court, 293 (1928).

has heretofore characterized the United States courts. The burden of vindicating the interests behind this body of recent litigation should, on the whole, be assumed by the states. At the least, the expedient of entrusting state courts with the enforcement of federal laws of this nature, like state enforcement of the Federal Employers' Liability Act, deserves to be thoroughly canvassed. Another alternative is the withdrawal of the petty criminal business from the federal district courts by devising an appropriate method of summary procedure. One thing is clear. The relief of the district courts from this avoidable litigation, which eventually has its reflex upon the Supreme Court's work, is an insistent problem of federal jurisdiction.

CHAPTER XIX

UNIFICATION OF THE SYSTEM OF STATE COURTS

In the two chapters immediately preceding, consideration has been given to the improvements of a general character to which our judicial system is open. There remains for consideration the changes that can be made with advantage in the system of courts of the individual states. Among these, much the most important is that of bringing about a unification of the existing scattered, and more or less independent, judicial tribunals into a single Supreme Court of Judicature. The situation now existing as regards the provision that is made for the handling of the work of adjudication is almost identical with that which until recently existed in respect to the provision made for the handling of the administration work of the government.

As has been pointed out in the volume dealing with the administrative branch,[1] the administrative systems of our states developed in a haphazard way, one service after another being created as need for the performance of a particular duty seemed to arise, until a condition arose where the administrative branches of the states consisted of a conglomerate of bureaus, boards, commissions, and offices, each in large part independent of the others, and, collectively, conforming to no consistent principle of organization. The result was confusion, duplication, overlapping of organization and functions, conflicts of jurisdiction, unnecessary cost, etc.

The history of the organization of the judicial branches of the states has been similar. The judicial power has been split up and vested in a large number of separate tribunals, each going its own way from the administrative standpoint, with little regard to the others. As new needs have arisen the only way adopted for meeting them was to establish new courts. The system has consequently tended to become more complex and responsibility more widely diffused.

[1] W. F. Willoughby, Principles of public administration, 81-103 (1927). Institute for Government Research.

Advantages of Unification. Just as in the administrative branch, the defects of the old system have at last been recognized, and a strong movement is now under way to replace it by one where all the administrative agencies will be knit together as integral parts of a single piece of administrative mechanism, all operating in close coöperation and subject to a common direction and control, so the corresponding defects in the judicial machinery of the states are now appreciated by students of this branch of public administration, and efforts are being put forth to supplant the the existing system of independent, uncorrelated judicial tribunals by a single unified tribunal in which the existing courts, so far as they are retained, become subdivisions or parts. The character of a judicial organization that would result if this policy were adopted is shown by the following outline of organization of such a tribunal as suggested by the American Judiciary Society for a General Court of Judicature.

1. Court of Appeals
   1. Supreme Court Division
   2. Other Divisions: three judges each
2. Superior Court
   1. Territorial Divisions
3. County Court
   1. Territorial Divisions
4. Metropolitan Courts
   (Combining Superior and County Courts in Metropolitan Areas)

It will be seen from this outline that what is proposed is, not the abolition, of existing courts, except in certain cases, but a fundamental change in their legal status. Instead of being independent tribunals, they will become subdivisions of a single unit and all the judges will be judges of this single court, though they may be permanently assigned to the conduct of particular subdivisions.

The proposal for the creation of a single unitary court carries with it, however, the adoption of certain principles that go far beyond that of merely changing the legal status of existing tribunals. If the system is fully to accomplish its purposes, large powers of general direction, supervision, and control over the entire work of the court, must be vested in the chief justice or in a council presided over by him. These powers should embrace those of:

classifying these several divisions; assigning to these divisions the judges attached to the court, with a view to the most effective utilization of their special attainments and the advantages resulting from specialization; controlling assignments to the several divisions, with a view to equalizing the burden of work and making the fullest use of judicial personnel; formulating the rules of procedure, so as to secure uniformity in respect to the manner of conducting the business of the court; prescribing the character of records to be maintained; requiring periodical reports on the work performed and the condition of business; and, generally, exercising those powers that will ensure a standardization of practice and efficiency in the conduct of affairs. As a concomitant of the exercise of these powers, the chief justice, or the council, should itself prepare and submit to the legislature an annual report setting forth in full the operations of the court during the preceding year and presenting recommendations for legislative action that will put the whole task of the administration of justice upon a more efficient basis. The proposal, in other words, means the application to this branch of public administration of but the same principles that are now generally recognized as essential in securing efficiency in the conduct of purely administrative affairs, while, at the same time, interfering in no way with the exercise of judicial discretion, properly speaking, by the individual judges.

Nowhere have the arguments in favor of taking this action been better summarized than in a report of the Committee to Suggest Remedies and to Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation submitted to the American Bar Association in 1909.[2] This report, in part, reads:

The first principle which the Committee desire to submit is that of unification of the whole judicial system.

1. The whole judicial power of each state, at least for civil cases, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent, not merely waste of judicial power, but all needless clerical work, duplication of papers and records and the like, thus obviating expense to litigants and cost to the public.

[2] The creation of this committee, which constitutes a landmark in the movement for judicial reform in the United States, was the direct result of the paper by Roscoe Pound on "The causes of popular dissatisfaction with the administration of justice." Report, American Bar Association, 1906, p. 395.

While the whole judicial power should be concentrated in one court the court should be constituted in three chief branches: (1) county courts (including municipal courts) having exclusive jurisdiction of all petty causes, all of them to constitute in the aggregate one branch but with numerous local offices where papers may be filed, and as many places for hearing of causes in each county as the exigencies of business may require; (2) a superior court of first instance (to be called by some appropriate name) having a defined, original, exclusive, general jurisdiction at law, in equity, in probate and administration, in guardianship and kindred matters, and in divorce; this court to have numerous local offices where papers may be filed and at least one regular place of trial in each county, and to be divided into at least two, and probably three, divisions—(a) one for disposition of actions at law and other matters requiring a jury or of kindred nature, (b) one for equity causes; and (c) one for probate, administration, guardianship and the like. The first might be called the Law Division or the Common Pleas Division, the second the Equity or the Chancery Division and the third the Probate Division. Possibly many jurisdictions would desire to unite the first two, but it seems to the Committee that there is much to be said for separate administration of equity, provided the courts are free to administer whatever relief the case warrants and the distribution is made one of administration only. Divorce would be relegated generally to the second division, though there is much to be said for committing it to the third. The third branch would be a single ultimate court of appeal. All judges should be judges of the whole court. They should be assigned in some appropriate way to the branch and the division thereof or the locality in which they are to sit but should be eligible and liable to sit in any other branch or division or locality when called upon to do so.

* * * *

There is room for differences of opinion, no doubt, with respect to the proposition to include the tribunals for dispatch of petty cases in the scheme for unification of the judicial system. It was the original plan of those who drew the Judicature Act in England to incorporate the county courts in their scheme (Report of Judicature Commission 1869, p. 131). This portion of their plan failed of adoption. But the reasons in support of it are most urgent. The Municipal Court of Chicago has shown that it is perfectly feasible to administer a much higher grade of justice in petty causes than that dispensed by justices of the peace without resorting to the cumbrous and expensive machinery of our superior courts of record.

Following this is the statement in favor of the abolition of the justice of the peace courts and the vesting of this jurisdiction in the county and municipal courts which will later be reproduced. The report then continues:

The advantages of such an organization of the courts, of judicial business and administrative work of the courts are nine:

1. In the first place it would make a real judicial department. The federal department of justice under the headship of the Attorney General gives to the general government something in the line of what is proposed. But it is not in accord with the genius of our legal institutions that one who practices in the courts should be head of a department comprising the courts and charged with the supervision thereof. The several states accordingly have courts but they do not have any true judicial department.

2. It would do away with the waste of judicial power in our present system of separate courts with hard and fast judicial personnel. Where judges are chosen for, and their competence is restricted to rigid districts, or circuits, or courts of jurisdiction, it is a familiar consequence that business may be congested in one court while judges in another are idle. Devices for exchange of judges, or invitation to sit in another district may sometimes mitigate this evil to some extent, but they do not reach its source. In this respect the federal circuit courts and circuit courts of appeals are a model of flexible judicial organization. The judicial department should be so organized that the whole force may be applied to the work in hand for the times being according to the exigencies of that work.

3. It would do away with the bad practice of throwing causes out of court to be begun over again in cases where they are brought in the wrong place. They may be transferred simply and summarily to the proper branch or division, or rule may provide that the cause may be assigned at the outset to the place and division where it belongs and no question of jurisdiction of subject matter will stand in the way.

4. It would do away with the great and unnecessary expense involved in transfer of causes obviating all necessity of transcripts, bill of exceptions, certificates of evidence and the like and permitting original files, papers and documents to be used, since each tribunal, as a branch of division of the whole court may take judicial notice of all files, papers, and documents belonging to the court.

5. It would obviate all technicalities, intricacies, and pitfalls of appellate procedure. An appeal would be merely a motion for a new trial, or for modification or vacation of the judgment before another branch of the same court. It would require no greater formality of procedure than any other motion.

6. It would do away with the unfortunate innovation upon the common law which obtains in many states by which venue is a place where action must be begun rather than a place where it must be tried, so that a mistake therein may defeat an action entirely instead of resulting merely in a change of the place of hearing. This innovation is especially unfortunate when it is applied to equity causes, where originally there was no venue. If all tribunals are part of one court there need be nothing beyond a transfer of the cause. All proceedings up to the date thereof may be saved.

7. It would obviate conflicts between judges of coordinate jurisdiction such as unhappily obtains too often in many localities under a completely decentralized system which depends wholly upon the good taste and sense of propriety of individual judges, or the slow process of appeal to prevent such occurences. But a short time since it became a matter of comment and criticism in one of the great cities of the country that judges who were supposed to be trying causes with juries only, would take up divorce cases and dispose of them out of the usual order, although they were supposed to be heard only by the judge engaged in hearing equity causes. As most of our courts are organized at present, there is nothing to prevent any judge trying any cause pending in the court he pleases, however foreign to the work he and his colleagues have agreed he shall attend to.

8. It would allow judges to become specialists in the disposition of particular classes of litigation. The prevailing system of rotation is unfortunate. Usually where there are a number of judges they take up in rotation civil trials with juries, equity causes and criminal causes. It is becoming unusual for a judge to be kept continuously to any one class of causes so as to become thoroughly familiar therewith. This specialization was the real advantage of separate courts of law and equity. Instead of separation between law and equity in procedure the desirable thing is specialization in administration. The way to obtain this is to organize the courts in such a way that judges may be assigned permanently to the work for which they prove most fit. So long as they make the assignments by agreement among themselves, the tendency to follow the line of least resistance will result in the unfortunate practice of periodical rotation.

9. Finally, it would bring about better supervision and control of the administrative officers connected with judicial administration, and make it possible to introduce improved and more business-like methods in the making of judicial records and the clerical work of the courts.

Clear and comprehensive as this report is, there are certain features in it on which it is desirable to comment further. One

of these is the matter of specialization in the setting up of tribunals for the trial of particular classes of causes.

In the administrative field it is well recognized that a high degree of specialization in the assignment of work to technical divisions, and to personnel according to special abilities possessed, is essential if efficiency is to be secured. What is true of this field is no less true of that of the administration of law. The task of the adjudication of disputes and the trial of offenders is a highly complex one as regards the subject-matter to be handled and the special knowledge required on the part of those handling it. Cases coming before the courts involve questions covering practically the whole field of human activities, and the character of the remedies sought is varied. It would be difficult to find a class of work offering a greater field for intelligent specialization.

In general, this opportunity has been neglected and, when embraced, has taken the wrong form. Though the different classes of causes coming before the courts are well defined, such as civil and criminal, and, within these, those having to do with such distinct matters as real estate, contracts, domestic relations, patent rights, etc., only in rare cases has an attempt been made to recognize such classes in the assignment of causes to particular divisions or judges with a view to having each class handled by a specialist. In courts with a single judge, that officer is compelled to handle all classes of cases. In courts with several judges the prevailing system is one of rotation, where each judge takes his turn in handling the several classes of cases.

Within recent years the desirability of specialization has become recognized. In most cases this has found expression in the creation of special courts, such as juvenile courts, courts of domestic relations, etc. Though the advantages of specialization have thus been secured, they have been had at the expense of the judicial system as a whole, since they have aggravated the evil of distributing responsibility among a number of independent, uncoördinated agencies. The real solution of this problem is to be found in the unified court. One of the great advantages of that system is that it permits the carrying of the principle of specialization to any limits without dissipating judicial authority, and ensuring that this assignment of work, according to its character, will be done by a competent authority, and modified from time to time

as experience indicates that modification is desirable. With such a court, specialization takes place and should take place within the organization, instead of through the creation of new agencies.

It is safe to say that as provision is made for unified courts, the practice of specialization will be carried far beyond that now attempted and will be wholly productive of good. As the Preliminary Report on Efficiency in the Administration of Justice, prepared for the National Economic League by a Committee composed of Charles W. Eliot, Louis D. Brandeis, Moorfield Storey, Adoph J. Rodenbeck and Roscoe Pound, puts it:[3]

> Multiplication of tribunals is the first attempt of the law to meet the demand for specialization and division of labor. Yet it is at best a crude device. The need is for judges who are specialists in the class of causes with which they have to deal. This need may be met by specialized courts with specialized jurisdiction. But it may be met also by a unified court with specialist judges to whom special classes of litigation are assigned. Undoubtedly much specialization is desirable and will be desirable increasingly in the future. But concurrent jurisdictions, jurisdictional lines between courts with consequent litigation over the forum and venue at the expense of the merits, and judges who can do but one thing no matter how little of that is to be done, nor how much of something else, are not the way to provide therefor. Rather there should be specialist judges. As cases of a certain class become numerous and require that a specialist consider them, judges should be designated from the staff of the whole court for that purpose and the causes should be assigned to such judges in the one court in which all causes are entered by some functionary whose duty it is to see that the judicial power of the commonwealth is fully utilized and is utilized to the best advantage.

Among the advantages offered by the unitary court, it will be noted, that great prominence is given by the report of the committee of the American Bar Association to the factor of business administration. Under such a system it is possible to make use of all of the means employed in an ordinary business enterprise to secure efficiency in the dispatch of business. Among these the most important is that of conferring upon the presiding judges of the court the status, power, and duties of a general manager in respect to the internal organization, and purely administrative features of

[3] Publication of the National Economic League, not dated.

the work of the court. The act providing for the unification of the courts would largely fail of its purpose unless careful provision for this feature was incorporated in it. This subject, however, on account of its importance, is made the subject of a later, special chapter.

Movement for Unification. The rise of the movement for the establishment of unitary courts in the United States is primarily due to the striking success of the similar movement in England which led to the creation there of its Supreme Court of Judicature. The creation of this tribunal was probably the leading feature of the great judicial reform brought about by the Judication Acts of 1875-78. The submission in 1909 of the report of the committee of the American Bar Association, from which we have quoted, may be taken as the starting point of the similar movement in the United States. The proposal of this committee has received the practically unanimous support of other organizations and students directing their attention to the improvement of our judicial system. Among those special mention should be made of the American Judicature Society, which, since its organization in 1913, has not ceased to urge this action, and has by its publications contributed powerfully to the promotion of legislation having this end in view. Not content with pointing out in a general way the advantages offered by a unitary court system, it has drafted a model act for the guidance of states desiring to establish such a court.[4] Its Journal, moreover, abounds with contributions bearing upon this subject, and reveals the extent to which it has received the support of those to whom the country looks for advice in the handling of this branch of public administration. Mention, finally, should be made of the fact that the model constitution, prepared by the National Municipal League after several years of study and with the collaboration of many students of political science, incorporates this system without qualification as the fundamental feature of its judiciary article.[5]

[4] Second draft of a state-wide judicature act, Bulletin VII-A (Bulletin VII revised), March, 1917, and later revision in *Journal of the American Judicature Society*, December, 1927.

[5] A model state constitution, prepared by the Committee on State Government of the National Municipal League. Reprinted with explanatory articles, 1921.

It is not remarkable that a proposal of such far-reaching significance, despite its strong endorsement, should not receive ready acceptance. No state has adopted it, and in but few have really active efforts been made in its behalf. Oklahoma is the outstanding instance of a state in which an attempt was made to put this proposal into full effect. In 1920 the State Bar Association prepared a draft for the revision of the judiciary articles of the state constitution that would permit of the establishment by the legislature of a single unified court to take over the entire judicial function and the accomplishment of other important judicial reforms. No action has been had upon this draft. As in the case of many other reforms representing a marked departure from practice, the chief delay is encountered in the initiatory stages. One state having acted, and the feasibility and the advantages of the change demonstrated, progress thereafter may be rapid.

CHAPTER XX

JUDICIAL COUNCILS

Though, as has been shown, no state has as yet adopted the policy of bringing together all of the courts in a single organization, proposals brought forward and in part acted upon, indicate that there is a general and keen appreciation of the evils resulting from the present dispersion of judicial power, and a belief that these evils can only be remedied by vesting in some central agency the power to exercise direction and control of a general character. As an alternative, and less radical, proposal than that of bringing all existing tribunals into a single court, recent years have witnessed a pronounced movement for the creation of what are known as judicial councils, whose function it is to concern themselves with all phases of judicial administration and to take steps that will tend to improve and render more uniform existing rules of judicial procedure, more evenly distribute the work of adjudication among the several courts of the state, and provide for a more efficient conduct of the purely business aspects of court operations. These councils are usually composed of judges representing the several courts of the states, presided over by the chief justice of the supreme court, though representation on them is sometimes given to the bar and the office of attorney general. The functions of these bodies as investigatory and directive agencies are shown in the account which follows of the several councils that have been created.

Wisconsin Board of Circuit Judges. The first state to take action in the way of providing for a central body to exercise functions in respect to judicial administration was Wisconsin. In that state the courts of general trial jurisdiction are the circuit courts. The constitution provided for five such courts, but authorized the creation of additional judges as need therefor might arise. In time the system developed to one that included twenty-five circuit judges. Primarily, in order to secure a more even distribution of

work among these judges and thereby avoid the necessity of providing for additional judges, the legislature, in 1913, passed an act creating what was known as the Board of Circuit Judges. This act did little more than provide for an annual meeting of all the circuit judges, with power to adopt such rules and regulations as they "should deem advisable to promote the administration of the judicial business of the circuit courts of the state." By subsequent legislation the powers of this board were increased so as to provide that it should "elect a chairman whose duty it shall be to expedite and equalize so far as practicable the work of the circuit judges. The chairman shall request judges whose calendars are not congested to assist those judges whose calendars are congested. Every circuit judge shall report monthly, and every clerk and reporter of a circuit court shall report when requested to the chairman such information as the latter shall request respecting the condition of judicial business in the circuit of such circuit judge."

It will be seen that the legal functions of this board do not go much beyond that of equalizing business among the several judicial courts and ensuring a fuller utilization of the energies of all the judges. Its creation, however, was of significance as indicating an appreciation of the need for knitting together a number of separate judicial units into a system and providing for their cooperation in a general task. It is reported, moreover, that the setting up of this system has been productive of other collateral benefits. In an article on this board by its chairman, the statement is thus made that:[1]

> The mere association of the judges at their annual meetings has proved of great advantage in promoting the administration of judicial business. Matters of procedure and methods of conducting business are discussed and views and experiences are exchanged. Because of the acquaintances and feelings of mutual regard that have been established between judges who would otherwise have remained practical or complete strangers, aversions to asking for help have been overcome and more free and generous dispositions toward granting it have developed, with the result that exchange of work and rendition of service directly between judges have greatly increased. Practice and procedure have become practically

[1] Wisconsin Board of Circuit Judges, by Judge Chester A. Fowler, Chairman of the Board of Circuit Judges, *Journal of the American Judicature Society*, December, 1920.

uniform throughout the state. Lawyers going to distant circuits to conduct court business are as much at home as when practicing in their own circuits. At the meetings many proposals for statutory changes in matters of practice have been discussed and such as have been considered worthy have been recommended to the legislature with the result that several highly important ones have been enacted.

Judicial Council: Massachusetts. Though the action of Wisconsin was a step in this direction, it is to Massachusetts that belongs the credit of taking the first step in the way of creating a permanent agency with the duty of subjecting the whole system of administration of the law in the state to study, of informing itself regarding the practical workings of such system, and of making recommendations for the correction of defects thus brought to light.

In 1919 the legislature provided for the creation of a Judicature Commission, with the duty of investigating and reporting upon all phases of the judicial system of the state. This commission made a partial report in 1920 and a final report in 1921. These reports were exceptionally able documents. The commission also formulated a number of bills to put its recommendations into effect. Among them was one for the creation of a judicial commission, which should be a permanent body to make investigations and recommendations in respect to the judicial work of the government. In support of this bill the report said:[3]

> The courts of Massachusetts have developed hitherto as separate organizations having very little relation to each other. There has never been any central body of a permanent character for the accumulation of information and the consideration and discussion of questions of organization, practice and procedure bearing on the subject of judicial administration. . . .
>
> It is not a good business arrangement for the commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people, for whose benefit the courts exist, calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement. . . . Some central official body is needed for the continuous study of questions relating to the courts. Such a body, the Commission believes,

[3] Pp. 25-28.

should consist partly of judges and partly of members of the bar, with the Chief Justice of the Supreme Judicial Court as the head of the judicial system of the state, or some other member of that court, delegated by him, as its presiding officer. The members of this body should serve without compensation, but they should be provided with the necessary clerical assistance and an efficient executive secretary, at an adequate salary, to collect information and prepare the material for their consideration.

It has been suggested that such a council should be given rule-making powers, but, in the opinion of the Commission, this is not necessary. The functions of the body should be those of a permanent judicature commission, with authority to investigate and with the duty of submitting an annual report to the Governor in regard to the work in the court of the Commonwealth, and making such suggestions as they deem advisable. The contents of such reports may then be used as a basis of study and recommendation by any one interested, and the Legislature, the bar, the courts themselves, and the people will be better informed than they ever have been before in regard to the operation of this branch of the government. It should be provided also that clerks of the various courts should make such periodical reports in regard to the business done as the council may require, so that a centralized system of statistics may be developed.

It does not seem advisable that this body should be too formal in its character or in its deliberations. The main point is that there shall be an officially recognized body of judges and members of the bar who are expected to meet for the mutual exchange of views and the discussion of practical questions, to whom suggestions may be made, and who will report annually. The Commission believes that such discussions would gradually result in many valuable improvements in the courts of the Commonwealth and the methods of administration and practice.

For these reasons the Commission recommends legislation to provide for a judicial council and submits a draft of such legislation; and we believe that this recommendation of such a council with such functions as are outlined above, will appeal to the business sense of the community.

The bill providing for putting these recommendations into effect became a law on April 12, 1924. It is entitled "An Act Providing for the Establishment of a Judicial Council to Make a Continuous Study of the Organization, Procedure and Practice of the Courts" and its essential provisions read as follows:

There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the

judicial system of the commonwealth, the work accomplished and the results procured by that system and its various parts. Said council shall be composed of the chief justice of the Supreme Judicial Court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years as he shall determine.

The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

No member of said council shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve.

The council has to date rendered three annual reports, all of which are valuable documents as pointing out defects in the existing judicial system of the state and recommending changes for their removal.

Judicial Council: Ohio. Though Massachusetts took the lead in recommending, through its special judiciary commission, the creation of a judicial council as a permanent body for studying the system of judicial administration, Ohio was the first state actually to provide for such a body. By an act passed in 1922, which was avowedly based upon the Massachusetts draft, provision was made for a judicial council of nine members, composed of the chief justice of the supreme court and four other judges representing and selected by, the other courts of the state, and three practicing attorneys appointed by the governor. To this council was entrusted the duty of making a "continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the

state of Ohio, the work accomplished and the results produced by that system and its various parts." It is required to report biennially to the legislature on "work of the various branches of the judicial system with its recommendations for modification of existing conditions," and it is authorized to submit from time to time "such suggestions as it may deem advisable for the consideration of the judges of the various courts with relation to rules and practice and procedure." The clerks of the various courts and other officers are required to make to the council "such reports on such matters and in such form periodically or from time to time, as the council may prescribe." The council is also authorized "to hold public hearings, to administer oaths and require the attendance of witnesses and the production of books and documents."

Judicial Council: Oregon. In 1918 the Oregon legislature passed an act providing for a commission of seven members to be appointed by the Supreme Court "to investigate and report to the next succeeding legislative assembly a plan for the revision and improvement of judicial administration, practice and procedure with a view to simplification and to reduce the expense and delays of litigation and to promote certainty of justice in judicial proceedings." This committee reported certain bills of a remedial character. Two of the members, however, made a minority report holding that no palliative measures would meet the needs of the situation; that nothing short of a complete reorganization of the judicial system of the state through the setting up of a unified court system could give to the state a satisfactory system of judicial administration.[3]

The legislature was not willing to take the radical action here recommended. Later, however, in 1923, it passed an act providing for the creation of a judicial council, which while not revising the existing system of courts, had as its purpose to introduce a measure of centralization in respect to control over those courts. This act, in principle, and to a considerable extent in language, follows the Ohio law.[4] The council is made up of the chief justice

[3] For a copy of this minority report and draft of bill providing for the creation of a unitary court for Oregon, see *Journal of the American Judicature Society*, February, 1919.

[4] For a copy of this act, see *Journal of the American Judicature Society*, October, 1923.

of the supreme court as chairman, an associate justice of the supreme court and three judges of the courts of record, all selected by the chief justice of the supreme court. A distinctive feature of the system is the concentration of responsibility in the hands of the chief justice. The chief justice also has the power to invite the president of the State Bar Association and the president of the State Attorney's Association or other member of the bar to attend the meetings of the council and advise it in the performance of its duties. The duties of the council are similar to those of the Ohio council. The judges of all courts, including courts not of record, are required to report to the chairman of the council at such times and in such manner as he may prescribe respecting the condition of the judicial business in their respective courts. The council, furthermore, is directed to summon annually a meeting of all of the judges of courts of record in the state for the consideration of complaints and proposals of change in respect to the manner of conducting the business of the courts. The council has power to summon witnesses, order the production of papers and records, etc.[5]

Judicial Council: North Carolina. In 1925 North Carolina followed the example of Massachusetts, Ohio, and Oregon, and provided by statute for the creation of a judicial council. This act conforms in most respects to those of the states which have been mentioned. It departs from them, however, in giving representation on the council to all the judges of the supreme and superior courts, to the attorney general of the states, and to one practicing attorney from each judicial district, to be appointed by the governor for a term of two years. The chief justice of the supreme court is made the presiding officer and the clerk of the supreme court the secretary.[6]

The duties of this body as set forth in the act are as follows:

The conference shall report annually to the Governor the work of the various parts and branches of the judicial system with its recommendations as to any changes or reforms in the system and in the practice and procedure of the courts, and the Governor shall

[5] A bill passed by the legislature providing for the abolition of this council was vetoed by the Governor.

[6] For a copy of this act, see *Journal of the American Judicature Society*, June, 1925.

transmit the report of the conference biennially to the general assembly with such recommendations as he may deem advisable. The conference may also from time to time submit such suggestions and recommendations as it may deem advisable for the consideration of the judges of the various courts with relation to rules of practice and procedure. The clerks of the various courts and other officials shall make to the conference such reports on such matters and in such form, periodically or from time to time as the conference may prescribe.

The council, it is prescribed, shall meet twice a year, may hold public meetings, and has the power to administer oaths, require the attendance of witnesses, and order the production of documents and papers.

Judicial Council: Washington. In the same year that North Carolina acted, 1925, the legislature of Washington enacted a law[7] providing for a Judicial Council composed of the chief justice of the supreme court as chairman, one other justice of the supreme court, three judges of superior courts, the chairmen of the judiciary committees of the two houses of the legislature, and three members of the bar, one of whom must be a practicing attorney. The powers and duties of this council are similar to those of the councils already described. A distinctive feature is that it includes in its membership representatives of the two houses of the legislature.

Judicial Council: California. In 1926 California provided for a judicial council through an amendment to her constitution.[8] This amendment was secured largely through the efforts of a committee of the Commonwealth Club headed by Professor Samuel C. May of the Department of Political Science of the University of California. It provides for a council composed of the chief justice of the supreme court and ten other judges representing the various classes of judicial tribunals, including a police or municipal court to be designated by the chief justice, and to serve for a term of two years. The council has the usual powers and duties of investigation and report.

[7] For a copy of this act, see *Journal of the American Judicature Society*, December, 1925.

[8] For a copy of this amendment, see *Journal of the American Judicature Society*, April, 1925.

Judicial Council: North Dakota. Provision for a judicial council was made by North Daktoa in 1927.[9] The enactment of this act was due to the joint efforts of the bench and bar, which, through their organizations, drafted and promoted the bill that became the law. The council follows that of North Carolina, as regards its composition, being composed of all of the judges of the supreme and district courts, the attorney general of the state, the dean of the state university law school, a county judge, and five members of the bar. Its duties are declared to be "to make a continuous study of the operation of the judicial system of the state to the end that procedure may be simplified, business expedited and justice better administered." Meetings of the council must be held at least twice a year and provision is made for an executive secretary. Exceptionally complete provision is made for the keeping of records. The act provides:

SECTION 7. *Bureau of Statistics.* The Council shall have the power to organize a bureau of statistics for the purpose of gathering information relating to crime and criminal and civil litigation. Judges, state's attorneys, sheriffs, the attorney general, clerks of the district courts, the state board of administration, the superintending officers of penal and reformatory institutions and of asylums and other places of detention, and all other state, county and municipal officers, boards and commissions, shall render to the council such reports as it may request on matters within the scope of its powers. The clerks of the district courts of the state shall prepare a statement semi-annually under the seal of the court showing the number of cases filed, the number of cases ready for trial and the number of cases tried during the preceding period of six months, together with such additional information as may be required by the council; and such statement shall be forwarded to the judicial council not later than January first and July first of each year.

Among other provisions is one that requires the preparation and submission of an annual report "upon the work of the various branches of the judicial system of the state." The council is required to submit recommendations to the governor and to the legislature on "such measures as it shall deem advisable and may from time to time submit for consideration of the supreme court suggestions regarding rules of practice and procedure."

[9] For a copy of this act, see *Journal of the American Judicature Society*, April, 1927.

Judicial Council: Connecticut. In 1927 Connecticut provided for a judicial council to be composed of the chief justice of the supreme court of errors, or some other justice or former justice of that court, appointed by the chief justice, and a justice or former justice of the superior court, the court of common pleas, and a city court, all to be appointed by the chief justice of the supreme court of errors, not more than four practicing attorneys at law, and one state's attorney to be appointed by the governor.[10] This council is directed to study the system of judicial administration, to submit from time to time suggestions for changes in rules of procedure, and to report generally every two years.

Judicial Council: Rhode Island. Provision for a judicial council was made by Rhode Island by an act approved April 21, 1927.[11] The system created follows closely that of Connecticut. The council is composed of the chief justice of the supreme court or some other justice or former justice designated by the chief justice, the presiding justice of the superior court or some other justice or former justice designated by him, a justice or associate justice of a district court designated by the governor, and three practicing attorneys of the state designated by the governor. The functions of this council are broadly stated to be: " the study of the organization rules and methods of procedure and practice of the judicial system of the state and all matters relating to the administration of said system and its several departments of service." The council is required to submit an annual report to the governor.

Judicial Council: Kansas. Kansas provided for a judicial council by an act passed in 1927.[12] This act follows that of Washington in including among the membership of the council, not only the chief justice of the supreme court and other judges to be appointed by the chief justice, but the chairman of the judiciary committees of the two houses of the legislature and four members of the bar. The powers and duties of the council correspond in general terms

[10] For a copy of the act creating this council, see *Journal of the American Judicature Society*, June, 1927.

[11] For a copy of this act, see *Journal of the American Judicature Society*, December, 1927.

[12] For a copy of the act creating this council, see *American Bar Association Journal*, May, 1927.

to those of the other councils that have been described. The council must submit an annual report to the governor.

Judicial Council: Virginia. In 1928 Virginia joined the ranks of the states making provision for a judicial council.[18] The council created follows the plan of the Federal Judicial Conference. The act provides that it shall be the duty of the president of the supreme court of appeals annually to summon not less than three nor more than five of the circuit judges, not less than two or more than three of the judges of other courts of record and ten members of the bar of the supreme court of appeals, one from each congressional district of the state, to meet as a council for the purpose of making "a comprehensive survey of the condition of business in the courts of the Commonwealth" and "recommendations for the improvement of the administration of justice" and particularly reporting "as to needed changes in the rules of practice and procedure in the several courts of the Commonwealth." On the request of the presiding officer the Attorney General is required to attend the conference and confer with its members in respect to the Commonwealth's business in the courts and the devising of methods for the prevention of undue delay in the trial of such cases.

As a preparatory step to such conference, each judge of a court of record is required to prepare and submit to the president of the supreme court of appeals for the consideration of the council, a report "showing the condition of business in his court for the preceding twelve months, including the number and character of cases on the docket, the business in arrears and cases disposed of, and such other facts pertinent to the business dispatched and pending in his court, together with recommendations as to the need of additional judicial assistance for the disposal of business for the ensuing year as said judge may deem proper."

The council is required to submit a report of its proceedings to the governor, in which shall be set forth the recommendations that may have been agreed upon.

It will be noted that this council has no authority itself to take action. Its function is purely one of consideration and recommenda-

[18] For a copy of the act creating this council, see *Journal of the American Judicature Society*, October, 1928.

tion. It is extremely likely that its recommendations will be acted upon when such action can be taken without additional legislation, and that its recommendations for new legislation will have great force with the legislature.

District Judicial Councils: Texas. In 1927 Texas passed an act which, while not providing for a central judicial council for the state, represents an important step in that direction. This act divides the state into nine administrative judicial districts and provides that all the trial judges in each district shall attend an annual conference at which will be considered the condition of their work and means of expediting and improving the administration of justice. The chairman of each of these conferences, who is one of the judges selected by the governor with the approval of the senate, has power to assign judges to hold special or regular terms of court to dispose of accumulated business in other judicial districts than their own. The system is not unlike that of the Federal Judicial Council, later described. The establishment of these district conferences would seem to pave the way for the creation of a central judicial council, if, in operation, they give satisfactory results.

Proposed Judicial Council: Missouri. On February 26, 1924, a revision of the constitution of Missouri in the form of twenty-one separate amendments was submitted to the voters of the state. Among these proposed amendments was one providing for a thorough revision of the judiciary article. The most important feature of this proposal was that providing for the creation of a judicial council to be presided over by the chief justice of the supreme court, to which was to be entrusted large powers of directing and controlling the work of all the courts of record. This proposed amendment, unfortunately, was rejected by the people in common with almost all the other proposed amendments that were voted upon.[14]

Judicial Conference: United States. The most important action that has been taken in the way of providing for a judicial council is probably that consummated by the passage by Congress, on

[14] Of this proposal Mr. Harley of the American Judicature Society, writing in 1927, said: "It was the most thoroughly worked out revision of a judiciary article on modern lines that had been made."

September 14, 1922, of an act providing for the creation of such a body as an integral part of the federal judiciary. This measure was strongly advocated by the American Bar Association, was drafted by the Attorney General of the United States, and urged for adoption by Chief Justice William H. Taft. This act [15] provides that the Chief Justice of the Supreme Court, or, in the case of his disability, the senior associate justice, and the nine senior justices of the nine circuit courts of appeal, or, in case of disability, the next in order of seniority, shall annually assemble in conference in Washington to consider the administrative problems of the federal judiciary. In terms of the act, the duties of this body are as follows:

The senior district judge of each United States District Court, on or before the first day of August in each year, shall prepare and submit to the senior circuit judge of the judicial district in which said district is situated, a report setting forth the condition of business in said district court, including the number and character of cases on the docket, the business in arrears, the cases disposed of, and such other facts pertinent to the business dispatched and pending as said district judge may deem proper, together with recommendations as to the need of additional judicial assistance for the dispatch of business for the year ensuing. Said reports shall be laid before the conference herein provided, by said senior circuit judge, or, in his absence, by the judge representing the circuit at the conference together with such recommendations as he may deem proper.

The chief justice, or in his absence the senior associate justice shall be the presiding officer of the conference. Said conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for the assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business.

The Attorney General shall, upon request of the chief justice report to said conference on matters relating to the business of the several courts of the United States, with particular reference to the causes or proceedings in which the United States may be a party.

[15] 42 Stat. L., 837. For a copy of this act, see *Journal of the American Judicature Society*, October, 1924.

Subsequent sections provide that:

Whenever any district judge by reason of any disability or necessary absence from his district or the accumulation or urgency of business is unable to perform speedily the work of his district, the senior circuit judge of that circuit, or in his absence, the circuit justice thereof, may, if in his judgment the public interest requires, designate and assign any district judge of any district court within the same judicial circuit to act as district judge in such district and to discharge all the judicial duties of a judge thereof for such time as the business of the said district court may require. Whenever it is found impracticable to designate and assign another district judge within the same judicial circuit as above provided and a certificate of the needs of any such district is presented by said senior circuit judge or said circuit justice to the Chief Justice of the United States, he, or in his absence the senior associate justice, may, if in his judgment the public interest so requires, designate and assign a district judge of an adjoining judicial circuit if practicable, or, if not practicable, then of any judicial circuit, to perform the duties of district judge and hold a district court in any such district as above provided: Provided, however, That before any such designation or assignment is made the senior circuit judge from which the designated or assigned judge is to be taken shall consent thereto. All designations and assignments made hereunder shall be filed in the office of the clerk and entered on the minutes of both the court from and to which a judge is designated and assigned.

* * * *

The chief justice of the United States or the circuit justice of any judicial court or the senior circuit judge thereof may, if the public interest requires designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit. The judge of the United States Court of Customs Appeals or any of them, wherever the business of that court will permit, may, if in the judgment of the Chief Justice of the United States the public interest requires, be designated and assigned by him for service from time to time and until he shall otherwise direct, in the Supreme Court of the District of Columbia or the Court of Appeals of the District of Columbia when requested by the Chief Justice of either of said courts.

Certain significant features of the foregoing provisions may be pointed out.

Prior to the passage of this act the only device resorted to for the handling of the increasing business of the federal courts was the increase in the number of courts or judges. This act has as

one of its most important purposes to provide means by which judges in districts where the work is light may be shifted for such time as may be necessary to districts where the work is heavy. In a way, it means the integration of the entire system of district courts into a single system, in which the individual courts are in effect divisions. The council, thus provides the agency through which this unified system is to be made to work.

Secondly, provision is made for the establishment of a system or reports from the several district courts, with the result that information will now be obtainable regarding their work. Apart from the value of such information, the requirement that it shall be furnished places a strong moral pressure upon the judges to handle the business coming before them with dispatch, to the end that their showings may compare favorably with those of their colleagues. In commenting upon this point Mr. Justice Taft, in his testimony before the committee having the bill in charge said:

It is the introduction into our system of an executive principle to secure effective team work. Heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any. Judges are men and are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation he is likely to coöperate much more readily in an organized effort to get rid of business and do justice than under the "go-as-you-please" system of our present federal judges which has left unemployed in easy districts a good deal of the judicial energy that may be now usefully applied elsewhere. . . . This executive principle of using all the judicial force economically and at the points where most needed should be adopted in every state and when adopted will offer a remedy to a great deal of the injustice by delay that now exists. State judges, as well as federal judges, should be interested in the adoption of this federal measure as a model for the states.

This Council, or Conference, has had annual meetings since its establishment, which have demonstrated the valuable results that may be expected from it. At these meetings, the Attorney General of the United States has appeared and given his views regarding action required in order to facilitate the handling of government business coming before the federal courts and the improvement of the judicial system generally; discussion has been had of proposed

legislation affecting the organization and procedure of the federal courts; committees have been appointed to consider special problems; and the reports of those committees have been read and action take upon them. An idea of the nature of the matters receiving the attention of the Conference may be had from the following list of some of the committees that have been created: Rules and Procedure of the Conference; Forms and Procedure for the Transfer of Judges; Character of Reports to be Submittted by the District Judges; Need and Possibility of Transfer of Judges; Recommendations to District Judges of Changes in Local Procedure to Expedite Disposition of Pending Cases and to Rid Dockets of Dead Litigation; Recommendations as to Bankruptcy Rules; Recommendations as to Equity Rules; and Amendments to Appellate Procedure.

Judicial Council: England. In the creation of judicial councils, the national government and the states that have been mentioned have followed the example of England. The judiciary act of that country makes the following provision for a body of this character:[16]

A council of the judges of the Supreme Court of which due notice shall be given to all the said judges shall assemble once at least in every year on such day or days as shall be fixed by the Lord Chancellor with the concurrence of the Lord Chief Justice for the purpose of considering the operation of this act and of any rules of court, and also the working of the several offices and the arrangements relative to the duties of the several officers of the Supreme Court and of enquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the High Court or the Court of Appeal, or in any other court from which any appeal lies to the High Court or any judge thereof or to the Court of Appeal.

(2) The said council shall report annually to a Secretary of State what amendments or alterations, if any, it would in their judgment be expedient to make in this act, or otherwise relating to the administration of justice, and what other provisions, if any, which cannot be carried into effect without the authority of Parliament it would be expedient to make for the better administration of justice.

(3) The Lord Chancellor may convene at any time an extraordinary council of the judges.

[16] Supreme Court of Judicature (Consolidation) Act, 1925. Section 210.

General Comment. It will be noted that while the federal act provides for an affirmative overhead direction and control of the judicial system through the power granted to transfer judges, the acts of the states providing for judicial councils gives to those bodies merely investigatory, reporting, and recommendatory powers. They have no authority to prescribe rules of procedure or to assign judges to particular courts or districts for the purpose of equalizing the work and enabling a court that has more than it can attend to, to clean up its docket. Though these bodies have not been given the affirmative powers that students of judicial reform believe should be conferred upon them, their creation represents a great advance. It means the definite recognition of the need for a continuing oversight of the work of the courts and of a permanent official agency which shall have the responsibility of determining by study the shortcomings in the system of judicial administration and the steps which should be taken to remove them. A strategic advantage, moreover, is secured by their creation, since it will be much easier to add to their duties and powers and convert them into bodies having real administrative authority than it would be to create wholly new institutions. These bodies may be looked upon as but a first step in the direction of making systematic provision for the general direction and control of the judicial branch from the administrative standpoint.

CHAPTER XXI

UNIFIED MUNICIPAL COURTS

For the same reason that all of the courts of a state should be knit together in a single organization, differentiation functionally and territorially taking place within that organization, so it is desirable that the judicial agencies within a particular district should be integrated, especially within metropolitan areas where the work of adjudication is heavy and varied. In this field, in marked contrast with the paucity of results in that of state unification, important action has been taken. One of the most striking developments in the American judicial system during recent years is the rise of the modern municipal court. This has been due to the recognition of a number of compelling facts: that the old justice of the peace courts, whatever may have been their services in the past, are no longer adapted to modern conditions as they exist in the large centers of population; that the need for strong, competent tribunals for the trial of petty offenses and small civil cases is as great as that for tribunals for the trial of more important issues; that the old system of distributing jurisdiction among a number of independent, uncoördinated tribunals is vicious in theory and leads to many evils in practice; and that efficiency in operation can only be secured by concentrating jurisdiction in a single tribunal. It has also come to be recognized that, in organizing such tribunals, provision should be made for vesting in the chief justice large administrative powers, and that a wide discretion should be granted to the court to determine its own organization, to distribute work among its several operating units, and to adopt such rules of procedure, which may vary according to the classes of cases to be handled, as will enable it most effectively to discharge the duties entrusted to it. The desirability of all these features is not here argued, since their advantages are elsewhere fully set forth.

It should not be understood that all of these features are present in all of the modern municipal courts. Some are admirably covered in certain courts and others in other courts. Collectively, however, they represent the movement to put into execution those modern

ideas regarding the changes that should be made in our system for the administration of justice. What has been done and the results that have followed can be seen from the following brief accounts of the more important tribunals of this character that have been created in the United States.

Municipal Court of Chicago. In any account of the movement for the establishment of unified municipal courts in the United States, primary consideration must be given to the Municipal Court of Chicago; both because the creation of that court represents the first step in this direction and because of the valuable work that has been done by it. To it belongs the credit of breaking radically with traditions, of courageously making an innovation in the system of the administration of justice in the United States, and of furnishing a demonstration of the good results of an experiment that has proven a powerful incentive to similar action in other states.

In 1904 Illinois adopted an amendment to its constitution which, among other things, provided that "the General Assembly shall have power, subject to the conditions and limitations hereinafter contained, to pass any law . . . providing a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the City of Chicago. . . . In case the General Assembly shall create municipal courts in the City of Chicago, it may abolish the offices of Justices of the Peace, police magistrates and constables in and for the territory . . . and in such case the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe."

This amendment cleared the way of constitutional obstacles to a thorough reorganization of the judicial system of Chicago. Action immediately followed. In 1905 the voters by an overwhelming majority approved an act providing for the creation of a central municipal court, and on December 1, 1906, the court was established.

The situation that existed prior to the creation of this court was described by Mr. Herbert Harley as follows:[1]

At that time the courts in operation in Chicago, which had obtained a population of about one million, eight hundred thousand

[1] A modern experiment in judicial administration: the municipal court of Chicago. Annual Address to the Louisiana State Bar Association, May 8, 1915; republished by the American Judicature Society, 1915.

people, were as follows: the Probate Court for Cook County, with one judge and three assistants; the county court with one judge, an anomalous Illinois tribunal having jurisdiction chiefly in insanity proceedings and with respect to taxation and elections; the Circuit Court, having general trial jurisdiction at law and in chancery; the Superior Court, which is a later arrival than the Circuit, but identical in all respects except that its process is on yellow paper, while that of the Circuit Court is the cold but chaste white paper of commerce; these two courts it may be said parenthetically, supply the justices of the intermediate court of appeals, to the number of twelve at the present time, and also man the Criminal Court in which all cases of the grade of felony are tried. At the time when the new court appeared on the scene there were twenty-six judges in the Circuit and Superior Courts and their calendars were so glutted that a lawyer could assure his clients, if on the defense, that nothing could happen to his detriment for about three years. This disgraceful situation would have been more poignant were it not for the pestering bites of a whole swarm of petty judicial officers, fifty-four in number, who, as justices of the peace and police magistrates, acted as an effective counter-irritant against all other shortcomings of the courts. It will suffice to leave much to the imagination on the matter of pernicious maladministration of justice by a goodly number of these justices of the peace. Those exercising criminal jurisdiction were designated by the mayor at the suggestion of aldermen. Note this vicious connection. Wherever municipal government in America has most signally failed there invariably the magistracy has been corrupted to the end of politocrats so that they may acquire power with an unthinking or dissolute electorate by controlling the gateways to punishment and to absolution. Many of the one hundred constables were common criminals. They made false returns, they extorted money, and even shot down those who resisted them. In the world's greatest melting pot where all the tongues of Christendom are spoken, the opportunity for such licensed rogues to prey upon ignorant aliens was unexcelled. Too often the magistrates conspired with the constables, for the vicious fee system with its legal and social poison was at work.

This was the condition which the new municipal court was created to remedy. Though, as will be shortly pointed out, the establishment of this court did not effect the complete unification of the judicial tribunals of the city that was desirable, it was an important step in this direction. It wiped out the multiplicity of independent justice of the peace and police magistrate courts and conferred their jurisdiction upon the new municipal court. That court was thus given jurisdiction in criminal matters over all

misdemeanor cases and power to examine and hold for trial in felony cases. In civil matters its jurisdiction extended over all contract cases, regardless of the amount involved, and, in cases of tort, it was competent to handle cases involving not to exceed $1000. Moreover, provision was made that any cause whatever might be transferred from any of the other local courts in order to secure its prompt trial.

A chief justice with a salary of $7500 was provided for; also twenty-seven associate justices, at a salary of $6000, all to be elected for terms of six years.

Second only to its provision for a single, strong court in substitution for a multitude of petty justice of the peace and police magistrate courts, the outstanding feature of this legislation was the recognition of the principle that the chief justice of a court, while being merely *primus inter pares* in respect to the exercise of the judicial function, should be the administrative head of the organization, with practically all the powers of a general manager to direct and control its operations. The act thus declared that the:

> Chief Justice, in addition to the exercise of all the other powers of a judge of said court shall have the general superintendence of the business of said court; he shall preside at all meetings of the judges, and he shall assign the associate judges to duty in the branch courts, from time to time, as he may deem necessary for the prompt disposition of the business thereof, and it shall be the duty of each associate judge to attend and serve at any branch court to which he may be so assigned. . . . The chief justice shall also superintend the preparation of the calendars of cases for trial in said court and shall make such classification and distribution of the same upon different calendars as he shall deem proper and expedient. Each associate judge shall at the commencement of each month make to the chief justice, under his formal oath, a report in writing of the duties performed by him during the preceding month, which report shall specify the number of days attendance in court of such judge during such month at the branch courts upon which he has attended, and the number of hours per day of such attendance. . . .

It is a matter of congratulation that this grant of large administrative powers to the chief justice was followed by the election as the first chief justice of a man who fully appreciated his responsibilities in this field. Harry Olson, who has been the chief justice

from the outset has proved to be one of the outstanding leaders of the country in promoting and securing efficiency in the administration of justice. To him belongs much of the credit for the phenomenal success of the Chicago court. He has conducted it with a firm hand and has shown unusual skill in putting all phases of its work upon a business basis. Though the act did not prescribe that he should make an annual report setting forth the operations of the court during the year, he immediately instituted this practice, and, later, secured an amendment to the act making this compulsory. The court handles large sums of money. He provided for the installation of a proper accounting system and a monthly audit by a firm of accountants. He perfected the system of judicial statistics, and in many other ways applied to the organization and work of the court the principle and practices which are essential features of the proper conduct of any business undertaking.

A third prominent features of the new court was that the chief justice and the associate judge sat as a council to consider all matters affecting the proper administration of justice in the court. The act thus provides that:

> It shall be the duty of the chief justice and the associate judges to meet together at least once in each month, excepting the month of August, in each year, at such hour and place as may be designated by the chief justice, for the consideration of such matters pertaining to the administration of justice in said court as may be brought before them. At such meetings they shall receive and investigate or cause to be investigated, all complaints presented to them pertaining to the said court, and to the officers thereof, and shall take such steps as they may deem necessary or proper with respect thereto, and they shall have power, and it shall be their duty to adopt or cause to be adopted all such rules and regulations for the proper administration of justice in said court as to them may seem expedient.

The act also put into effect the principle, so long advocated by those leaders of the bench and bar who have actively interested themselves in matters of judicial reform, that the rules of procedure should be formulated by the court itself instead of being determined by statute. This has permitted the court to adopt rules providing for a simple and direct procedure, to vary this procedure so as to make it conform to the needs of the several special branches

into which the court has been organized, and to modify those rules from time to time as conditions seem to justify. The chief justice sent one of his associate judges, Stephen Foster, to England to make a study of the simplified rules of the British courts, and, on the basis of the information thus obtained, formulated rules that eliminate much of the technicalities, opportunities for delay, and other defects of the procedure in the ordinary courts. Regarding these rules Mr. Harley writes:[2]

> The success of the rules of pleading lie in two things: first, the plaintiff must file, in lieu of declaration, his statement of claim, supported by an affidavit as to the amount claimed in all cases of liquidated damages; second, the defendant must file an affidavit of merits in order to obtain any standing in court. All pleadings are in simple, straight-forward language. Annually, thousands of cases are determined by the mere entering of judgment on default, because the defendant does not file an affidavit of merits. In other Illinois courts these matters would clog the calendars for months and years. In the Municipal Court they are passed upon almost automatically. This is one of the big reasons why this is the greatest commercial court in the world.

In no respect has the advantage of conferring broad, discretionary powers upon the court to determine its internal organization and procedure been more strikingly shown than in the practice that has been adopted by the court of segregating cases coming before it according to their character, and of assigning each class to a single judge, who thus becomes highly expert in the handling of such cases. To one judge, for example, were assigned all the replevin, attachment, and garnishment cases; to another, all actions for the recovery of the possession of real estate; to another, the quasi-criminal actions brought under city ordinances, and so on. This principle of specialization has been still more strikingly applied in the creation of special branches, each with its own special procedure and means of action, to handle classes of cases needing very special treatment.

The first branch of this kind to be established was created in 1911 to handle cases involving wife abandonment, illegal parentage, failure to support, and offenses against minors. This branch which is known as the "Court of Domestic Relations," though its status

[2] *Ibid.*, 13.

is but that of a branch of the Municipal Court, was the first of its kind to be established in the United States and from the start proved to be a great success. In the following year, 1912, was created the Speeder's Branch, to handle cases involving violation of the automobile traffic regulations; in 1913, the "Morals Court," to handle prostitution cases; in 1914, the "Boys' Court" for the handling of cases of juvenile delinquency; and, in 1916, the Small Claims Branch to handle, under a special procedure and without the use of a jury, claims involving not over $35, afterwards increased, first to $100, and then to $200. Finally, in 1914, the Municipal Court established as an integral part of its organization, a psychopathic laboratory for the examination of prisoners to aid in determining the nature of the sentence that should be imposed. All of these branches have proved very successful and their work has established the reputation of the court as one of the most interesting and important judicial tribunals in the United States.[3]

Notable as is this court, and great as is the improvement which its creation has effected in the administration of justice in Chicago, it by no means represents the last word in respect to the character of judicial organization that should be possessed by a great metropolitan center. Its most serious shortcoming is that it does not provide for a single court to have general charge of the administration of justice. In this direction its creation did little more than eliminate the old justice of the peace and police magistrate courts. How far Chicago still is from possessing a unified court, and some of the disadvantages resulting from such lack, can be seen from the report, made in 1917, by the Chicago Bureau of Public Efficiency on the "Unification of Local Governments in Chicago." In considering the organization of the judicial branch this report said:

> The judicial machinery of Cook County and Chicago, as it is now organized, is on the whole conspicuously inefficient and wasteful. There are five separate, independently organized courts—the Circuit, Superior, County Probate and Criminal Courts—and the Municipal Court of Chicago. (The Appellate Court of the First District, which is coterminous with Cook County is not included because it is a state court, the clerk of which is not a local official.) The jurisdiction of all these courts is concurrent in many respects

[3] For an account of the work of these branches and of the psychopathic laboratory, see chapters dealing specially with those phases of judicial administration.

and yet cases arise in which no one of them has a sufficiently complete and comprehensive jurisdiction to adjudicate upon all matters involved. There are thirty-eight judges of the Circuit and Superior Courts for the administrative control of whose work no adequate provision now exists. The present judicial organization and procedure lead to much needless annoyance, expense and delay, in the disposition of litigation.

After pointing out the duplication of organization resulting from the existence of six separate clerk's offices and an excessive number of sheriffs, bailiffs, deputies, etc., the report continues:

It must be obvious that a consolidating and reorganization of these courts and of their administrative machinery would mean not only that the services which they render to the community and to litigants would become much more satisfactory in many respects, but also that the cost of administration could be greatly reduced. . . . A very immediate saving could be effected, however, through consolidation and reorganization of the administrative machinery of the courts. One court would require but one clerk where now there are six and but one executive officer where now there are two—the sheriff and the bailiff of the Municipal Court. Thus consolidation would eliminate several elective officials who are paid unnecessarily large salaries.

The maintenance of several independent clerk's offices involves a duplication of subordinate positions, several of which could be dispensed with if there were but one principal office. The consolidation of all the present clerk's offices into a single organization should make it possible to effect a saving of not less than $100,000 a year. . . . A large number of deputy sheriffs and deputy bailiffs are now engaged in serving summons and other writs. The Sheriff's deputies and the Bailiff's deputies traverse substantially the same territory and due partly to the time consumed in travel each deputy serves an astonishingly small number of writs. The consolidation would eliminate entirely the need for two men tramping over the same district and the Bureau estimates that in that event the services of at least twenty deputy sheriffs now employed could be dispensed with. The resultant saving would be $40,000 a year. The consolidation would also make it possible to dispense with the Sheriff and with several subordinates who are a part of the overhead organization of the present offices. This would mean an additional saving of $16,000 a year.

Still further important economies could undoubtedly be effected through the consolidation of these two offices, particularly in connection with the reorganization of the force of bailiffs assigned to preserve order in the courts. With respect to the serving of sum-

monses and perhaps of some other writs, it would seem that much of the other work might be assigned to the police. If such a plan were adopted a great deal of money would be saved. The Bureau is not in a position to estimate definitely what the saving from the last two sources might amount to; probably it would total at least $100,000 a year.

Jurors are now drawn separately for each court and the number of jurors drawn and kept in waiting in order to insure the prompt and proper filling of juries is much larger than the number that would be required if there were but a single court. Since jurors kept in waiting are paid the usual per diem rate the large number required under present conditions means an expense which otherwise would be wholly unnecessary. Fifty thousand dollars a year would seem to be a conservative estimate which could be saved on jurors' fees if there were but one court instead of six courts.

This report naturally stressed the economy feature of the consolidation of courts which it recommended. Of equal, if not of greater, importance would be the general simplification of the problem of the administration of justice, the benefits that would be conferred upon litigants and the greater efficiency and dispatch in the enforcement of the criminal law. To illustrate how unsatisfactory present conditions are from this standpoint, it may be pointed out that the Municipal Court has only a part of the criminal jurisdiction—that formerly possessed by the justice of the peace courts. In all cases of felony it is limited to binding over for the grand jury. The Prosecuting Attorney has absolute power to *nolle prosse;* furthermore, he can ignore the Municipal Court by procuring indictments directly before the grand jury. In the trial of these felony cases, in the criminal court presided over by the judges of the circuit and superior courts, the archaic methods of procedure obtain, and the result is that conviction is secured in only a small fraction of the cases. Responsibility for enforcement of the criminal law is thus diffused instead of concentrated.

Another serious defect of the system is the practice of choosing judges by election, which tends to throw the court into politics and militates against securing the most desirable type of judge.

These defects in the Municipal Court and in the judicial system generally of Chicago, are fully recognized by members of the Chicago bar and others interested in judicial reform. The desirability of effecting a general consolidation of the courts of Chicago

and Cook County received a great deal of attention in the convention for revising the constitution of the state, and provision was made in the draft for a revised constitution, which was submitted to the people on December 22, 1922, for a Metropolitan Court of Chicago, in which would be merged the Municipal Court, Circuit Court, Superior Court, Probate Court, Criminal Court, County Court and City Court of Chicago Heights. Unfortunately, this was rejected by the people, and an opportunity was lost to create in the United States a great unified court for a metropolitan district. It is to be hoped that the accomplishment of this important reform is only postponed for a time.

Recorders Court of Detroit. Ranking close in interest to the Municipal Court of Chicago is the new municipal court of Detroit. This court, which is known as the "Recorders Court," began operations April, 1920, the act authorizing it being approved by popular vote. The feature of special interest of this court is that it represents the complete unification of the criminal courts of the city. According to the Journal of the American Judicature Society, this court represents the first attempt in any American city to vest in a single court jurisdiction in respect to criminal cases, whether of misdemeanor or felony grade.

By thus unifying the adjudication of criminal cases it has made it possible to adopt an efficient system of specialization in the trial of cases. "For example, one court (or rather division of the court) handles all ordinance cases; another court petty misdemeanors; a third the major misdemeanors, trials without a jury and signs complaints and warrants; a fourth conducts assignments on warrants; another arraignments on information; another condemnation cases; and the seventh conducts examinations, when demanded, in felony cases. By virtue of this distribution, each judge has a limited amount of this minor work and then devotes the balance of his time to the trial of felony cases with juries."[1]

This court, like the Chicago court, has appreciated its function as a general service for social betterment. It has created a Domestic Relations Division of the Women's Department where the effort is made to keep families together and direct action toward meeting the needs of the individual cases rather than by simply imposing

[1] *Journal of the American Judicature Society*, April, 1922.

sentences. A psychopathic clinic has been created which functions along the lines of Chicago's psychopathic laboratory.

Statistics of the operations of this court indicate that it was at the start very successful and brought about a marked diminution in crime in the city.[5] Unfortunately, it lost its creator, Judge Marsh, and, as a result of a vicious system of election, came under the control of inferior judges under whose administration the work of the court deteriorated. With a better method of selecting judges there is no reason, however, why the court should not come back and justify the principles underlying its organization.

Municipal Court of New York City. As valuable information can often be obtained from a critical study of a defective institution as from that of a superior one. If the municipal courts of Chicago, Cleveland, and Detroit point the way to the kind of system needed for the proper administration of justice in a large city, the Municipal Court of New York City offers an equally illuminating example of the manner in which this problem should not be handled and of the evils resulting therefrom.

What is known as the Municipal Court of the City of New York is in reality a collection of forty-eight municipal judges, holding court in twenty-five independent court houses, scattered throughout the five boroughs of the city. The judges are elected for ten-year terms by the electors of their respective districts and must be residents of the district for which they are elected. They exercise jurisdiction in civil matters only in cases where the amount involved does not exceed $1,000. They have no equity or criminal jurisdiction. Their status and powers are thus but those of the ordinary justice of the peace in respect to civil matters.

[5] Reports on the current work of this court are given in monthly bulletins of the Detroit Police Department. The Detroit Bureau of Governmental Research has made several studies of the work of this court the results of which are given in the following publications issued by it:

No. 63, Nov. 1, 1921. An Appraisal of the First Year's Operations of the Reorganized Recorders Court of Detroit, April 20, 1920–April 19, 1921.

No. 72, Aug. 1, 1922. An Appraisal of the Recorders Court of Detroit During Its Second Year, 1921-1922.

No. 79, Aug. 30, 1923. Crime in Detroit.

See also Report of Alan Johnston, Jr., on Consolidated Criminal Court of Detroit, Baltimore Criminal Justice Commission, 1923. Mimeographed manuscript.

The Greater New York Charter, as enacted in 1897, evidenced an appreciation on the part of its framers that a system of a large number of separate courts, each acting independently of the other, was not a satisfactory one for the great volume of petty litigation arising in a large city. It accordingly provided [6] that, after January 1, 1898, the justices of all of these courts should constitute a board of justices of the Municipal Court, which should exercise a general direction and supervision over the work of the courts.

The purpose of the legislation was to coördinate the justices into a coherent judicial unit. The duty of running the court was thereby imposed on the justices themselves. The unhampered power to administer efficiently its business was placed in their hands. The justices were to elect from their own number a president of the board and at pleasure remove him and elect a successor. The board controls the conduct of its meetings, the keeping and preservation of its records and the public inspection thereof. The board provides for the order of judicial business, the manner of its discharge and the maintenance of order in and about the courts. It establishes parts of the court and makes the yearly assignments of justices to the several parts so established, subject only to the rule of rotation. The board of justices has control over all administrative matters, through its power to adopt and amend rules declaring the hours during which the court shall be open, the duties of the staff, including clerks, deputy clerks, assistant clerks, stenographers, interpreters, attendants and employees, and the manner of keeping records and papers, the collection and disposition of money and the accounts thereof, calendar practice and the designation of a part or parts of the court where special classes of cases shall be brought on trial. The board may assign an assistant clerk temporarily to any district in any Borough in the event of an emergency requiring such action. The president of the board has power, when he deems it necessary for the prompt disposition of business, to assign temporarily a justice within the borough from which he is elected and with the consent of the justice to another borough. He is also given power to transfer cases for trial from one district to another in the same borough. However, the board retains full control over his acts and directions, by its power to vacate, amend or modify.[7]

[6] Section 1374. Only slight changes have been made in these provisions by subsequent legislation.

[7] Municipal Court Commission of the City of New York. Report and recommendations, 8-9 (1924).

This provision furnishes an interesting example of an attempt to do the right thing in the wrong way. The great mistake was made of seeking to secure a unified court through the adoption of the board principle of organization. Under any conditions a board of forty-eight members would be an unwieldy body, especially where no real primacy as regards powers is conferred upon its chairman. Under conditions prevailing in New York, where the justices are elected by the people for relatively short terms, must be residents of the district from which elected, and cannot be required to hold court outside of their boroughs without their consent, such a system is foredoomed to failure.

In point of fact, this board as a real governing authority, has scarcely functioned at all. Abuses of all kinds have developed and have gone uncorrected. No attempt has ever been made by the board to put the administrative work of the courts upon an efficient basis. Not only are the justices selected through political action, but the belief is widespread that political considerations often influence the decisions of the judges. It is hardly going too far to state that the administration of justice by these courts has become almost a public scandal. So bad did the situation become that, in August, 1923, Governor Alfred E. Smith, caused a commission to be appointed to report to him regarding the action to be taken. This commission, after a thorough investigation, made an exceedingly able report on February 25, 1924. The character of the findings may be seen from the following excerpts taken from various places in the report:

It [the court] is a loose association of forty-eight justices of the peace and their clerks and attendants. It represents an unsuccessful effort to merge forty-eight justices of the peace into a metropolitan court. The result is that it possesses the vices of both and the virtues of neither. . . . The justices have failed to exercise the powers vested in them by law. The court remains a loose association of forty-eight justices of the peace. The justices have not collected and classified the information necessary for intelligent executive control. They have not conferred upon its President Justice real executive powers. They have not exercised the power to assign justices and clerks to those districts in which there is the greatest flow of litigation. . . . The records are not kept so as to disclose the undisposed business of any court at the end of each year, still less at the end of each month. Whether the court is

progressing or going back cannot be determined because there is no way in which the condition of a court at the end of one year can be compared with its condition at the end of the previous or succeeding year. An adequate system of records and accounts, reflecting the business of the entire court, the business transacted in the different districts, and by individual judges and particularly furnishing the necessary data to deal with specific problems may be the growth of time and care. But so far as appears no attempt has heretofore been made to compile and classify the information now received in order to make it available in determining the proper distribution of justices, clerks and cases, nor has any attempt been made to secure the additional information which the most casual examination of the figures recorded would suggest. . . . No real system of accounting designed to reflect the work of the court and the justices thereof, was available and, if available, it could not have been applied to the fragmentary information disclosed by the reports. An audit of the records to check the accuracy of the reports, or to secure additional information was impossible. . . . The reason why the legislative provisions designed to facilitate the efficient administration of judicial business has resulted in no material improvement is plain. The justices are local justices elected from their districts. Most of these hold their offices by virtue of their political service and look to their local political organizations for reëlection. This viewpoint is naturally a local or district viewpoint. The constituent provisions of the court permit the continuance of this local and district spirit rather than compel coöperation. The Board of Justices will do nothing which interferes with the rights of the members of the board as district justices. The President of the board is a nonentity. The justices remain district justices preserving and maintaining their district privileges without any thought of the welfare of the court as a whole.

The close association existing between many of the justices and the clerks and the local political organizations tends to create an atmosphere of local and political favoritism. The district lines are determined by political consideration so as to distribute the justices and clerks between the two parties. Democratic justices appoint Democratic clerks and Republican justices appoint Republican clerks. . . . So perfectly are party lines followed in fixing boundaries that we might say that in some districts we have a Democratic court or a Republican court rather than a court of justice. . . . Under these conditions it is natural that there should exist some feeling that political considerations and friendship unduly affect the determination of civil cases in this court. Of the existence of this feeling, whether well founded or not, there can be no doubt. . . . The first requirement of a well conducted court

is a clerk's office where the records can be made properly and kept safely. The work of the clerk is performed, in many cases, under obviously inadequate physical conditions. The care of papers is such as to shock the manager of an ordinary business office. The system of filing is antiquated and a direct incentive to the loss and mislaying of papers. Charges of intentional loss are persistent. Inspection of the methods would disclose that this is an ever-present possibility. The helter-skelter method of doing business gives one wonder that the clerks obtain as good results as they do under most untoward conditions.

The remedy for these evils is plain—the creation of a real metropolitan court, on the model of the courts of Chicago and other cities which have established such tribunals, and the taking of the steps that will take the justices and their staffs out of politics. This is clearly recognized by the commission and urged in its report. After calling attention to the principles of organization adopted by large industrial and commercial enterprises it says:

These large industrial combinations have forced the development of a Chief Executive and a proper system of accounting. No executive of a large business can remain familiar with every detail. To give him the knowledge necessary to administer the business, the modern accountant has devised a system which places at the disposal of the Executive the information necessary to enable him to control and administer the larger unit. The same forces which have caused the creation of larger industrial units apply to judicial business. . . . The time for the creation of this larger judicial unit with a Chief Executive, an adequate accounting system, and ample facilities for doing the work has arrived. It is useless to keep adding justices and clerks as an emergency measure. No substantial progress can be made until the responsibility for administration is vested in a chief executive. He must be furnished with classified information necessary for executive action, the staff and power to carry out his directions.

As a result of the work of this commission, in which the latter had the strong support of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association, the legislature enacted a law putting most of the recommendations made into effect. The more important provisions of this act have been summarized as follows

in the report of the Special Calendar Committee, appointed by the Appellate Division of the Supreme Court, First Department:[8]

1. The appointment is authorized of a President-Justice, with extensive administrative power, to be designated by the Mayor for a term of five years, from among the elected justices.

2. Membership of the Bar for a period of ten years (instead of five) is required as a qualification for justices hereafter elected.

3. A justice is prohibited from becoming a member of any committee of any political party or from holding any office in any party organization or political party association.

4. The powers of the President-Justice are as follows:

(a) He shall exercise "general superintendence over the business of the court and shall establish and supervise the system of keeping the records of the court."

(b) He may "make and modify rules controlling calendar practices" classifying action by "character or amount."

(c) He may designate a district or districts within any borough, and establish parts within districts for the trial of special classes of cases, for the hearing of notions, and for jury trials.

(d) He may transfer (with certain exceptions in cases having a local aspect) cases from one district to another in the same borough.

(e) He may assign a justice to hold court in any district and in any part in any district, in the borough from which the justice was elected or appointed, subject (except in certain specified cases) to the condition that no justice shall sit in any district for two consecutive months, "or in any district for more than the minimum number of months under a system of complete rotation by the justices within the same borough;" and in case of necessity, he may temporarily assign a justice to sit in another borough.

(f) He may designate a central court house in any borough for the trial of jury cases and have power to transfer to such court house actions and summary proceedings in which a jury trial shall have been demanded by either party and to assign sufficient justices and clerks for the transaction of the judicial business thereof.

5. The President-Justice is required to render a written annual report to the mayor and to the Appellate Division of the First and Second Departments within sixty days after the expiration of the calendar year. The report, among other things, shall include "a statement of the number of days each justice sat and the total number of cases, including inquests, tried by him."

[8] Second Report, June 1, 1928.

6. A justice may complain of the President-Justice to the Appellate Division of the Department in which his district is located and a hearing may be had upon such complaint.

7. The fees, when a jury trial is demanded, are increased to $6.00 in the case of a jury of six and $12.00 in the case of a jury of twelve, this amount to be paid at the time of the demand.

It will be noted that these provisions are exceedingly conservative. They have to do almost wholly with the purely administrative features of the court. There is no consideration of the jurisdiction or procedure of the court except in its business aspects. No attention, furthermore, is given to the far greater problem of a unification of this court with the other courts of the city with a view to the establishment of a single unified court. The improvement of the present municipal court as an institution would thus be but one step toward solving the problem of the judicial administration of justice generally in New York City.

Proposed Municipal Criminal Court, Baltimore. Conditions in respect to the administration of criminal justice in Baltimore, Maryland, were so unsatisfactory that there was organized in 1923 a body, known as the Baltimore Criminal Justice Commission for the purpose of their improvement. One of the first conclusions arrived at by this body was that no worth-while improvement in the prosecution of crime could be accomplished until the whole archaic system of police courts had been abolished, and a consolidated criminal court set up in its place. Entering upon its work, the commission found that the work of trying criminal cases in Baltimore was performed by nine separate tribunals—eight police courts, one in each of the eight police districts, and one criminal court. The character of these police courts and the manner in which they performed their duties is shown by the following extracts from the annual report of the commission for 1923.[9]

The appointment of Police Justices, with occasional exceptions, are based upon political expediency and are made at the behest of political leaders rather than because of fitness for these important posts is too well known to require comment.

[9] The same information with additional data is given in a special report published by the commission. Report on police courts of Baltimore, prepared by the Baltimore Criminal Justice Commission, 1923. Mimeographed manuscript.

Of the ten now serving but three are lawyers, while the previous experience of the others in no way qualified them for the work.

Those of them who are lawyers employ their spare time in the practice of their profession. The temptation is ever present to accept employment as counsel from men accused in their courts, or the courts of the other justices and some have been known to yield to such temptation.

That the Police Justices are approached by politicians on cases pending in their several courts is frankly admitted.

The present police courts of Baltimore are the happy hunting grounds of the petty fogging political lawyers.

The law prescribes that each justice shall sit four hours on week days and two hours on Sundays and holidays. Actually the average time consumed each day in the trial of the above-mentioned cases by the eight courts was two hours per court, or sixteen hours for all of them. For this service the State pays a salary bill of $25,000.00 per annum. Two capable, full-time judges working eight hours a day or three such judges working less than six hours a day could have disposed of these cases.

Only two of the court rooms are in any respect suitable.

The commission declared the remedy to lie in the amendment of the state constitution so as to provide for, or to permit, the creation of a single criminal court to take over the work of the nine tribunals that have been mentioned. It accordingly drafted such an amendment and submitted it to the legislature. The bill providing for this amendment passed the lower house but failed of enactment due to the fact that the original bill was "lost" and the substituted certified copy mysteriously disappeared between the desk of the chairman of the City Senate and that of the President of the Senate. Regarding this incident the Quarterly Bulletin of the commission for March 31, 1924, said:

The experience of this bill serves to establish the fact if further proof be necessary that the police courts of Baltimore City as presently constituted and operated are not courts of justice; but that they are courts ordered and controlled for political reasons by politicians who stand solidly against any attempt to examine their work and operations by the people of this city; if that examination even appears to menace their existence.

It is hardly necessary to say that the commission will continue its efforts to secure adoption of this measure.

Municipal Court of Cleveland. The Municipal Court of Cleveland, which began operations on January 1, 1912, was created

avowedly in imitation of the Chicago Court. Its criminal jurisdiction, like that of the Chicago court, is limited to misdemeanors and violations of city ordinances and to acting as an examining magistrate in respect to felonies. On the civil side, it has jurisdiction over all actions for the recovery of money or personal property where the amount claimed does not exceed $1000, and all other actions on contract where the amount involved does not exceed $2500. The most important features in respect to which it follows the Chicago court are: in conferring large administrative powers upon the chief justice, and in making provision for a council of judges, presided over by the chief justice, to which is entrusted broad powers to adopt and modify the rules of procedure. Reports are required from the individual judges, and the chief justice himself submits an annual report. A statistician is employed, and care is taken to develop judicial statistics in a proper manner.

As regards procedure, all cases are tried by a judge alone, unless a jury trial is demanded, and in this case use is made of a jury of six, unless the full panel of twelve is demanded. In civil cases a verdict is rendered upon the concurrence of three-fourths of the jury. Another innovation is the serving of writs by mail.

A notable feature of this court is its conciliations branch. As a part of this system the clerk's office maintains a department for giving free legal advice and assistance to litigants in preparing and filing their cases.

Other Municipal Courts. By act of the Ohio legislature, May 2, 1913, provision was made for the establishment of a municipal court in Cincinnati to take over the jurisdiction formerly exercised by the justices of the peace courts and the old police court. Municipal courts have likewise been created in Kansas City (Mo.), Milwaukee, Buffalo, Pittsburgh, Philadelphia and Atlanta.

General Summary. In the foregoing pages has been given a fairly comprehensive account of the leading examples of municipal courts in this country. This account is, it is believed, not only of interest in itself, but as serving to show in a concrete way the problem that is presented and the means that are open for meeting it. The Chicago court in particular has served as a model that has

been copied to a greater or less extent in other cities. In this account the attempt has been made to set forth the problem of the administration of justice in a large city, partly by a general consideration of the problem and partly by a description of the more notable efforts that have been made in recent years to solve this problem. It is difficult to draw too dark a picture regarding conditions as they exist in many of our large cities. How bad these conditions are, may be seen from the description that has been given of the situation in Baltimore. It is also difficult to overemphasize the need for a proper system, both from the standpoint of doing justice and of giving to the people political institutions that will secure their respect. All must concur in the following statement of the problem by the Baltimore Criminal Justice Commission in its annual report for 1925:

> The police courts of Baltimore as of all other cities continue in the opinion of the Commission to be in many respects the most important courts of all courts. They are closer to the ordinary citizen. Where one person comes in contact with other courts of justice ten are familiar with the police courts. Indeed the only conception of the state or the government on the part of many people is gained by an experience with these courts. . . . These courts of all courts should present to the humble, the ignorant, the first offender and the foreign born the maximum of dignity, of consideration for the rights of the accused, of solicitude for the fair, human, intelligent administration of law. . . . The Commission is of the definite opinion that the judge who sits in minor criminal cases should be of equal standing, learning, training, and ability as the judge of the highest court of the state.

In comparatively few instances are these requirements now met by American cities. Except where strong municipal courts have been established, the trial of petty cases, civil and criminal, is had by magistrates of low standing, justices of the peace, and police judges, in quarters that are inadequate, unsanitary, and illy ventilated, and under a procedure that lacks dignity and decorum. If action is not of a hit or miss order, it conveys the impression that it has this character.

The nature of the action that should be taken to correct this condition of affairs has been indicated. Most desirable is probably the creation of a single, metropolitan court, in which will

be vested full jurisdiction, original and appellate, to hear and determine all causes, civil and criminal, arising in the city, to be presided over by a chief justice having full powers to control the internal organization of this court, to set up the divisions to be presided over by the associate justices for the handling of the special classes of cases coming before the court for adjudication, and to determine, subject to general provisions of law, the procedure to be followed in the several divisions.

It is probable, however, that no state legislature is prepared at this time to take so advanced a step; at least, no state has thus far shown its willingness to do so. The nearest approach to the establishment of such a unified court is the Recorders Court of Detroit, and that represents a unification only in respect to criminal actions. Failing this, action should take the form of the creation of a unified court for the handling of smaller cases. This is the line along which action has thus far proceeded. Here the question is presented as to whether there should be two unified courts, one for civil and one for criminal cases, or a single court to handle both classes of cases. As a matter of tactics the former action may be more easily secured. The Chicago court, however, seems to demonstrate that it is quite feasible for a single court to handle with efficiency both civil and criminal cases.[10]

[10] For a consideration in detail of the provision that should be made for the establishment of a unified municipal court, see Bulletin IV B (Bulletin IV Revised) of the American Judicature Society, "Second draft of a model act to establish a court for a metropolitan district," January, 1916.

CHAPTER XXII

ABOLITION OF JUSTICE OF THE PEACE COURTS

In the chapters immediately preceding consideration has been given to the problem of devising a proper system of courts, first for the state as a whole and second, for metropolitan areas. There remains for consideration the problem of the organization of a court system for the smaller towns and rural areas. It has been pointed out that the most essential step required in perfecting a court system for metropolitan areas is the abolition of justice of the peace courts and the vesting of their functions in a single unitary court. The same action should be taken in the small towns and counties.

Justice of the peace courts represent the extreme in decentralization in the administration of the law and the application of the principle that special abilities are not required for the adjudication of small cases. In many localities, where the population is large, there are a number of such courts with concurrent jurisdiction, among which suitors can make a choice in bringing their actions. The justices presiding over them need not be learned in the law. Some may be lawyers, though none need be and comparatively few are. Often they are illiterate, ignorant, and moved in the performance of their duties by political and other improper considerations. Inasmuch as they receive their compensation in the form of fees and, as stated, a suitor can select the justice before whom he will bring his case, they tend to favor those attorneys who bring patronage to them. Such lawyers, in many jurisdictions, have their favorite justice and rarely fail of success. The action of these courts does not even have the merit of being final. In many cases an appeal lies to the county court or other court of general trial jurisdiction, where the whole case is again tried as if there was no previous action. The following account of the character of these courts in one of our large cities may present an unusually bad picture, but it illustrates what can take place

under the system, and what, to a greater or less extent, does occur in many places:

In 1905 the Legal Aid Society of Cleveland, acting through a committee of attorneys, made a careful investigation of existing evils arising out of the Justice court system. A casual and cursory examination of that report will convince the reader that most of the officials of that court, including the Justices of the Peace themselves, were unscrupulous and dishonest. It is unnecessary to dwell at any length in enumerating the many evils that exist and have existed in our Justices courts. So much has been said and written concerning it that not even the selfish defenders of the system dare deny the systematic plunder practiced by official vultures under the guise of law. So far as Cleveland and other large cities are concerned, we have come to regard the county Justice of the Peace and his fellow workers as nothing less than a public menace which had to be resisted with grim determination.[1]

Regarding this system of having petty cases handled by justice of the peace courts Judge Simeon E. Baldwin has written:[2]

The weakest point in this system of judicial organization is the vesting of jurisdiction of small civil cases in Justices of the Peace. Of these there are generally several in each town having jurisdiction over the whole county. Some may be lawyers. None need be and few are. Any one of these can try cases. Which of them can try particular cases is left to be determined by the lawyer who brings it.

After pointing out that these magistrates can be better trusted in respect to such matters as the trial of petty criminal cases, conducting preliminary hearings, etc., he says:

Even here mischief often results from their ignorance of law and the sufferers have little means of redress. Such prosecutions are brought by a public officer who will not be apt to select an incompetent magistrate and has no strong motive for choosing one especially likely to give judgment against the defendant. But in civil cases for the lawyer who initiates them to pick out his judge at will from a number who are equally competent to assume jurisdiction and at the same time (as is generally the law) are left wholly without salaries, receiving nothing except fees for cases actually brought before them, is to place the defendant in a much less favorable position than the plaintiff. If the justice decides in favor of the latter he is obviously more likely to get the subsequent patronage

[1] Judge Manuel Levine, The Conciliation Court of Cleveland, *American Political Science Review*, December, 1914; reproduced in Bulletin VIII, American Judicature Society.

[2] Baldwin, The American judiciary, 129-30.

of his lawyer. In most justice's suits judgment does go for the plaintiff and not infrequently it is to be feared that he gets it from that consideration. Some justices rarely give any other judgment. Many lawyers bring all their cases before one justice and seldom fail of success. . . . A system in which such things are possible is inherently vicious and only endurable because the defeated party can always appeal and have a new trial before a higher court. That relief, however, is expensive. Judgments ought to be just in the first instance and it is the business of governments to ensure this so far as they reasonably can.

The Governor's Committee on Consolidation and Simplification of Virginia, in its exceedingly able report on county government in the state, says of this institution:[3]

No subject concerned with the administration of rural justice in Virginia elicited such uniformly unfavorable comment from county officials as that of the justices of the peace. If the system, as now operated, has any supporters the survey failed to discover them.

The only thing that can be said in favor of this system is that it is one which may have met the needs of the situation as they existed in England when the system took its rise, and the primitive conditions that prevailed in the United States when it was transplanted to our shores. At that time conditions were comparatively simple; the people of a district were personally acquainted with their neighbors, and the difficulties of communication were such that if justice was to be done in small cases it had to be brought to the doors of the parties. At the present time the people live to a considerable extent in urban centers and, when residing in rural districts, access to population centers is comparatively easy as the result of improved roads and the widespread use of the automobile. In fact, the justice of the peace court, whatever may have been its merits in the past, is now an archaic survival wholly unadapted to present conditions. Its continuance means that the same grade of administration of justice is not given to the poor that is open to those better provided with the goods of this world.

The remedy for this condition of affairs is the abolition of justice of the peace courts and the conferring of their business upon the county courts in the rural districts and upon unified

[3] County government in Virginia, 49.

municipal courts in the cities. This is the action strongly recommended by the Committee to Suggest Remedies and to Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation of the American Bar Association in its valuable report submitted in 1909. In that report, it said:

The system of committing petty causes to justices of the peace subject to appeal to some superior court and review of its judgment by a court of appellate jurisdiction is too often a denial of justice to the weaker litigant. It compels men to forego just claims against those who can afford to litigate to the end because of the delay and expense involved in asserting them. Petty cases demand good judges no less than cases involving larger sums. The judges to whom such causes are committed ought to be of such caliber that but one review should be necessary and that confined to questions of law. The original reason for our present system was the desire to bring justice to everyone's back door in his own locality at a time when communication was slow and difficult. Under present conditions of travel the result may be reached in another way. A county judge, or a number of county judges, may go to any part of a county to try causes and dispatch business, and there may be as many local offices for filing papers and beginning causes as business may require. Nor will such plan involve undue expense through requiring additional judges. Our present system involves waste of judicial powers to such an extent that more judges are now employed in many jurisdictions than a unified and thoroughly organized system with a simplified practice would demand. The county judges would be eligible to serve in any branch or division where their service for the time being might be demanded, and, on the other hand, judges assigned to other work might be used, whenever necessary, to assist in disposing of petty litigation.

It may be objected also that the scheme proposed is at variance with our ideals of home rule and local independence. But a loose judicial organization is not necessary to home rule and local administration of justice. Organization of the courts and above all organization of the business of the courts with a view of making the most of the judicial machinery will permit judges to go to each locality where business awaits them, dispatch it, and be sent somewhere else in accordance with an intelligent plan and under the direction of someone whose duty it is to see that the work of the court is provided for and disposed of.

It will be noted that this recommendation contemplates not merely the abolition of the justice of the peace courts and the development in each county of a strong county court to try the cases formerly falling within the jurisdiction of the justice of the peace courts,

but also the making of these county courts integral branches or divisions of a single unified court for the whole state. This feature of the committee's proposal, which represents a step that it is of the highest importance should be taken, is one that has already received attention.[4]

The Crime Commission of the State of New York is equally emphatic in holding that the time has come for the abolition of these courts, at least as tribunals for the administration of the criminal law. In its report for 1927, it says:[5]

Probably the most unsatisfactory feature of the administration of the criminal law remaining in this state today is the obsolete and antiquated institution known as the Justice of the Peace. Thoughtful students of the subject have for some years past realized fully that this was an unsatisfactory form of organization and nothing but the expense of providing adequate trained lawyers to man these minor courts have prevented remedying the situation.

We believe that the time has come when this subject should be resolutely dealt with and we recommend that hereafter the work of the Justices of Peace shall be limited to civil and administrative matters and submit an appropriate constitutional amendment to that end. To do satisfactorily the criminal work which now rests upon their shoulders, we recommend that there be created district judges on salary in each county who shall possess the same criminal jurisdiction which Justices of the Peace now have, these judges to be lawyers and to be appointed by the local boards of supervisors for a term of not less than five years.

[4] Mr. Herbert Harley, Secretary of the American Judicature Society, suggests that it may be desirable to retain the Justice of the Peace as a sort of assistant to the Judge of the County Court. He thus says (Journal of the American Judicature Society, June, 1919): "This simple and flexible system (of county courts) will provide for nearly all of the civil causes. But it will be found desirable to have branches of the County Court or deputies of the County Court Judge at convenient points in the rural districts for speedy action when criminal process is applied for. The Justice of the Peace, properly adapted to his function, may well serve as deputy judge. The fact that he is a layman will be no objection because he will be guided by his responsible superior. An authorized stipend should take the place of random fees. To avoid confusion let us call this reformed justice a district magistrate . . . . As to issuing warrants it is presumed that they will act under instructions of the County Judge whenever his counsel is available and according to rules laid down by him at other times. They might have power to try in cases of misdemeanors with the consent of the accused and of the County Judge."

If proper provision is made for a sheriff and deputies or a state or rural constabulary this probably would not be necessary.

[5] P. 44.

CHAPTER XXIII

SMALL CLAIMS COURTS

Need for Special Provision for Handling Small Claims. At best it is a hardship for a person whose rights have been violated to be forced to undergo the expense and trouble of a trial in order to secure redress. Where there is a *bona fide* difference of opinion between the parties regarding the facts or the law bearing upon the facts, resort to some adjudicatory process or formal trial in court is necessary. There are many cases, however, where the facts are clear and can readily be established and no real issue of law can be raised. Such, for example, are cases involving payment for goods or services received, proceedings to enforce payment of a note, and the like. In many of these cases where no defense at law or on the facts can be made, the defendants, nevertheless, contest the claim purely for purposes of delay or to gratify a spite. In such cases it is an undue hardship to compel the complainant to submit to the delay and incur the expense and trouble involved in a formal trial that proceeds through all of its stages, with a possible prolongation of the proceeding through an appeal to a superior court. Especially are these evils felt to be grievious in the cases of petty disputes where the issues or amounts involved are small. They are, in fact, so onerous as to involve a practical denial of justice. Any system of judicial procedure is defective that does not take into account such cases and provide in some way for prompt action upon them. To quote from the thorough study by Mr. Reginald Heber Smith of the problem of adapting judicial administration to the needs of the poor.[1]

The inability to provide justice in small cases has always been one of the weakest points in our system of administering justice. From the days of ordeal by battle, the method provided by the common law for proving and reducing to judgment any type of small claims has been cumbersome, slow and expensive out of all proportion to the matter involved. Our legal system has taken too

[1] *Justice and the poor,* Reginald Heber Smith, Carnegie Foundation for the Advancement of Teaching, Bulletin 13 (1919), p. 41.

literally the ancient maxim "*de minimis non curat lex.*" A complicated procedure requires the attorney, but the expense for his services is more than the traffic can bear. It was once asked at a meeting of the American Bar Association whether a lawyer, in suing for seven dollars wages due his client, a blacksmith, was justified in charging a fee of half that amount. The question reveals the common dilemma—the services were worth the amount charged and yet, to the blacksmith, it would hardly be satisfactory to collect seven dollars at a cost of three dollars and a half. As Dean Pound puts it: "For ordinary causes our contentious system has great merit as a means of getting the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers and it is a shame to drive them to legal aid societies to get as charity what the state should give as a right."

Similarly, court costs constitute an expense prohibitory to small litigation. The man hired at fifteen dollars a week who is put off the first week and not paid the second has a valid claim for thirty dollars but often not a dollar in his pocket. In addition to an attorney's fee, he cannot pay court costs because he has not been paid, and yet because he has not been paid court action is imperative. It is indeed a vicious circle, but within that circle thousands of unpaid wage earners have been caught.

Delay plays its part by permitting a debtor who has no real defense, to file an appearance and answer and interlocutory motions, to have the case continued once or twice, and then, when it is finally called for trial to default. This serves to hold the plaintiff off for months, to cause him loss of time in court attendance, and to rob the ultimate judgment of much of its worth.

Small tradespeople today are forced to the practice either of wiping all small claims off their books or of selling them at a ridiculous discount to professional collection agencies. They have the possible relief of increasing the price of necessities they sell, thereby adding the waste of the judicial system to the cost of living. The wage-earner and the small lodging-house keeper, under conditions of modern competition, have not even that relief; they have been obliged to stand their losses.

Claims of this sort are often contemptiously spoken of as "petty litigation." But it is in this very field that the courts have their greatest political effect. In every urban community these are the cases of the large majority of citizens. As they are treated well or ill, so they form their opinion of American judicial institutions.

This condition is fully supported by the findings of the Massachusetts Judicature Commission, which in 1920 made an exceptionally able study of the judicial system of that state. In its report it said:[2]

[2] P. 10.

The substantial point which the commission believes to be established by all this testimony is that, as a practical matter in many cases involving small amounts, the delay incident to formal court procedure, the expense involved in the service of process and in the present entry fee, and the expense of an attorney, result in a failure of justice simply because the parties have not the money to pay what is required in the litigation of these matters.

There is another phase to the matter. Even were the disadvantages that have been enumerated not present, it would still be uneconomic and illogical to use a procedure devised for the handling of matters of great importance for the adjustment of small issues. As Mr. Harley has put it in one of his papers, it is like putting into motion a thousand-barrel mill for the grinding of a bushel of corn.

The solution of this problem lies in the creation by the courts of separate divisions, or branches, to handle these cases in such a way that the evils that have been enumerated—expense, delay, need for the services of attorneys, etc.—will be obviated. Fortunately, the need for such action has been appreciated, and there has arisen in this country a movement for the establishment of what are known as "small claim courts," which it is to be hoped will receive a rapid development.

Before entering upon an account of this movement it would be well, however, to indicate more precisely the more important requirements of such a system if it is to be successful. These are: the organization of these tribunals as branches of existing courts instead of the creation of new independent courts; the elimination of the jury; the definite determination of the controversy through the denial or rigid restriction of the right of appeal; the reduction of expense to a minimum; the discouragement of the participation of lawyers; the use of an informal procedure in which little or no regard will be had to the technicalities pertaining to the offering of evidence; and the assumption by the judge of direct, affirmative authority to control the hearing in all its aspects. How all of these requirements can best be met, will be seen in the account of the organization of tribunals of this character to which we now pass.

Small Claims Procedure: England. Special provision for the handling of small claims has long existed in England, where use is made of the masters who handle cases of this character in a

summary way, with the result that few of them go before the court and the issues are expeditiously and economically adjudicated. This system, as described by Professor Edwin R. Sunderland, in his study of judicial procedure in England, is as follows:[3]

Summary judgment procedure, in essence, is nothing but a process for the prompt collection of debts. It was never employed by the common law courts, because they developed all their rules of procedure as mere by-products of controversial litigation, and such litigation is not adapted for collecting debts. Machinery for that purpose must provide a test to determine that the plaintiff has a debt and not a controverted claim, and a means for getting an immediate judgment without the expense and delay of a trial. The English practice does both of these things with neatness and dispatch.

The creditor issues a summons with a description of the debt indorsed upon it, files an affidavit of the truth of his claim and of his belief that there is no defense, and upon that showing, without pleadings and without the aid of counsel, he may bring the debtor before a High Court master on four days' notice to show cause why a summary judgment should not be forthwith rendered against him. The burden is thus placed upon the debtor to satisfy the master, by convincing proofs, that he ought to be given the right to litigate the claim. No formal gesture, such as the affidavit of merits so often provided for in our summary judgment acts, will suffice. The masters want solid assurances, and sham defenses are ruthlessly rejected. Under the skillful hands of the masters these cases are disposed of very rapidly, five or ten minutes being usually enough. Very large judgments, running into thousands or even millions of dollars, are constantly being rendered in this summary way.

The immense value of the practice is indicated by its wide use. In the year 1923, for example, there were 6773 summary judgments rendered by the masters of the King's Bench Division, as compared with 1546 judgments entered by the judges after trial of issues. That means that by this device the trial dockets were relieved of 80 per cent of the cases which would otherwise have come before the courts for formal trial, and that claimants in all those cases got their judgments in as many days as it would have required months through ordinary litigation in the courts.

Movement for Establishment of Small Claims Courts in the United States. In the United States, conditions in the past have

[3] Edwin R. Sunderland, An appraisal of English procedure, Report, American Bar Association, 1925.

been so unsatisfactory that it is hardly an extreme statement to say that there was largely a denial of justice in so far as the collection of small claims has been concerned, due to the fact that the cost and trouble involved in enforcing such claims exceeded the results to be obtained even when successful prosecution was had. In recent years effort has been made to correct this condition of affairs. These efforts have been made, chiefly in connection with the establishment of improved municipal courts and through the passage of state-wide acts authorizing trial courts to put into effect special procedure for the handling of this class of cases.

Small Debtors' Courts: Kansas. The first step for the creation of special courts in the United States to handle small cases seems to have been taken in Kansas. By an act passed March 15, 1913,[4] provision was made for what were termed "small debtors' courts" in Topeka, Leavenworth, and Kansas City. These courts are by no means fully satisfactory. Their jurisdiction is very limited, extending only to small debts and claims to the value of not exceeding twenty dollars, thereby excluding all actions in tort; they are independent tribunals instead of being branches of existing courts; and the judge need not be a lawyer, or even one skilled in the law, the act simply providing that he shall be "some reputable resident citizen of approved integrity who is sympathetically inclined to consider the situation of the poor, friendless and misfortunate." Though these courts seem to have accomplished good, they far from represent a satisfactory solution of the problem.

Conciliation Branch: Cleveland Municipal Court. As set forth in the chapter on Conciliation, the Municipal Court of Cleveland, on March 15, 1913, created a Conciliation Branch for the handling of practically all classes of small cases. Though the judge presiding over the Conciliation Branch seeks first to reach an adjustment of the disputes coming before him through the use of conciliation methods, failing this, he can render a judgment that will be final as to the facts, appeals on matters of law going directly to the court of appeals. This tribunal is thus of a mixed character. Question might be raised as to whether this is advisable. That it works in practice, there can be no doubt. Mr. Reginald Heber Smith says of it:[5]

[4] Kansas Session Laws of 1913, ch. 170, p. 291; General Statutes of Kansas (1915), ch. 27, Art. 19, Secs. 3316-27.

The Cleveland small claims court is unquestionably a remarkable institution. Like the Portland court, it is a branch or session of the regular municipal court, so that no difficulties of jurisdiction are created. It exists, not under statutory regulation, but under rules of the municipal courts, which is a preferable plan because changes can be more readily made as needs arise or as experience may dictate; thus its limit of $35 may at any time be raised. It is a court of election not compulsion. The original rule requiring all cases involving amounts under $35 to be entered on the small claims docket was given up in favor of a rule requiring the clerk to place cases on the docket only when so requested by the plaintiff. . . . Speed is secured, most cases being heard and determined within a week after their filing; and the cost is extremely low, the total fees and costs amounting only to fifty-seven cents. The procedure is so simple that no pleadings at all are required.

Describing more particularly the manner in which this court acts, Mr. Smith says:

A person goes to the clerk of the Conciliation Branch, who has a separate office, exactly like a legal aid society, where the person may feel at home and at liberty to talk the difficulty over with the clerk. If the dispute seems one that offers fair hope of immediate adjustment, the clerk, like a legal aid society attorney, telephones or writes the defendant and endeavors to secure an amicable settlement. If that fails, or if the case at once appears likely to demand judicial consideration, the clerk fills out in the court docket a very brief statement of claims, which the plaintiff signs. A date for the hearing—the defendant being entitled to three days notice—is at once assigned, the plaintiff being given a little card, bearing the date, the time, the court room and the court address and telephone number. A summons is made out and delivered to the bailiff, who deposits a copy in the mail box and certifies to that effect on the original summons. At first registered mail was used, but today ordinary mail is employed, because in the event of a defective address it is returned more promptly. If the summons cannot be delivered, it is returned at once to the court and the bailiff amends his return of service. The summons states the precise time and the exact room for the hearing and the case is tried at that time and place. The small claims court room is like any other court except that attorneys are noticeably absent. They are not excluded by law, but the attitude of the court and the opinion of the bar is to discourage their attendance. Omitting the conciliation feature for the moment, the court tries the case by letting the parties tell their stories and by questioning them and permitting them to question each other. The court is as dignified, its proceedings are as orderly, it commands as much respect as a supreme court. The

judgment rendered by the court is final as to the facts and an appeal on law goes direct to the Court of Appeals.

If parties appear with counsel, or with a large number of witnesses, or if the issues involve extended accounts or any problem not adapted to informal treatment, the case is transferred from the small claims court to the regular trial court which is accomplished merely by the judge's direction to that effect, inasmucn as both courts are simply departments of the one municipal court.

One has but to read this description of procedure to appreciate the advantages that this court has over the justice of the peace court and over the regular trial courts, and the advantages resulting from the court being but a division of a unified municipal court instead of an independent tribunal.

Small Claims Department, District Court for Multnomah County: Oregon. In 1915 the legislature of Oregon created a special department in the district court for Multnomah County for the adjudication of small claims.[6] This court is in effect the municipal court for Portland. The act follows in some respects the Kansas statute, but avoids some of the features of that act which we have pointed out as being undesirable. Regarding this tribunal Mr. Reginald Heber Smith, writes:[7]

This court is a great improvement over its Kansas model in that it secures the advantage of simplicity, cheapness and speed, without sacrificing any fundamentals. It is justice by trained judges, who, although given wide discretion by the statute, in fact decide cases according to substantive law and not their own arbitrary opinion of right and wrong. It is an entire breaking away from our traditional justice conducted according to procedural and evidential law, but its justice is nevertheless ascertained and administered according to substantive law. It thus reëmphasizes the lesson afforded by the Kansas courts, that justice in small causes can be secured without reliance on technical procedure and without the assistance of counsel. Further the court has the advantage of not being a separate court but a department of the District Court (which corresponds to a municipal court). There is a curious and wholly unnecessary taking over of the Kansas idea of a district court in the provision that a judgment of a judge sitting in the small claims department is not automatically given full legal effect, but must first be certified to the clerk who enters it in the District Court docket, whereupon it acquires validity and execution may issue.

[6] Oregon General Laws of 1915, c. 327.

[7] *Op. cit.*, 47.

From the outset the court has been a success and many thousands of cases are handled by it yearly. In 1917 the provisions of the act were extended to all the counties of the state.

Court of Small Claims: Chicago Municipal Court. On February 26, 1916, the Municipal Court of Chicago followed the example of the Cleveland Municipal Court by making provision for a special branch to which it gave the name of "Court of Small Claims." A significant feature of this court is that it was established by the Municipal Court acting under its broad powers to determine for itself the organization and procedure to be followed in handling its business. At the outset the jurisdiction of this new branch was fixed at claims amounting to not over $35.00. The success of the court led to broadening of its jurisdiction, first to claims amounting to $100, and later $200. It will be remarked that the trial of cases falling within the jurisdiction of this court is not optional with the parties. All such cases are entered upon the docket of this branch and are tried there, unless a jury trial is demanded. When such demand is made, trial before a jury is immediately had, as special provision is made for juries to handle this class of cases. In point of fact, a demand for a trial by jury is rarely made.

The procedure is marked by a simplicity and dispatch. The judge is in charge and pays little regard to technicalities. There is no need for the presence of attorneys and their participation is discouraged. On an average, cases are dispatched in fifteen minutes.

Conciliation, Small Claims, and Legal Aid Division: Philadelphia Municipal Court. In 1920 the Municipal Court of Philadelphia created a special branch known as the "Conciliation Small Claims and Legal Aid Division." This division seeks to act as the friend of small litigants; first by seeking, through the use of conciliation, to bring the parties to an agreement and, failing this, to decide the case after a hearing in which every effort is made to employ a summary and non-technical procedure. Incidentally, the division gives advice to poor litigants who are unable to employ counsel. The annual report of the court for 1922 states that in the twenty-seven and a half months that the division had been in existence it had handled 8477 cases. The jurisdiction of the court extends to claims amounting to not over $1500.

Small Claims Court: Spokane. In the same year, 1920, a small claims court was created in Spokane, Washington.

Small Claims Courts: Massachusetts. The creation by municipal courts of branches to handle small claims by a special procedure, important though it is, represents, after all, but an attempt to meet the problem of the adjudication of such cases in particular localities where, due to existing tribunals of broad powers, the conditions for action are favorable. What the situation calls for is the definite incorporation in the judicial systems of the states of provisions for the creation and functioning of tribunals of this character.

The first state to take action in this way was Massachusetts. In 1919 Massachusetts created a Judicature Commission, to which it assigned the task of making a thorough investigation of its system of judicial administration. One of the most important findings of this commission, which reported in 1920, was as to the failure of the existing system to provide the means by which justice might be done to small claimants. On the basis of this report, the legislature, in 1920, passed an act[8] providing for a state-wide system of small claims courts. The importance of this act can hardly be overestimated in that it makes the small claims court an integral part of the judicial system.

The outstanding features of this act are: that it is state-wide in its application, applying to every lower court throughout the state; that it does not provide for new courts, but merely the adoption by existing courts of a special summary procedure for the hearing of small claims; that this procedure can be employed in the case of all small claims to the amount of $35.00, including those arising out of tort (with the exception of slander and libel) as well as contracts; and that it prescribes only in general terms the procedure to be followed by the courts in handling these cases, thus leaving to the courts a wide discretion to adopt rules and to modify them as experience may dictate.

As has been pointed out, one of the chief obstacles to be overcome in providing for a summary and inexpensive method of adjudicating small claims, is the constitutional right that the parties have in most of the states to demand a trial by jury. This matter is handled by the Massachusetts act in this way. The plaintiff in a small claims case may sue in the regular way, but if he elects to have his claim adjudicated in the small claims branch, he is deemed

[8] Massachusetts Acts of 1920, ch. 553. For a copy of this act and the rules adopted for putting the act into effect, see *Journal of the American Judicature Society*, April, 1921.

to have waived his right to a trial by jury. The defendant may also demand a trial by jury, but this demand must be made at once and not after the decision, otherwise he, too, is deemed to have waived his right. In point of fact, the plaintiffs almost universally elect to have their cases tried in the small claims branch; and only rarely, do the defendants ask for a jury trial. Thus, of the 2041 cases entered in the small claims branch of the Boston Municipal Court in 1921, but six defendants exercised their right to have the cases transferred to the regular branch for trial by jury. The decision of the small claims branch is final.

Small Claims Acts: California, South Dakota, Nevada, Idaho, and Iowa. The importance of the Masachusetts act lies, not merely in the excellent system that it has provided for the handling of small claims in the state, but also in the fact that it offers an encouragement to other states to take action in the same way and provides them with a model for their guidance. The influence of this act became almost immediately apparent. In the following year, 1921, California and South Dakota enacted statutes providing for a statewide system of small-claims procedure;[9] and in 1923 Nevada and Idaho followed suit. The Iowa conciliation act of the same year also provided that judges adopting its provisions shall also "adopt rules for the speedy determination of causes involving comparatively small amounts as stated in such rules and the clerk shall enter such causes upon a separate short cause calendar."

General Summary. It will be seen from the foregoing that a definite beginning has been made in the United States toward incorporating in the American judicial system this necessary provision for a special procedure for the adjudication of small claims. Though experience with the systems created has covered only a few years, results have demonstrated their value. This is amply shown by the approval which they have received from the members of the bar who have studied their operations. The report of the Committee on Small Claims and Conciliation Procedure of the Conference of Bar Association Delegates, submitted in 1923, which gives an excellent consideration of the whole subject, reads:[10]

[9] For copy of California Act, see *Journal of the American Judicature Society*, June, 1921.

[10] *American Bar Association Journal*, November, 1924.

We have now gone far enough to venture some appraisal of these courts. They are obviously not revolutionary or subversive of cardinal principles. They are new courts but still courts of law. And though new they do not add to our problem of multiplicity of courts because they are organized as branches or sessions of existing courts. They represent, not new institutions but new equipment for existing institutions. We may go further and say that in many respects the small claims courts are the finest in the country. Many of the reforms so long advocated by bar associations, but which have not been generally accepted by law-making bodies, may be found in successful operation in these courts. Power to control procedure through rules is an example. More important, in the small claims courts, the judges have won back their proper and rightful power and influence which has been so badly curtailed in our state tribunals. The small claims court judge is not an umpire, he is an impartial investigator into the truth. He is not a passive agent waiting for objections, he is in affirmative control of the whole proceedings. It has long been recognized as an anomaly that judges, sitting without juries, should be thrust into the straightjacket of the rules of evidence which exist solely for the protection and guidance of lay juries. In the small claims court the judge is not shackled, he is not obliged to sit by in impatience while, as Thayer has said "the rules of evidence are sharply and technically used to worry an inexperienced or ill-prepared adversary in order to support a worthless case." He is equipped and empowered not only to prevent injustice but to do justice. The small claims courts are sound. They demonstrate what our judges can do, and will do, if they are given the needed power and responsibility.

It is likewise of value to reproduce the remarks of the committee regarding certain of the more important features of a proper small claims procedure.

In respect to the matter of the extent of the jurisdiction that it is advisable to confer upon small claims branches, it says:

How far the jurisdiction of small claims courts may wisely be extended is a matter for experience, not theory, to decide. Chicago started at $50.00 in 1915, increased its limit to $100 in 1916 and to $200 in 1917. No other court has gone so far. The Oregon courts are limited to money claims not exceeding $20. Cleveland's conciliation branch court is limited to $35. but, in 1923 Chief Justice Dempsey of the Municipal Court said: "We are seriously considering consigning to the court all cases in which the amount involved is $100 or less." The Massachusetts legislature set the figure at $35., the State Grange has sought to have this increased to $75; several of the clerks favor $100, but Chief Justice Bolster of the Boston Municipal Court says: "While not opposing such a small in-

crease as to $50. I believe the system has not been tried for a long enough time to determine whether for large claims it would constitute an improvement over the usual procedure." The Minneapolis conciliation court's jurisdiction has been increased from $50 to $75.

Some of these courts are limited to contract actions. In Cleveland, by rule, Massachusetts by statute, and California by judicial interpretation the courts also may determine tort actions (other than slander and libel) where the damages claimed are within the fixed limits. This seems to us entirely sound. Many of the cases of the poor sound in tort, or conversion of or damage to personal property, and there is no logical reason why these cannot be handled just as simply as grocery bills or claims for wages.

In respect to the matter of permitting appeals from the decisions of the small claims courts, the committee says:

This problem of appeal—which means delay and expense—and the allied problem of the right to jury trial are critical and must be overcome at the outset. We commend the Massachusetts plan, which is sound law and workable in practice, as the precedent to be followed wherever it is applicable. In Cleveland, the situation is analogous. The small claims court's decision is final on the facts; an appeal on points of law goes directly to the Court of Appeals, the intermediate appeal to the Court of Common Pleas having been abolished. In California the decision is conclusive as to the plaintiff, but the defendant may appeal by giving bond to pay the judgment (if affirmed) and also a special fee of $15 for the plaintiff's attorney. The system in Idaho, Minnesota and Oregon is substantially the same.

Finally, the committee, in respect to the policy of permitting lawyers to participate in the proceedings of the small claims courts has this to say:

Small claims courts do not encourage and sometimes forbid the presence of lawyers at the hearings. Without stressing too much the fact that the better members of our profession have no ardent desire to try $25 cases in a small claims court, and that it is the less desirable faction of the bar that the small claims courts want to keep out, we may consider this difficulty impersonally in the light of general propositions. It is desirable that lawyers should not commonly appear because it is desirable that the expense of their appearance should be avoided. It is more than the traffic can bear. In the great run of cases the lawyer is unnecessary. Take a simple grocery bill for $25, strip the proceedings of all the usual technicalities of pleading and evidence and there is absolutely nothing

for the lawyer to do. The lawyer has a vital function to perform in the administration of justice as a whole, but, with rare exceptions, he has no function to perform in the small claims court.

These propositions we believe to be sound. In their desire to attain these ends the statutes creating small claims courts have not been as gracious as they might have been; sometimes they are a little pointed. The California act provides: "No attorney at law shall take any part in the filing or prosecution or defense of such litigation in the small claims courts." It must be noted that this prohibition was made by a state legislature. Where judges have been given the power to regulate the small claims procedure through rules, as in Chicago and Massachusetts, no prohibition will be found.

To prohibit the attorney by absolute fiat we consider a mistake. While reiterating the proposition that in most small claim court cases the attorney has no function to perform, we believe that there are likely to be some cases where a party is ignorant, or frightened, or unfamiliar with our language, so that an attorney (the attorney of a legal aid society, for example) might assist the court and facilitate the hearing.

One or two further features involved in this problem of providing satisfactory means for the adjudication of small claims deserve attention.

Provision for proper machinery for handling these small cases constitutes the first essential step. There still remains the problem of insuring that avail will be taken of this system. As Mr. Reginald Heber Smith points out,[11] a desirable, if not an essential, feature is that provision shall be made for some officer of the court assisting the litigants in the bringing and defense of their cases. This is all the more necessary, since it is desirable that as far as possible recourse to the services of an attorney shall be avoided. In Kansas the judge gives this assistance, in Portland the clerk, while in Cleveland a special department in the clerk's office has been created for the purpose. Mr. Smith also mentions as desirable the power of the judge to order the payment of judgments in installments. As he says: "A defendant often denies a debt because he cannot pay it." This power is conferred by the law upon the Kansas, Portland, and Minneapolis courts, and is exercised by the Cleveland court without express grant of authority.

[11] *Op. cit.*, 56.

CHAPTER XXIV

JUVENILE AND DOMESTIC RELATIONS COURTS

It is inevitable and desirable, with the growing complexity of social relations and the consequent increasing variety of questions, resort should be had to the creation of special divisions of courts or special independent tribunals for the handling of particular classes of cases. It has already been pointed out in the consideration of unified municipal courts that immediate use was made by these tribunals of the powers vested in them to set up divisions of this character. Among the special courts created in this way, or as independent tribunals set up by special acts of the legislature, much the most important, with the possible exception of the small claims courts, are the so-called "juvenile" and "domestic relations" courts.[1] Though these two classes of courts are, as will be seen, intimately related to each other and, indeed, as will also be pointed out, should have an organic relation to each other, they have developed more or less as independent institutions and in response to somewhat different motives. It is desirable, therefore, to trace their rise separately before entering upon a consideration of the characteristics they have in common.

Rise and Development of Juvenile Courts. From the earliest times, Anglo-Saxon jurisprudence has recognized the child as, in a way, the ward of the state, where need has arisen for taking action to protect its interests, and as having a special status in respect to its accountability for acts of a criminal nature. At common law the father who neglected to provide for his child to the extent that it was brought to the point of starvation, could be proceeded against criminally and the husband who deserted his wife could be compelled to provide for the support of his children as well as of his wife. Courts of equity would intervene to protect other rights of the child. Thus, the chancellor in 1822 took away the children of the Duke of Wellesley because of his profligate

[1] These courts are sometimes styled "children's courts" and "family courts."

conduct, and the poet Shelley was deprived of the custody of his children because he had declared himself to be an atheist.[2]

With the great development of the humanitarian spirit in the nineteenth and twentieth centuries, the welfare of the child became a matter of increasing solicitude; a great mass of legislation was enacted having in view its protection, and the courts assumed, or had conferred upon them, the duty of intervening in a great variety of ways in its behalf. At the same time, studies that began to be made of crime, or rather of the criminal, developed two facts of supreme importance, first, that criminals to a large extent enter upon their careers of law breaking at a comparatively early age, many when they are in the early teens; and second, that the incarceration of youthful offenders in the general penal institutions, instead of having a deterrent effect upon them in respect to the commission of criminal acts, but hardens them in their anti-social character. These facts pointed to the conclusions; that, if crime was to be lessened, it must be attacked at one of its most important sources, the youthful offender, who is just entering upon his criminal course of conduct; and that other provision must be made for the punishment of the juvenile delinquent than that of incarcerating him with the hardened adult criminal. It thus became recognized that the problem of the juvenile delinquent is a special one, requiring special treatment for its solution. It became apparent, furthermore, that the two problems of the treatment of the juvenile delinquent, and the protection of the dependent child in his rights and the promotion of his material and moral interests cannot be divorced, both needs being in large part the products of his environment and necessitating action looking to the improvement of such environment. The social and the legal problems thus became but different aspects of the same problem.

From the standpoint of judicial administration, the most important consequence of the rise of this problem of the child in its developed aspect was the demonstration of the fact that the courts, acting through their ordinary methods of procedure, were unable efficiently to handle the multitude of cases in which their powers

[2] Bernard Flexner and Reuben Oppenheimer, The legal aspect of the juvenile court, United States Children's Bureau Publication No. 99 (1922); also Bernard Flexner, The juvenile court: its legal aspect, *Annals* of the American Academy of Political and Social Science, July, 1910.

were invoked and to make their decrees conform to the requirements of the cases presented. It became imperative, therefore, that provision should be made in some way by which these classes of cases could be given special consideration, and action, other than that open in the case of adults, be taken. This provision has taken the form of the creation of special courts known as "children's courts," or "juvenile courts," to handle cases having to do with juvenile delinquency and the protection of the child when such protection cannot, or is not, adequately given by the parent.

Though prior action had been taken in a number of states for the special handling of juvenile cases coming before the criminal courts, it was not until 1899 that the first juvenile court in the modern sense was created.[3] In that year Illinois passed a law[4] authorizing the creation of a special children's court of a new kind, and in accordance with this law the Chicago juvenile court or to give it its official name, the "Juvenile Court of Cook County," was established July, 1899. The enactment of this law and the creation of this court, according to the author of the monograph on children's courts published by the United States Children's Bureau,[5] introduced a new legal concept in American jurisprudence; namely, "that the delinquent child is not to be proceeded against as one who had committed an offense against the state for which the state must mete out punishment, but as a subject for the state's special protection, care and guardianship in exactly the same degree as the child who is neglected or homeless." The distinction between the Illinois act and the Massachusetts and New York acts is set forth by Mr. Hastings H. Hart in the following way:[6]

> The essential difference is that the children's courts of New York and Massachusetts were criminal courts, in which it was necessary to convict the child of a crime before he could be paroled or could enjoy the remedial influences of the court. Hon. Harvey B. Hurd, who was the author of the juvenile court law, made provision for taking children's cases out of the jurisdiction of the justices of the peace, the police courts and the criminal courts. The law

[3] For an account of this earlier action, see Herbert H. Lou, Juvenile courts in the United States (1927), Chapter II, "History of the juvenile court."

[4] Approved April 12, 1899. Laws 1899, p. 131.

[5] Evelina Belden, Courts in the United States hearing children's cases, Children's Bureau Publication No. 65 (1920).

[6] Distinctive Features of the Juvenile Court, *Annals* of the American Academy of Political and Social Science, July, 1910, p. 57.

made provision for dealing with these cases, not as a criminal proceeding, but as a chancery proceeding, in which the child was treated, not as a prisoner at the bar, but as a ward of the state. The statute was carefully drawn so as to free the proceeding from all taint of the criminal court and provided that, when children's cases were brought before justices' courts or police courts, it should be the duty of the justice to transfer the case to the juvenile court. Under the Illinois Juvenile Court Law, there is no indictment or complaint, and the child is not accused of any crime, but a petition is filed alleging a condition—namely, the condition of the delinquency or the condition of dependency. . . . When the child is found delinquent, no sentence is pronounced. The judge has a wide discretion. He may return the child to his own home, under the friendly watch-care of a probation officer. He may instruct the probation officer to find a proper home for the child. He may commit the child to the friendly care of some child-helping society, or he may commit the child to a reformatory or some other institution—not for punishment, but for care and training. The judge may retain jurisdiction over the case for the further watch-care and guardianship.

The striking features of this act which have been generally adopted are: the vesting in the same tribunal of jurisdiction in respect to both criminal and civil cases; the handling of cases with a view to the welfare of the child rather than his punishment; the granting of wide discretion to the court in determining the action to be taken; and the informal and special procedure made use of in the trial, or to use a more correct term, the examination of the case.

The Illinois innovation was speedily copied by other states. In 1901 was created the juvenile court of Denver, Colorado, which, under the administration of Judge Ben Lindsey, attracted country-wide attention. This was followed in 1903 by the passage by the legislature of Colorado of a special juvenile court law. By act of March 19, 1906, Congress established a juvenile court for the District of Columbia. Since then, the movement has spread throughout the United States. In 1925 the United States Children's Bureau reported that every state but one had adopted legislation providing for one or all of the characteristic features of juvenile court organization and that every city having a population of one hundred thousand or more had a court especially organized for children's cases.[1] The institution of juvenile courts is thus now firmly established as an important feature of our judicial system.

[1] Katherine F. Lenroot and Emma O. Lundburg, Juvenile courts at work, Children's Bureau Publication, No. 141 (1925), p. 1.

Space does not permit of any detailed examination of the organization and procedure of these courts. There is, of course, a wide divergence among the several courts in respect to their jurisdiction and modes of procedure. One important variation may be mentioned. In some cases the courts have been created as independent tribunals; in others they are but divisions of the regular courts. Consistent with the position taken throughout this volume, it is the opinion of the author that the second status is the desirable one.[8]

Rise and Development of Domestic Relations Courts. Parallel with the rise of juvenile courts, recent years have witnessed the development of another system of special courts, analogous to such courts, known as "family courts" or "courts of domestic relations." There are few social institutions in respect to which the law exercises a more careful solicitude than that of the family. Provision exists for resort to the courts for the adjustment of a wide range of difficulties that threaten the integrity of the family or interfere with its harmonious life. The aid of the courts is, or may be, sought: to make proper provision in bastardy cases; to legalize the adoption of children; to provide for the handling of children who are incorrigible or whose proper control is beyond the powers of the parents; to proceed against husbands who desert their wives and fail to make proper provision for their support and that of their children; to compel husbands to contribute to the support of their wives and children when the husband and wife are living apart; to annul marriages, and, in such cases, to determine the custody of the children, and whether or not payment in the form of alimony shall be made; to provide for the guardianship of

[8] On the basis of its studies, and in conference with representatives of the National Probation Association, a committee of the Children's Bureau prepared a statement of the standard that should govern juvenile court organization and administration. After discussion and amendment this statement was adopted by a conference held by the Children's Bureau and the National Probation Association in 1923. A draft of a model or standard juvenile court law based on these standards was drafted by a committee of the National Probation Association which was adopted by the Association at the eighteenth annual conference in 1924. The statement of standards above mentioned are to be found in Juvenile Courts at Work, Children's Bureau Publication No. 141 (1925), and a copy of the model or standard act in the Development of juvenile courts and probation, Proceedings of the National Probation Association, 1925.

children in case where the parents are dead, or fail, or are unable properly, to care for their children; and generally to do those things which are necessary to protect the rights and interests of individuals as members of a family.

These matters having to do with the family or domestic relations have a special character which differentiates them markedly from the ordinary cases coming before the courts. To a considerable extent they are non-contentious, or at least not contentious in the sense they call for the adjudication of rights between two parties; the end sought is often the adjustment of a social difficulty rather than the punishment or penalization of the defendant; in many cases the preferable form of action is the adjustment of the difficulty through methods of conciliation rather than the issuance of a formal decree or judgment; usually a condition precedent to the taking of proper action is the securing of information regarding the conditions that have given rise to the difficulties that cannot easily be secured through formal action in court and can only fully be obtained by a personal investigation by a trained official; and, finally, the decision finally reached can only be effectively enforced when provision is made for a continuing oversight of its operation. Conditions, in a word, are such that the ordinary courts, operating under the ordinary rules of procedure, are ill adapted to handling these classes of cases in a manner that is at once efficient and adapted to serve the ends sought.

These conditions, it will be observed, are similar to those which obtained in respect to cases affecting children prior to the establishment of special courts for their hearing. The same solution of the problem has accordingly been sought; namely, that of setting up special tribunals for the hearing of cases having to do with the family or domestic relations. In this case, however, there were present two other factors which either were not present, or were not so important, in the case of children's cases, making it desirable that the handling of these cases should be entrusted to a special tribunal.

The first of these was the desirability of maintaining as far as possible the integrity of the family. It is now the practically unanimous opinion of students and workers in the field of social amelioration that the prime end to be sought is the maintenance intact of the family. Aid societies, therefore, go to the limit of

their resources to keep the members of a family united. Institutional aid is resorted to only as a last resort. Unfortunately, the nature of the proceeding in, and the character of the action that might be taken by, the ordinary courts were not such as to promote this end. Too often the action taken took the form of breaking up families, rather than uniting them.

Secondly, the problem of handling cases affecting the family is complicated and proper action is rendered difficult by the diffusion of jurisdiction in respect to them among a number of courts. In some cases resort has to be had to criminal courts and in others to the civil courts; and in respect to those where resort lies to the civil courts, jurisdiction is distributed among a number of independent tribunals in such a way that the complete adjustment of a difficulty can often only be had by the bringing of a number of different actions in a number of different courts. As Mr. Reginald Heber Smith in commenting on this situation, writes: [9]

No one court as yet comprises within its jurisdiction all these matters. One disintegrating force is the sharp historical distinction between the civil and the criminal law. As courts are now organized each has a slice of this whole jurisdiction. There is neither unification, nor specialization nor even uniformity.

To illustrate the extent to which jurisdiction is divided among a number of different courts, a writer describing conditions in Michigan says: [10]

As our laws are now constituted, however, the various phases of the family life are considered by independent courts whose work is in no way interrelated and is consequently more or less wasteful and barren of the results many of our people believe ought to be obtained. In this state these courts are the Circuit Court, having original and exclusive jurisdiction in divorce cases including the custody of children of the parties and the granting of alimony, the juvenile court, having charge of the delinquent and dependent children of the community; the Probate Court having exclusive jurisdiction over the matters of estates and the adoption and guardianship of children; and the Criminal courts having jurisdiction over various offenses growing out of the family relation such as adultery, abandonment, failure to support and the like. Exclusive jurisdiction in bastardy cases is conferred upon the Circuit Court, and marriage licenses are issued by the County Clerk.

[9] Justice and the poor, 74.

[10] Willis B. Perkins, Family Courts, *Michigan Law Review*, March, 1919.

The difficulties resulting from this diffusion of authority is graphically brought out by the following quotation from the report of the Massachusetts Judicature Commission of 1921.[11]

Jurisdiction on this subject is in an unsatisfactory condition. The Superior Court has jurisdiction to grant divorces and incidental to that procedure to award the custody of children to one parent or the other. The probate courts have jurisdiction of petitions for separate support and custody of children between husband and wife living apart for justifiable causes, including the power to restrain the husband from interference with the wife under such circumstances, and the power to secure to the wife the control of her property without interference from the husband, and without securing a release of the statutory rights which a husband normally has in his wife's real estate. In such cases the order of the probate court directing the husband to pay a fixed sum of money to his wife is enforced by proceedings for contempt for failure to comply with the order. The district courts throughout the state have jurisdiction, under the Uniform Desertion Act (General Laws, Chapter 273, Section 1-10) over criminal proceedings against the husband for non support. . . . Under these statutes certain conflicts of jurisdiction arise in cases in which a wife lives apart from her husband for justifiable cause. In such cases, if the wife not only wishes support, but wishes also an order restraining her husband from interfering with her, and an order for the custody of the children she must go to the probate court. As the probate proceedings to force her husband to pay money are not as effective for practicable reasons as the proceedings in the criminal courts, she may find that she cannot collect the money because of difficulties in following up her husband. If she then goes to a district court for the purpose of starting criminal proceedings for non-support she finds in some districts that the judge of the probate court or the judge of the district court, or both, understand the law to mean that if one court has taken jurisdiction of the case the other court should not take jurisdiction and she is left without any effective remedy in either court. In some cases we understand that the district court judges will not act unless a decree of the probate court granting separate support is revoked.

Other cases are then cited where it is impossible for a single court to give all the relief that the circumstances require and proceedings must be had in a number of courts.

Opinion is crystallizing that the only way to handle this situation lies in the creation of special courts or, better still, special divisions

[11] Pp. 43-44.

of a unitary court, which will have entire jurisdiction, civil and criminal, over matters affecting domestic relations. The case for such action is put by the author already quoted in the following way: [12]

The causes of juvenile delinquency, and dependency, desertion and nonsupport, pauperism, divorce and marital dissensions generally speaking are all related subjects. They cannot be treated separately; nor will any legislation which seeks so to do be wholly successful. All these matters can be traced to some defect in the administration of the family. This defect in most instances is so obscure that it cannot always be reached by the ordinary methods appointed by law for dealing with domestic relations. . . . It is therefore, apparent that if we are to deal with the family effectively and relieve present distress by ascertaining and remedying the causes of disruption and of anti-social conduct in general some court or other tribunal must be given power to deal with the family as a unit. . . . The only possible solution of the difficult and complicated problems involved, if they can be solved at all, is to combine in one court exclusive jurisdiction to hear and determine all matters concerning the family growing out of the family relations. Such a combination would not only prevent the present economic waste, but separate the purely sociological questions that arise from domestic disturbances from those that arise solely in the economic and business affairs of the community, giving to each class of cases a separate tribunal. Any legislation which attempts to deal with this subject in any other way than by a complete subordination of all domestic troubles whatever their source, to the jurisdiction of a single court will, in my judgment, prove abortive and unavailing.

To the writer the greatest argument in favor of a special court or division with general jurisdiction over domestic relations cases, is, however, the necessity that exists that such cases should be handled in a special manner and that the court shall have special powers and facilities, through the use of probation or other officers, to conduct investigations regarding conditions and to supervise the execution of decrees made by it.

To the State of New York probably belongs the credit of taking the first action for the establishment of a court of domestic relations. In 1910 the Buffalo City Court, acting upon the recommendation of the State Probation Commission, set aside a special division of that court, to which it gave the name of "Domestic

[12] Perkins, *Op. cit.*

Relations Court," for the hearing of non-support and kindred cases; and on September 1, of that year domestic relations courts were established by law in Manhattan and Brooklyn.[13] In the following year, 1911, the Chicago Municipal Court created its famous Court of Domestic Relations, to which it assigned the handling of cases involving wife abandonment, illegal parentage, failure to support, and offenses against minors. From the start this court, which is but a branch or division of the Municipal Court, proved a success. Of it, one of the judges of the Municipal Court said:[14]

This court of domestic relations, so far as I know, is the only one ever created whose primary function is to keep a family together. Our divorce courts were organized to separate families, while Mr. Herbert Harley, speaking to the same point said: "The Domestic Relations branch was undoubtedly the greatest judicial invention of the time, sufficient to ensure lasting fame to its progenitor. The strong arm of the law, for the first time, was utilized, not to sever families, but to heal their wounds and bind them closer together."

This innovation is of interest, not so much from the standpoint of specialization as from that of the attitude assumed by the court toward these cases and the methods employed in handling them. Each case was not so much a controversy to be adjudicated as a special social problem to be solved.

In every case, all the troubles of the family were laid bare and the court employed every means, legal and social, to bring about a satisfactory status. Fifty or more social organizations became allied with the court, every fraternal society and every church in the city became a potential ally. The court shaped a destiny for its erring wards and solicited the most powerful social influences to exert a continuing pressure. From the standpoint of the lawyer, earning a livelihood by conducting the litigation of his clients in the civil courts according to contentious procedure, this is no court at all. It absolutely fails to classify in his consciousness, but it persists because there is a demand for just this sort of thing and our jurisprudence has grown to embrace it, or perish in the attempt.

[13] Adult probation in New York State, by Frank S. Wade (member of the State Probation Commission of New York State), Publication of the New York State Probation Commission, 1923, pp. 6-7.

[14] William M. Gemmill, Chicago Court of Domestic Relations, *Annals* of the American academy of political and social science, March, 1914.

Either our judicial system will develop to meet modern needs or it will give way to some agency that can do the work, as we see it already giving way to public service commissions, railroad commissions, commerce commissions and like bodies.[15]

This innovation on the part of the Chicago Municipal Court has been followed by a number of the other courts, notably those of New York, Philadelphia, and Cincinnati. In no case, however, have these courts been given complete jurisdiction in respect to all classes of cases affecting the family. According to Mr. Reginald Heber Smith,[16] one of the most complete domestic relations courts was that created for Detroit by act of the legislature in 1913, which secured the unanimous vote of both houses but was declared unconstitutional by the Michigan Supreme Court as violating the constitutional prohibition against special legislation. The jurisdiction of the Philadelphia court, however, is nearly comprehensive, covering all matters except full and limited divorce and it has recommended that such jurisdiction be conferred upon it. Information is not at hand regarding the extent to which tribunals of this character have been created in the United States. One of the difficulties in securing and presenting this information is due to the difficulty of distinguishing these courts from juvenile courts, since, as will now be pointed out, these two classes of courts have overlapping jurisdictions, and it is not easy at all times to determine whether a particular court should be styled a juvenile court or a court of domestic relations.

Desirability of Consolidating Juvenile and Domestic Relations Courts. It is impossible to study the organization and operations of juvenile and domestic relations courts without reaching the conclusion that the separate development of these two classes of tribunals has been unfortunate. The fundamental basis upon which cases should be segregated for consideration by a separate tribunal is the family and not the child. It is impossible to consider the needs of the child except as a member of a family. In the great majority of cases affecting the child, consideration has to be given to the conduct of the parent, and the action ordered should have

[15] Herbert Harley, Business management for the courts, *Virginia Law Review*, Vol. V, No. 1.

[16] *Op. cit.*, 75.

relation to what should be done by the parent as well as by the child. The same court, therefore, should have jurisdiction over both if it is to be in a position to do what the needs of the case require. What is needed, in other words, is a single court, or division, of domestic relations that shall have all the jurisdiction such courts now have, and in addition all the jurisdiction conferred upon, and that it is desirable to confer upon, juvenile courts. Where separate juvenile and domestic relations courts exist, the former should be absorbed by the latter; where provisions exist for but one of these courts, it should be reorganized so as to have the broad jurisdiction specified; and where no provision at all exists for tribunals of this character, efforts should be directed toward the creation of a single division of domestic relations.

Action in this way is desirable from whatever standpoint viewed; that of eliminating conflicts of jurisdiction, that of concentrating responsibility in a single, instead of two, organs, and that of securing efficiency and economy in the actual conduct of the work of the courts. In respect to the last point it will be pointed out that an essential feature of a properly constituted juvenile court or domestic relations court is the possession by that court of a service of probation officers. With but one court, a single probation service is sufficient; with two courts two services are required or the disadvantages of two separate tribunals making use of a single service are presented.

The trouble resulting from the court having jurisdiction only in respect to the child and not over the father, mother, or guardian is shown by the following discussion of the relationship of the juvenile court to other courts contained in the study of the Chicago juvenile court made for the United States Children's Bureau:[17]

As explained in an earlier section, the juvenile court has no jurisdiction over adults except in the matter of enforcing an order for the support of a child removed from its own home. The lack of criminal jurisdiction has two important results. The first is that it becomes necessary for the probation officer handling the child's case, whenever court action against a parent of another adult is needed in behalf of a child, to institute proceedings in another court. The second is that a number of dependent and neglected children whose parents have been prosecuted in another court by

[17] Helen Rankin Jeter, The Chicago Juvenile Court, Children's Bureau Publication No. 104, p. 103 (1922).

persons outside the juvenile court never come to the attention of juvenile probation officers and never benefit from the services of the court.

Reports of the juvenile court contain repeated references to the first of these difficulties and point out the waste involved in the necessity of having to carry cases into other courts and sometimes having two probation officers at work on the same family, one representing the adult probation department and the other the juvenile court. In 1916, for example, the report of the court contained the following statement:

"In studying the records of dependent children one cannot help reaching the decision that the present overlapping of courts in Cook County is nothing short of ridiculous. In the same case the parents might be taken before the municipal court of domestic relations or the children before the juvenile court of Cook County, or both parents and children might be taken before the different courts. Some day the courts will be combined. If that is not done in the near future, the adult and juvenile probation forces should be united so that the probation officers will at least work under one head. . . . So long as cases of abandonment, contributing to dependency and delinquency, bastardy, etc., can be prosecuted without the children involved ever coming to the attention of the juvenile court, the development of a uniform policy of child care in Chicago is impossible."

* * * *

In a recent report of the court of domestic relations the presiding judge expressed the opinion of that court as follows:

"As has been pointed out before, the domestic-relations branch would at once enter upon a greater program of usefulness to the public were the lawgivers to enlarge its jurisdiction to take in all matters affecting the family that require judicial adjustment. If it be admitted that public policy of the present day and faulty administrative methods of justice call for special service then, obviously, it follows that such special courts should be endowed with ample powers to handle their special problems. This argument means that all family troubles ought to be taken care of in one tribunal, doing away with a multiplicity of courts with conflicting interests and consequent confusion, expense, delay, waste of time of litigants and lawyers, armies of witnesses and scores of jury panels" (Tenth and Eleventh Annual Reports Municipal Court of Chicago, 1915-1917).

In another publication of the Children's Bureau, the desirability of having a single court to handle all cases affecting the family is set forth in the following way:[18]

[18] Evelina Belden, Courts in the United States hearing children's cases, Children's Bureau Publication No. 65, p. 18.

The socialization of the courts dealing with children has pointed the need for the socialization of other courts especially those dealing with the family life in its varying aspects. Frequently juvenile courts are given jurisdiction in cases involving adults contributing to the delinquency or neglect of children. This work is held by many to be essential to successful juvenile court work.

There is a movement looking toward the coördination of the trial and treatment of juvenile and family cases, including desertion and non-support contributing to delinquency, or dependency, divorce, illegitimacy cases, adoption and guardianship. The National Probation Association has gone on record in favor of such coördination of court work touching closely the family life, holding that all these cases should be dealt with in the same manner as children's cases. In the report of the committee of the National Probation Association on domestic relations courts in 1918 (Annual Report 1918) in which the case for family courts is strongly stated, the chairman emphasized the necessity of preserving the juvenile court organization. He states that "the principle of the juvenile court is the foundation upon which the family court must be constructed" and defines the relation of the juvenile court and the family court as follows:

"The family court is not intended to limit or restrict the jurisdiction incident to juvenile courts. In fact the juvenile court will become an integral part or division of the family court. By reason of the organization of family courts we believe that the administration of the juvenile court will become more effective and significant and better understood not only by those connected with the juvenile court but by the public generally."

Fundamental Features of Juvenile and Domestic Relations Courts. In many respects the most interesting feature of juvenile and domestic relations courts is not so much the fact of the segregation of a particular class of cases and the intrusting of their handling to a special court as the organization and procedure that has been developed by such courts for the performance of their duties. Sufficient experience has been had with these courts to demonstrate that if they are fully and efficiently to perform their functions, they should have the following fundamental features: (1) Their jurisdiction should be broad enough to cover all cases, civil and criminal, affecting the child and domestic relations; (2) the function of the court should be viewed primarily as that of a social agency rather than one to enforce criminal law or decide technical controversies between litigants; (3) the court should be presided over by a judge holding office permanently and not on

temporary assignment following a system of rotation, and selected with a view to his special qualifications to discharge the peculiar duties of the court; (4) the hearings should be held apart from the proceedings of the other branches of the court, in the judge's chamber or other special room from which the general public can be excluded and only those having an interest in the matter to be settled be admitted; (5) these hearings should be of an informal character, no use being made of the technical rules of pleading or those governing the production of evidence; (6) provision should exist for a probation system and an adequate force of probation officers to ensure its proper administration; (7) these probation officers should have the duty, when so directed by the judge, of investigating cases coming before the court for the purpose of aiding the judge to reach his conclusions regarding the action to be taken as well as to supervise those who have been placed upon probation; (8) the authority of the judge should be a continuing one to see, through his probation officers, that the determinations reached by him are in fact carried out; (9) provision should also exist for a system of physical and mental examination of all children brought before the court and of adults where need for such examination appears to be present; (10) close working relations should be established between the court and organized social agencies, to the end that these agencies will bring to the attention of the court cases needing its attention and may be made use of by the court in having done what is needed in the way of looking after the interests of the persons whom the court seeks to aid; and, finally, (11) careful provision should be made for the recording of the social data developed by the court's proceedings.

The desirability of most, if not all, of these features is so evident that it is unnecessary to give arguments in their support. A few words, however, may be said in regard to two of them: the need for a probation system and one for the physical and mental examination of the children and, at times, of adults coming before the court. A proper probation system is essential for two reasons: to enable the court to secure the information needed by it for reaching intelligent decisions; and as agencies to carry into execution, or to supervise the carrying into execution of, the orders of the court. The need for a system of physical and especially mental examination of children, and at times of parents, is equally

great. Without such an examination the court cannot determine the disposition that should be made of a child or the provision that should be made for his welfare. Thus, to quote from the valuable study of children's courts in Connecticut made for the United States Children's Bureau in 1918:[19]

> The more scientifically juvenile delinquency is studied, the more evident it becomes that in a large proportion of the so-called delinquents there is an accompaniment of low mentality. . . . One of the first duties of the court should be to order a mental examination of a child whose school record is unsatisfactory. . . .
>
> Many children are thus brought before the court again and again before it is finally determined as a result of a mental examination that they are not responsible for their actions. Many such children are placed on probation with the idea that it is possible for the probation officer to keep such subnormal children out of trouble in the future. Almost without exception the probation officers complain that cases are turned over to them in which it is hopeless to expect improvement. The efficiency of the probation service in the state is lowered by loading up the officers with a number of impossible cases.

In conclusion, it is desired to point out the extreme interest that these tribunals have from the standpoint of political science, and especially that feature of the American political system known as the separation of powers. From this standpoint, the most interesting feature of these courts is that they are as much administrative as judicial agencies. To such an extent is this true that they may be viewed almost as administrative agencies, the directors of which have the power, when occasion requires, of putting their orders in the form of judicial decrees and of availing themselves of the judicial process to enforce such decree. This is excellently brought out by the study of the Domestic Relations Court of Cincinnati, made by Mr. Alan Johnstone, Jr., Director of the Baltimore Criminal Justice Commission.[20] In describing the work of this court, he says:

> A great portion of the work of the court consists in supervised probation of children and in arriving at its decree the court avails

[19] William B. Bailey, Children before the courts in Connecticut, Children's Bureau, Publication No. 43, p. 36 (1918).

[20] Baltimore Criminal Justice Commission. Mimeographed manuscript, 1924.

itself of the aid of social investigation and mental and medical examination. The Service Department of the Court is under the general direction of a Chief Probation Officer and is subdivided as follows:

1. Delinquent Boys Department, in charge of an Assistant Chief Probation Officer with three assistants.
2. Delinquent Girls Department, in charge of an Assistant Chief Probation Officer with three assistants.
3. Home Rehabilitation Department, in charge of a Director with two assistants.
4. Domestic Relations Department, in charge of a Director.
5. Psychological Clinic, in charge of a Chief Psychiatrist assisted by a Psychologist and Assistant Psychologist.

The Boys Division, in addition to supervising the probation of all delinquent boys placed on probation, makes an investigation in the first instance of all cases of such boys reported to the court. The Director holds a reference to determine the facts in the case. To this reference are invited the parents and all interested parties who, upon failure to appear are formally summoned by the court. In many cases voluntary probation is agreed to without formal order of the court by the Director and the difficulty is adjusted without further procedure. In other cases a formal hearing is had before the judge at which time the court in addition to the facts brought out by examination of witnesses has before it the facts developed by the reference and the mental and physical examination of the boy. . . .

The Girls Division follows similar procedure. . . . In addition to the cases of delinquent girls presented to the court for formal action this Division handled and disposed of without court action the cases of 347 such girls. . . . Thus only 18 per cent of the cases required formal action. . . .

The Home Rehabilitation Division administers mothers' pensions, investigates cases of dependency, crippled children and makes placement of children in foster homes. In 1922 the Division administered $400,000.00 of public money in relief to dependent families and children.

The Domestic Relations Division makes investigations in divorce and alimony cases and in failure to provide cases. It collects and administers moneys according to the decree of the court in non-support cases. In 1922 it administered $162,000.00 of such funds.

The Division of Psychiatry makes examination of all children who are brought to the court and renders opinions thereon. It also makes such examinations of parents who are brought into court for default in their duty to their children.

This organization and procedure is a far cry from the old regular courts, with their lack of any permanent trained staff to secure

information for the court by personal investigation in the field, and to supervise the carrying out of the court's decree; with their formalities in respect to the bringing of actions, the production of evidence, and the conduct of proceedings generally; their costs; the necessity of counsel; and the comparatively limited discretion possessed by the court in fitting its decrees to the circumstances of the individual cases. This use by a judicial tribunal of an administrative organization and the employment of administrative methods is a matter of great significance. It paves the way for the modification of judicial organization and procedure generally as to those features in respect to which the judicial establishment is weakest.

CHAPTER XXV

BUSINESS ADMINISTRATION OF COURTS

In all business undertakings of any size it is well recognized that efficiency can be secured only if certain fundamental requirements are met: the field of operations or jurisdiction must be clearly defined; an organization must be set up specially adapted to the work to be done; this organization must be competently manned; and, finally and in some respects most important of all, provision must be made by which the undertaking as a whole may be directed, supervised, and controlled to the end that each part of the organization machine and each member of the staff shall be entrusted with those particular duties which it is most competent to perform, that the work shall be so distributed among these several parts and personnel that all will be fully employed and loss of energy will be reduced to a minimum, and that the procedure or methods of work employed shall be such as will secure the maximum of economy and efficiency in the dispatch of business.

If the attempt is made to fix responsibility for the admitted shortcomings in the administration of the law in the United States, the answer is largely to be found in the failure on the part of those responsible for this branch of public administration to appreciate that all of these requirements are as essential in this field as in any other branch. It is scarcely going too far to state that up until a comparatively recent date the task of judicial administration has hardly been considered from this standpoint, that is, as one presenting problems of administration. The explanation is probably to be found in the emphasis that has properly been placed upon preserving the independence of the judge from all outside influence and control in respect to the exercise of his judicial function. There has been an almost complete failure to recognize that a clear distinction can be drawn between the function of direction, supervision, and control in respect to matters of administration, and the exercise of judicial discretion in the trial and decision of cases. The result has been that, in the desire to preserve the independence

of the judge in the exercise of his latter function, no, or but inadequate, provision has been made for his direction, supervision, and control in respect to the purely administrative phases of his duties, or for the organization and work of the courts as a whole from their business side.

Not until this distinction between the judicial and purely administrative, or business, aspects of the problem of judicial administration is clearly recognized and not until it is understood that it is possible to set up a rigid system of general overhead direction, supervision, and control in respect to the latter, without in any way interfering with the former, can the first step be taken toward securing the same economy, efficiency, and dispatch in this branch of the government that is demanded in the other branches.

The Chief Justice as Business Manager. In a preceding chapter, it has been made clear that a thoroughly satisfactory system for the administration of justice can best be secured by knitting together all of the present scattered judicial units into one unified piece of harmonious mechanism. Failing this, however, much can be done to improve the business administration of the courts. The first and most important step to be taken is that of making provision for a unity of command. Here, again, the principle involved is precisely that which obtains in the business field. No one for a moment would think of attempting to carry on a large enterprise, where use has to be made of a number of operating units, without creating some organ, a general manager or a directing board, which will exercise general direction, supervision, and control over the whole. The same is no less true of the judicial establishment, viewed from the standpoint of administration. Efficiency in operation cannot be had unless provision is made for vesting general administrative authority over the whole system in some organ or officer, and similar power of general administration over the business operations of each of the subordinate units or courts in the chief officers of such units. Concretely, this means that the chief justice of the supreme court of the state, as far as is possible, should be viewed as, and given the responsibility and powers of, a general manager in respect to the whole judicial system; and the chief justice of each of the subdivisions, or courts, as the business director of such unit. To quote again from the report of the Committee of the American Bar Association of 1909:

Supervision of the business administration of the whole court should be committed to some one high official of the court who would be responsible for failure to utilize the judicial power of the state effectively. He should have power to make reassignments or temporary assignments of judges to particular branches or divisions or localities as the state of judicial business, vacancies in office, illness of judges or casualties may require. Likewise, he should have the power, subject to general rules, to assign or transfer causes or proceedings therein for hearing or disposition according to the condition of the docket for the time being and it should be his duty to see to it that the energies of the judicial department are employed fully and efficiently upon all business in hand. What this official of the whole court does for the general supervision of its affairs, should be done for each branch and each division and when there are large cities for each locality by some official specially charged with this duty and responsible for the efficient and business-like conduct of its affairs and disposition of causes upon the dockets. This official should be a judge, not a clerk, and responsibility laid upon him should be such as to guard against abuse of his office and insure efficiency.

The Office of Clerk of the Court. The office of clerk is the center of the administrative system of the court. Its duties are in no sense either political or judicial; they are wholly administrative. There is no reason why this office should not be organized and conducted with a view to the same efficiency and economy that is demanded of services of the administrative branch, in which it is well recognized that efficiency cannot be secured unless certain fundamental principles are insured. The most important of these are: that the head of the office shall be appointed and subject to removal by the head of the organization of which it is a subordinate unit, be subject to the direction, supervision, and control of such superior officer, and that means shall in fact exist whereby the latter can hold him to strict accountability for the manner in which the affairs of his office are conducted; that the office itself shall be thoroughly organized so that responsibility and the line of authority are definitely located and the work so distributed that the most effective use is made of the working personnel; that the most efficient methods of business practice and procedure for the actual handling of the work are employed; and finally, that where there are a number of units performing the same functions, having the same duties to perform, and belonging to the same general organization, they should have the same organization, and make use of the same methods of procedure.

Almost every one of these elementary requirements for efficiency and economy are lacking in the clerks' offices of the great majority of our courts. The movements for efficiency in the conduct of public business have almost wholly passed them by. It has been as if they were off the track and their very existence almost forgotten. It is a common thing for the clerks, of the superior courts at least, to be elected by popular vote and to occupy positions practically independent of the direction and control of the judges of the courts of which they are the administrative centers. They perform their work subject to no executive supervision or control. Each clerk organizes his office as he thinks best and makes use of such methods of procedure as he happens to find in the office or with which he may be familiar. There is no requirement for uniformity in the offices of the several courts of the same judicial system. As regards actual business methods, these offices are still in the dark ages where such modern devices as flat filing, card indexes, the use of photostat machines for the making of copies, improved mechanical equipment, etc., are unknown.

The situation is partially set forth in the report of the Committee to Suggest Remedies and to Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation of the American Bar Association in 1909.

We have (the report reads) carried decentralization of courts to such an extent that in many jurisdictions the clerks are practically independent functionaries over whom courts have little real control. In some jurisdictions the clerks of supreme and appellate courts are elective officers. It is a pretty general practice to have an elective clerk of the superior court of general jurisdiction (by whatever name called) in each county. Each clerk is not merely, to a considerable degree, independent of effective judicial control, but he is wholly independent of every other clerk. No one is charged with supervision of this important branch of the judicial system. It is no one's business to make this part of the system effective, to obviate waste and needless expense and to promote improvement. The fee system has often tended to make earning and collection of fees one of the chief objects which engrosses the clerk's attention. There is much unnecessary duplication and recopying of papers, judicial records are needlessly prolix and hence unduly expensive.

The solution of this problem is preferably to be found in the creation of a single clerk's office for the whole judicial establish-

ment, with subdivisions in each of the several courts, the chief clerk in charge of the whole system to be appointed by, and subject to, the general authority of the chief justice as general manager, and the deputy clerks to be appointed by the chief clerk with the approval of the chief justice. As the report of the committee puts it:

> In like manner the business administration of the court should be organized. The whole clerical and stenographic force should be under the control and supervision of a responsible officer, and an officer in each branch, division and, if necessary, each locality should have a like duty and responsibility for efficient conduct of business commensurate therewith. An office in each locality could be an office for filing papers for the whole court and every branch and division thereof; the papers to be kept there when required in the locality or transmitted to the proper office elsewhere. Legislation should not attempt to lay down details upon this subject; the general principles should be settled and the remainder should be left to the rules of the court to be devised, altered and improved as experience points out the problems to be met and the best solutions thereof.

System of Administrative Records and Reports. It is impossible for one entrusted with the duty of directing, supervising, and controlling an undertaking properly to discharge this responsibility unless means are provided through which he can keep in immediate touch with the operations and needs of such undertaking. Without this information, he cannot distribute the work to be done in an effective manner, see that a full measure of service is being rendered by all officers and employees, meet new situations as they arise, and assure himself that directions given are being executed in an efficient and economical manner. This is well recognized in all business enterprises, and careful provision is made for the maintenance of operating records and, on the basis of them, of the preparation and rendition of reports to the general manager or directing board. Especially is such a system necessary where the undertaking is one involving the maintenance and operation of what is known as a field establishment; that is, a number of substantially similar operating units scattered over a considerable territory.

Nothing reveals more clearly the slight extent to which the judicial systems of the states have been deemed to present a problem in efficient administration than the almost complete failure to pro-

vide for this elementary tool of administration in the organization of this branch of the public service. With rare exceptions, resulting from the recent movement for judicial reform, has there been an attempt, in the drafting of laws providing for the organization and operation of the courts, to provide that these bodies shall keep a careful record of their operations and report at periodical intervals to some superior authority the facts revealed by such records. The result is that there is an almost complete lack of authentic information regarding the manner in which this important branch of government is being conducted. As the Journal of the American Judicature Society expressed it, in its first number:[1]

> One of the worst features of the present situation is that we have no authoritative body of facts concerning the administration side of the judicial function. On the essential juristic side our intense interest in case law has resulted in the most thorough system of reports ever known to any system of law. But with respect to the business of justice we have no statistical system. Ours is the only modern nation without data concerning the work of its courts. It would be difficult to exaggerate the extent of our loss in this respect. Precise criticism is impossible, but vague and sketchy accusations are encouraged. It prevents a common understanding and acceptance among judges of their responsibility. It leaves us without data greatly needed for social, criminal and procedural legislation.

In a subsequent section, attention is given to the need of proper judicial statistics. Here we are concerned with the recording and reporting of data required for purposes of administrative control. These data consist of such information as those regarding the number and character of causes originating in or assigned to each court or each judge, the action had in respect of such causes and particularly the number finally disposed of; the number of days and the number of hours per day the several judges hold court, the dispatch with which business is handled, etc. These are the criteria to be used by the chief justice, or directing board in determining the relative efficiency of the several judges, from the business standpoint at least; in making an equitable apportionment of work among the several courts and subdivisions of courts; and in expediting the performance of work through the assignment of judges to districts where there is an accumulation of business and in providing for the assignment of cases to courts or judges whose dockets are

[1] June, 1917.

light. As a business proposition, these things cannot be done except as full information is currently recorded according to a prescribed, uniform system and made available to the directing authority through a systematic scheme of periodical reports.

In the same way that the individual courts or judges should make reports to the chief justice in his capacity as administrator in chief of the system, so the latter should prepare and submit to the legislature at least an annual administrative report regarding the operations of the judicial establishment as a whole. This will give to the legislature the information upon which to base its action in providing for the growing needs of the service or in correcting defects in existing organization and procedure which it should be the duty of the chief justice to point out.

As has been pointed out, up until a recent date the idea of any such system of records and reports scarcely existed. Fortunately, this imperative need is now beginning to be appreciated. This has found expression chiefly in the organization of central municipal courts in our cities. A number of these, such as the Municipal Court of Chicago, the Philadelphia Municipal Court, and the Recorder's Court of Detroit, now make annual administrative reports similar in character to the reports of the administrative services. These courts have but pointed the way. What is required are similar reports regarding the operations of the entire judicial system of the several states. It would be desirable if the appropriate authorities of the states could get together on this proposition and agree upon a form of report that would give substantially the same information and in the same form for all the states, so that comparisons could be made between judicial operations in the different states and something in the way of a consolidated presentation for all the states made possible. The adoption of a unitary court system would vastly simplify this problem; indeed, one of the strong arguments in favor of such a system is that it would lay the basis for securing data in this way. Without such a system much could be done however, by requiring each of the independent courts to keep proper administrative records, to prepare and transmit to some central authority annual reports, and such central authority in turn to compile the data so received and make it public in an annual report to the legislature. The state that has gone furthest in this direction is probably Louisiana. Its revised constitution, adopted in 1921, provides that "the Supreme Court shall

have control of and general supervision over all inferior courts"; and that "it shall also have power and authority to require all inferior courts to make such reports of the nature, character, amount and condition of the work and business before them as the court by rule may prescribe, and to direct such investigation into the business and affairs of such courts it it may deem proper and to that end to require the services of the Attorney General, his assistants, or such other officers as may be found necessary."

Judicial Statistics. In the preceding section attention has been directed to the necessity for proper records and reports of the activities of the courts as an essential means for the exercise of administrative direction and control. Purely apart from this consideration, it is of the highest importance that detailed data should be available regarding the work of the courts. It is doubtful if a country has a more important task than that of the administration of its civil and criminal law. It is impossible to perform this task efficiently without full information regarding the causes to be handled and the action taken in reference to such causes. The statement is often made that the amount of litigation is steadily increasing with the result that the burden of work thrown upon the courts is correspondingly augmented. We do not know whether this is so or not; or, if so, the extent of the increase and the classes of cases chiefly responsible for it. We have no authentic data as to whether the business now coming before the courts is of the same character as formerly, or whether it is handled with greater or less dispatch, economy, and certainty. The statement is also often made that the country is being swept by a crime wave, or that crime generally is on the increase. We have no certain knowledge as to this. Prison statistics may give us some information regarding the successful prosecution of crime, but they throw no light upon the more important questions of the number of offenses reported to the authorities, the number of prosecutions instigated, the action had on such prosecutions, etc. Again, we know little or nothing regarding the classes of the community most responsible for crime. The assertion is often made that the prevalence of crime in this country is due chiefly to our large foreign born population and to the illiterate class. We do not know whether this is a fact or not. Within recent years there has been a great development of the system of paroling prisoners. This system is receiving

a constant development without any reliable information as to how it has worked in practice, or the essential requirements of a successful system. It may well be that the results are good in a state, where provision is made for an adequate corps of competent parole officers, and that nothing but bad results are secured in a southern state where the criminals paroled are largely negroes, where the parole officers are selected largely with reference to political considerations, or where parole officers perform their duties in a lax or perfunctory manner. Constant experimentation is taking place in the way of creating new courts and in the adoption of modifications in procedure. The states differ among themselves in respect to the use of the grand jury and in the requirement of unanimity on the part of petty juries for a decision. We have no means of measuring the results obtained under these different systems for the purpose of determining under which the best results are obtained. We have it constantly brought to our attention that there are many more murders reported in the single city of New York or Chicago than in the whole of Great Britain. We lack the data to enable us to determine just why this should be so, whether responsibility rests upon the character of our population or in our defective system for the detection, prosecution, and punishment of crimes of this character.

In the field of civil law we know that important changes have taken place in respect to the character of litigation coming before the courts. In a general way we are aware that actions for damages brought by employees against their employers have diminished in number as the result of the establishment of workmen's compensation commissions and changed methods of handling this class of cases. It is said that actions involving the title and possession of real estate have greatly diminished in number as the result of the work of title examining and guarantee companies and the gradual clearing up of questions of titles as the country has passed out of frontier to more settled conditions. On the other hand, new classes of cases, unknown to the courts of earlier days, have arisen. We have no accurate methods of measuring these changes. In the field of criminal jurisprudence, it is also likely that important changes have taken place and are now occurring. Crimes against property may have increased or decreased relatively to those against the person. There may be an increase or decrease of serious crimes as compared with those of lesser seriousness. We do not know.

All of these and scores of other points, it is of the utmost importance should be known. If we do not know the facts, it is impossible to take the proper action in reference to them. As the Committee on Law Enforcement of the American Bar Association, in its report presented at the annual meeting of that organization in 1923, said:

Throughout all our work we have been greatly hampered by the lack of reliable official information for it still remains true, as stated in our former report that the United States is the only great civilized country which does not collect and preserve its criminal statistics. . . . In consequence of the almost complete lack of Federal statistics and in many instances of State statistics we have been obliged to spend a great amount of time as well as considerable money in an effort to obtain information upon the crime situation.

Addressing itself to the same point, the Journal of the American Judicature Society, in its issue for February, 1922, says:

The first step in solving a problem is to ascertain precisely what that problem is. This can never be done until a standard system of recording is provided. Without statistical records our system has no memory. It does not know what it has done heretofore, or the consequence of its actions, or what it should do in the future. As well expect a navigator who has been deprived of his log and instruments in mid-ocean to find port safely as to look for success under existing conditions in the supremely difficult work of suppressing cirme. We do not know at present what crimes are most common throughout the state subject to the administration of innumerable local officers; we do not know what classes of people contribute to various kinds of crime; we do not know what various judges do with respect to sentencing; we do not know what the results of various kinds of treatment and administration are. We are groping in the dark. It is no wonder that there is a lot of experimental legislation and a great deal of argument and discussion as to the right thing to do.

The Federal Judicial Council, in its report for 1926,[2] submitted by Chief Justice William H. Taft, declares:

Everyone who has attempted to deal with the question of delays in the administration of justice has found his path obstructed by a mass of unintelligible statistics in respect to the exact condition of

[2] Attorney General of the United States, Annual Report, p. 7 (1926).

the dockets and the real business of the court. . . . No single agency to induce Congress and the state legislatures to the enactment of measures to improve the administration of the criminal law could be more effective than the practical truth in respect to the condition of the courts in the prosecution of crime, and nothing would more stimulate a demand for greater speed in the disposition of civil cases in behalf of the litigating public than the truth as to the delay and congestion in the civil docket.

It is impracticable to attempt here any presentation in detail of the nature of judicial statistics that should be available. The best that can be done is to point out the general scope that such statistics should have and certain practical considerations involved in making provision for their collection and compilation.

At the outset the distinction between judicial and penal statistics should be noted. The latter have to do solely with prison populations. Their purpose is to present the facts regarding the number of persons committed to penal institutions, their personal characteristics, such as sex, age, marital condition, color, race, literacy, etc., the offenses for which committed, the terms of sentence, etc. Judicial statistics have to do with all the preceding operations involved in the detection and prosecution of offenders against the criminal law and the institution, conduct, and results of actions instituted in the civil courts.

There is a large amount of raw data falling in the field of penal statistics in the records of penal institutions and a certain amount of these data has been made public in official reports of their operations. Unfortunately, the information thus available is exceedingly defective in character and restricted in scope. This condition can only be corrected by doing three things: (1) The formulation, as the result of careful study, of the precise character of records that should be kept by all penal institutions; (2) the securing of the adoption by the several states of this system, in its most essential respects at least, to the end that comparisons may be made between states and consolidated statements prepared for the country as a whole; and (3) the organization of a reporting system under which current reports will be made to a central authority in each state, and, through such authority, to some federal agency upon which will be placed the duty of compiling and publishing a consolidated report covering all the states.

In putting such a plan into operation, the initiative must necessarily be taken by the national government. The preferable procedure would seem to be for Congress to confer power upon some officer, such as the Attorney General of the United States, or the Director of the Bureau of the Census, to call a conference of state officers having responsibility for prison administration to which other specialists in the field of prison reform or statistics might be invited, to elaborate a scheme of records and reports to be recommended to the states and their political subdivisions for adoption, and, thereafter, of securing and compiling annually the data produced by such system. Attempts have been made at various times by the Bureau of the Census to secure penal statistics. These statistics, though of some value, are far from satisfactory. This is due partly to the defective methods employed, but principally to the fact that the essential basis for such inquiries, adequate records, are lacking. These inquiries demonstrate, if any demonstration is necessary, that proper penal statistics can only be secured where an adequate foundation of knowledge is laid in the form of suitable records.

Turning now to judicial statistics, as distinguished from penal statistics, a distinction should be made between those having to do with civil and criminal matters, respectively. If exception is made of the data here and there available in the annual reports of municipal courts, and in rare cases of other courts, there is practically nothing in the way of civil judicial statistics. We know almost nothing, and we have no means of knowing anything, about the volume and character of this class of business, the number of actions brought, the character of these actions, the amounts involved, the cost involved, the speed with which action is had upon them, the extent to which appeals are made from the decisions of trial courts, and the result of these appeals. The whole field is practically virgin soil.

Here too the solution of the problem is only to be found in the prosecution of a careful study of the character of data that it is desirable to have regarding this class of the business of the courts, and the establishment, through some central agency in each state or through some agency of the national government, of a uniform system of records and reports. In bringing about such an undertaking, the Department of Justice might well be given general responsibility both for working out, in coöperation with the states,

the system to be established, and its subsequent general direction from the advisory standpoint at least.

An example of what might be done is furnished by the present requirement that the Attorney General of the United States shall annually lay before Congress statistical tables showing for the whole country, by states, the number and kinds of cases in bankruptcy proceedings, the amount of property of bankrupt estates, the dividends paid, and the expenses of administration. The statute requiring this report provides that officers of bankruptcy courts shall furnish such information in writing as is within their knowledge and shown by records or papers in their possession to the Attorney General within ten days after being requested. It is possible to require this information due to the fact that jurisdiction in respect to bankruptcy matters is conferred by the Constitution upon the national government. In respect to matters not within the jurisdiction of the government, the best that can be done is for the Attorney General to be empowered to work out a record and reporting system in coöperation with representatives of the states, and then seek to secure the widest possible adoption of this system by the states.

Still a third point to be noted is that, even with the establishment of a proper record and reporting system on the part of the courts and penal institutions, the needs of the situation will not be fully met. In respect to criminal matters, at least, the starting point of the whole task of the administration of the law lies in services of the executive branch having responsibility for the detection and prosecution of crime. These services are the police and the office of prosecuting attorney. Here too there should be a system of accurate and detailed records showing the number and character of complaints made, or cases arising for action, the nature of the action taken, the results secured, etc.

Finally, the record and reporting system of these three classes of institutions—the police and prosecuting agencies, the courts, and the penal institutions—should be so worked out that they will correlate with and supplement each other. Only then will it be possible to handle in a scientific manner the whole great problem of the administration of the law, and, if there is failure, to determine whether responsibility lies in the prosecuting agencies, in the courts, or in the principles and practices applied in the penal institutions.

PART IV

JUDICIAL PERSONNEL

CHAPTER XXVI

AN INDEPENDENT JUDICIARY

Need for An Independent Judiciary. Turning from problems of judicial organization to those of personnel, it is to be observed first of all that all modern states recognize that a prime consideration to be met is that of securing men to preside over judicial tribunals who will be so situated that they will discharge their duties independent of all influences except those of seeing that the law is properly applied and justice done. The character of this independence, its implications, and the manner in which it can best be secured are not, however, in all cases fully understood. In studying this problem, the factor first to be grasped is that the principle of independence involves not merely independence from all personal or private influence, such as financial, religious, race, and other social or political considerations, but independence from influence or control on the part of any other branch or officer of the government. Courts have the function of adjudicating not merely private disputes but those arising between individuals and the government, and if need be between different branches of the government itself. Particularly is this so in the United States where no provision, as in France and other countries of Europe, has been made for a special system of administrative courts to handle questions arising in the conduct of administrative affairs by public officers; where express limitations have been placed by written constitutions upon the powers of the several branches of the government or of the government as a whole; and where the courts exercise the right of passing upon the validity not merely of administrative acts but those of the legislative branch as well.

The greatest advance ever made in the political field was the establishment of the principle that governments shall be of law instead of authority, and that there are certain fields of individual action into which governments shall not enter. If those two great principles are to be maintained; if there is to be assurance that government officers shall not act arbitrarily but only in strict

accordance with law, and that all individuals shall be protected in the enjoyment of the fundamental rights and liberties guaranteed by their constitutions, the duty must be placed somewhere for taking the action that will ensure that these conditions are lived up to. It is upon the courts of the land that this duty fails. Manifestly, if they are to perform this duty they must be so constituted that they can exercise their function free from direction and control by the officers or branches of government whose acts are passed upon by them, and fearless of consequences that may follow from their determination. As Alexander Hamilton so well expressed it, at a time when our political system was assuming its definite form:[1]

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no expost facto laws and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

In a very true sense the whole achievement of individual and political liberty has been brought about by the development of an independent judiciary from this standpoint and the perfection of the means by which this independence may be maintained. The whole constitutional history of England has had as one of its dominant features, the establishment of the judiciary as the protector of the liberties of the people against the tyranny of the King and his agents. Final victory was not won until the Revolution of 1688. To quote from F. W. Maitland:[2]

Throughout the Stuart reigns judges have been dismissed if they withstood the King—too often they have been his servile creatures. All along they have held their offices during the king's good pleasure.

At once after the Revolution the question is raised, and William's judges were commissioned during good behavior. He, however, refused his assent to a bill making this a matter of law—but the point was secured by the Act of Settlement. So soon as the House

[1] The Federalist, No. 78.
[2] Constitutional history, 312-13.

of Hanover comes to the throne, judges' commissions are to be made during good behavior and their salaries are to be fixed, but they are to be removable upon an address of both Houses of Parliament. This means that a judge cannot be dismissed except either in consequence of a conviction for some offense, or on the address of both houses.

One of the grievances cited in the Declaration of Independence against George III was that "he has made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries," thus denying to the colonies guarantees enjoyed by the mother country.

It might seem at first sight that this problem of securing a due compliance with the law by officers of the government and the guarantee of individual rights as against the government, would arise only in the case of governments of an autocratic character; that it would not be present in the case of a popular government where the final control of political affairs was in the hands of the people themselves. This, however, is not so. Popular government is necessarily government by a majority. The danger is always present that a majority of the people at any time may use its powers in an arbitrary manner to oppress the minority. When one considers the extent to which the people of a country, even with a comparatively homogeneous population, are divided into classes, separated by race, color, territorial and economic interests, religious beliefs, and other factors, it can be seen how real this danger is. It has been truly said that no tyranny is so great as that of a majority. One of the great problems confronting a people in establishing a popular government is that of providing means by which this danger may be avoided. Experience has shown that this can be done in but one way; namely, by entrusting to the courts the duty of seeing that no branch of the government, nor all the branches combined, shall take any action contrary to law or in violation of the rights guaranteed to individuals.

The result of doing this is to give to the judicial branch of government a status quite distinct from that of the other branches. In the first place, it occupies the anomalous position of being at once a branch of government and yet standing outside of, or at least independent of, the government in order that it may restrain the government. Secondly, courts are in the equally anomalous position of being agents of the people and yet not representative of the

people in the same way as the other branches, since their duty is not that of carrying out the will of the people, as represented by a majority of such people, but, on the contrary, of protecting the minority, no matter how small, whenever their rights are threatened or interfered with by the majority. As stated by Mr. Rome G. Brown in an exceedingly able paper,[3] " One of the chief functions of our courts is to stand between the legislature, although that body may for the time represent the majority of the people, and the individual, or individuals, who may for the time comprise the minority, and to prevent an infringement by the majority, through the legislature representing them temporarily, of the rights guaranteed to the individual or it may be an entire minority."

No one has described this peculiar status of the judiciary and expressed its special function of protecting the minority better than former President William H. Taft. In his message to Congress, vetoing the resolution providing for the admission of Arizona and New Mexico as states in 1911, due to their constitutions containing clauses which, in his opinion, failed adequately to protect the independence of judges, he said:

The executive and legislative branches are representatives of the majority of the people who elect them in guiding the course of the government within the limits of the constitution. They must act for the whole people, of course; but they may properly follow the views of the majority which elected them in respect to the governmental policy best adapted to secure the welfare of the whole people. But the judicial branch of the government is not representative of a majority of the people in any such sense, even if the mode of selecting judges is by popular election. . . . They are not popular representatives.

Again, in an address on " Judiciary and Progress " delivered at Toledo, Ohio, on March 8, 1912, he said:

But the judiciary are not representative in any such sense, whether appointed or elected. The moment they assume their duties they must enforce the law as they find it. They must not only interpret and enforce valid enactments of the legislature according to its intention, but when the legislature in its enactments has transgressed the limitations set upon its power in the constitu-

[3] Recall of judges, Address before the Minnesota Bar Association, July 19, 1911.

tion the judicial branch of the government must enforce the fundamental and higher law by annulling and declaring invalid the offending legislative enactment. Then the judges are to decide between individuals on principles of right and justice. The great body of the law is unwritten, determined by precedent, and founded on eternal principles of right and morality. This the courts have to declare and enforce. As between the individual and the state, as between the majority and the minority, as between the powerful and the weak, financially, socially, politically, courts must hold an even hand and give judgment without fear or favor. In so doing they are performing a governmental function, but it is a complete misunderstanding of our form of government, or any kind of government that exalts justice and righteousness to assume that judges are bound to follow the will of the majority of an electorate in respect of the issue for their decision. In many cases before the judges that temporary majority is a real party to the controversy to be decided. It may be seeking to deprive an individual or a minority of a right secured by the fundamental law. In such a case, if the judges were mere representatives or agents of the majority to carry out its will, they would lose their judicial character entirely and the so-called administration of justice would be a farce.

Means for Securing an Independent Judiciary. With this understanding of the special function of the courts to control the government and its officers, to see that no one branch exceeds its power, and to protect the rights of the individual and the minority against a temporary majority, we now pass to a consideration of the means by which assurance may be had that such bodies will have the independence that will enable them fearlessly to discharge it. These means have all been developed in the first instance in England and now constitute fundamental features of its judicial system.

Exemption of Judges from Civil Liability. First among these is the adoption of the principle that no civil liability attaches to the judge in the performance of his duties, no matter how gross may be his misconduct in the conduct of a trial. This principle governs both in England and in the United States. The law on this subject, as stated by two leading authorities is as follows:

> No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. . . . If corrupt he [the judge] may be impeached or indicted, but the law will not

tolerate an action to redress the individual wrong which may be done.[4]

* * * *

As a general rule no person is liable civilly for what he may do as judge while acting within the limits of his jurisdiction, nor is he liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and in such case there is no liability even though he exceeds his authority. The overwhelming weight of authority is to the effect that where a judge has full jurisdiction of the subject matter and of the parties, whether his jurisdiction be a general or limited one, he is not civilly liable when he acts erroneously, illegally or irregularly. . . . Nor is he liable for a failure to exercise due and ordinary care or where he acts from malicious or corrupt motives.[5]

That this immunity from liability is of the greatest importance to the judge in permitting him to act fearlessly regardless of consequences, there can be no doubt. It is a question, however, whether it does not go farther than the circumstances require in that the immunity covers acts of deliberate fraud or misconduct as well as other errors of conduct of a lesser grade. As bearing on this point it is of interest to note that no such broad immunity is provided for in European countries where there is equal adherence to the principle of an independent judiciary. Thus, to quote from Professor Edwin M. Borchard, who has handled this question with exceptional care:[6]

The extensive immunities of a judge from private suit in this country are only recognized by the civil law within the narrowest limits. On principle the continental judge is liable for his tortuous acts in excess or abuse of his authority like any other officer, the only qualification being that in matters within his judicial discretion he is allowed considerable leeway. But corrupt or malicious exercises of judicial powers in all cases involves the personal liability of the judges.

There is some question as to whether this principle of exemption from civil liability has not been carried to an excess in England and the United States. If any steps are taken toward modifying this principle, extreme care should be taken that it does not go far

[4] Throop, Public officers, Sec. 713 (1892), p. 674.
[5] Cyclopedia of law and procedure, XXIII, 568-69.
[6] State indemnity for errors of criminal justice, 7.

enough to jeopardize in any way the independence of the judge as protected by this principle.

Guaranteed Compensation of Judges. A second guarantee of independence is found in the provision that the compensation of a judge may not be withheld or diminished during his term of office. This is secured in England by making the compensation of judges a permanent charge upon the consolidated fund with the result that it is not subject to the recurrent scrutiny that is given to items which have to be included in annual appropriation bills. In the United States independence is secured by express constitutional provision; namely, that " the judges, both of the supreme and inferior courts shall hold office during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." In general the situation in this respect in the United States is thoroughly satisfactory.

Safeguards Against Arbitrary Dismissal. A third essential of independence of the judiciary is that judges shall not be subject to arbitrary dismissal; that they shall be removable only for cause; and that this cause shall be established only through a formal procedure. This requirement is met in England and the United States by the use of one or the other of two methods of procedure for the removal of judges: address of the two houses of the legislature and impeachment. These two methods will be considered in the chapter dealing with the removal of judges.

Other Safeguards. The foregoing three requirements are, it is believed, essential to ensure independence of the judiciary. There are other provisions which, while not essential, since independence has been secured without them, are nevertheless highly desirable in order to strengthen the principle in operation. These are the fixing of the terms of judges for life or rather during good behavior, instead of for a term of years, and the adoption of the method of selection through appointment rather than election by the legislature or by popular vote. The objection to the tenure for a term of years and of selection through election by the legislature or by the people, especially where the two systems exist concurrently, is that weight is given to partisan political considera-

tions and the judge is under obligations and influenced by the desirability of making his action conform to the wishes of those to whom he owes office and to whom he must look for reëlection. The questions here involved are set forth more fully in the special consideration hereafter given of the subject of methods of selection of judges.

In conclusion it may be stated that this problem of an independent judiciary has been solved in an exceptionally satisfactory manner in England. In the United States, the situation, as regards the national government, is equally satisfactory, since the framers of the Constitution were keenly appreciative of the importance of the principle and inserted in that document provisions calling for practically the same safeguards as had been developed in England. In the states conditions are not equally satisfactory, due chiefly to the general existence of the system of selecting judges through popular vote and a tenure of office for a term of years instead of during good behavior. It is only proper to state, however, that the moral principle that a judge should exercise the duties of his office in an independent manner is firmly established throughout the United States, and it is the exception where a judge, no matter what the method of his selection and his tenure of office, does not perform his duties in this spirit.

CHAPTER XXVII

METHOD OF SELECTION OF JUDGES

In the administrative branch, the problem of determining the methods to be employed in selecting personnel, the term for which they shall hold office, and the conditions under which they may be removed is, or should be, controlled by the single consideration of securing and retaining the services of capable and upright servants. In the case of judges, there is added to this consideration that of ensuring that these officers will be selected in such a manner, and the conditions governing their tenure and removal so fixed, that they will exercise their function independent of all outside influences and with sole regard to the facts and law as brought out in the proceedings before them. It is this factor that makes this problem, as it has to do with the judiciary, a special one.

Addressing ourselves first to the question of the method of selecting judges, examination of existing political systems reveals the following methods, among which a choice must be made:

1. Election by the people
2. Election by the legislature
3. Appointment by the chief justice of the supreme court
4. Appointment by the chief executive

The arguments in favor of and against each of these methods will be considered in turn.

Popular Election. The controlling argument in favor of the selection of judges by popular election is that in a popular government resting upon the principle of the separation of powers, those in control of each of the three branches of government should derive their offices from, and be responsible directly to, the people, and that a system, under which the officers of one branch hold office as the result of the choice of one of the other branches, does violence to the principle of the separation of powers. Particularly in this argument held to be strong in a political system in which, as in the United States, the judiciary has the important function

of passing upon the constitutionality of legislative measures of a political and social character. To quote one of our ablest students of jurisprudence:[1]

Perhaps the most important influence in bringing about a demand for a greater popular control of the courts is the increasingly important position which the courts have come to exercise as political organs of the government through their powers to declare laws unconstitutional or violations of the guarantees of "due process of law" and "equal protection of the laws." These guarantees mean whatever the courts in any particular case may decide that they mean and furnish a broad foundation upon which the courts may base declarations of unconstitutionality. As has been frequently suggested in recent years the courts have become practically legislative organs with an absolute power of veto over statutory legislation which they may regard as inexpedient; and this power has been used most frequently with respect to social and industrial legislation enacted to meet new social and economic conditions.

Though one can appreciate the basis of this position it is difficult to hold that it is not mistakenly taken. Judges are not the representatives of the people in the same way as those composing the legislative and executive branches. As has been pointed out in the consideration of an independent judiciary, it is of the essence of a function of a judge to oppose the will of the people, as represented by a majority, when that will proposes action in violation of constitutional provisions, and especially those for the protection of individual rights and liberties. Furthermore, little can be said in favor of this method from the standpoint of securing persons best fitted for the office. As the dean of one our leading law schools has put it:[2]

Obviously a satisfactory selection for any office can be made only when the selecting power can acquire some fair knowledge of the fitness of individual candidates for the office. When the selecting power is the electorate at large such knowledge is difficult to acquire in proportion as the members of the electorate increase. Where offices are essentially political and their incumbents are

[1] W. F. Dodd, Recall and the political responsibility of judges, *Michigan Law Review*, X, 85 (1911).

[2] James Parker Hall (Dean of the University of Chicago Law School), Address before the Ohio State Bar Association, Cincinnati, December 29, 1915; reproduced in *Journal of the American Judicature Society*, August, 1919.

charged with the duty of framing or of executing some one or more of competing policies, then the selective function of the electorate is performed under the most favorable circumstances—particularly if the offices to be filled are somewhat conspicuous and not too numerous. But in proportion as the requirements for office become technical, or the offices numerous, does the electorate become an inefficient instrument of selection. Now the principal qualities needed in a judge are personal integrity, adequate legal training and a judicial temperament. The second of these is wholly technical and little reliable information about it is likely to be found outside of the members of the bar themselves. The other needed qualities can be ascertained by personal acquaintances, but very few lawyers of the sort that would make desirable judges have been able to make themselves known, either personally or by reputation, to more than a minute fraction of the electorate in any of our good-sized cities or in the judicial districts that fill important judgeships. It is almost impossible for a lawyer to obtain a popular following of any size without a large expenditure of time and effort in ways altogether likely to make him less fitted for judicial office than if he faithfully devoted himself to his profession. . . . Indeed the obstacles in the way of any real public choice of judges by a numerous electorate are so great that in fact what almost invariably happens is that new candidates for judgeships are selected by the party leaders with little or no regard for the possibilities of any public perference in regard to these offices; and when a number of judges must be chosen at once as often happens in the large cities, the helplessness of the electorate is still greater.

This situation, Mr. Hall points out, is made even worse when use is made of the primary system for nominations.

In the few states that have tried this only chaos has resulted. Any lawyer being free to place his name in the nominating ballot by petition, large number have done so; and nearly all of these being but little known, a most disgusting campaign of personal advertising for the nomination has in many places ensued, followed to a great extent by the same kind of a campaign for election.

The Cleveland Survey is equally emphatic in condemning the use of the primary system for the nomination of judges. Its report reads:[3]

Cleveland has now had ten years' experience of the wide-open method of selection and, although few would care to return to the bossed party convention, it is safe to say there is scarcely a man in

[3] Criminal justice in Cleveland, 259.

Cleveland able to weigh the qualifications for the bench who does not deplore present tendencies and fear them. . . . Most serious is the present cheapening of the judicial office so that neither the bar, the press, nor the judicial incumbents themselves any longer respect it. Young lawyers who would have viewed the bench with reverence formerly, now give voice to their disrespect and retired and even sitting judges are openly cynical. The situation is summed up in the universal comment that the judges are generally above the suspicion of taking direct money bribes but find it difficult to forget the coming election.

The Survey then goes on to point out that one of the chief evils of the elective system, especially in combination with the primary, is the pressure upon judges seeking reëlection to cater to groups, race, religion, labor, etc. " One of the most disturbing features " is the intensifying of social and religious appeals. A man is elected or appointed because he is a Pole, a Jew, an Irishman, a Mason, a Protestant." Labor, it points out, watches the judges to determine who are favorable to its side in labor controversies that get into court.

Election by Legislature. The method of selecting judges by election by the legislature is one that, so far as the writer has knowledge, is employed by no foreign government. In the United States, it is used by but four states: Vermont, Rhode Island, South Carolina, and Virginia. Whether considered from the standpoint of ensuring an independent judiciary or of securing men best qualified for the position, the system has little to commend it. It is true that, in the states where it is used, reports indicate that in general men of good character and legal abilities have been selected, and that, with the possible exception of Rhode Island, political considerations have not exerted a seriously detrimental effect. The system is nevertheless one presenting a constant danger. It has a tendency to violate the principle of the separation of powers and to prevent the complete divorce of the judiciary from politics that is highly desirable. More attention to this method is not here given, since its further development in the United States is not to be apprehended.

Appointment by the Head of Judicial Branch. A method of selection that has much to recommend it is that of having all judges, other than the chief justice of the court of last resort,

appointed by the chief justice. This is the English system under which all judges of courts of record are appointed on the recommendation of the Lord Chancellor. The same system obtains in New Jersey in respect to the Court of Chancery, where the seven vice-chancellors of that court are appointed by its head, the Chancellor. In both cases, the system has given excellent results. The chief justice is not only outside of the field of partisan politics, and thus less likely than the chief executive to give consideration to this element in making selections, but is in an exceptionally strong position to select men who have the special qualifications required of judicial officers.

Though this system is foreign to the political practices of the American people it is possible, that the development of the system of a unified state court, with a chief justice exercising the powers and duties of a general manager, may carry with it the principle of having the associate justices selected in this way. It is certainly a step to be welcomed.

That this method is receiving some attention in the United States is evidenced by the recommendations made by a recent committee of the Cleveland Bar Association which was appointed to consider the subject. Its report[1] recommends that the chief justice of the supreme court be elected by the people; that the associate justices of the supreme court be appointed by the governor, with the approval of two-thirds of the senate or by a judicial council selected by the senate; that judges of appellate courts be appointed by the chief justice of the supreme court, with the approval of a majority of the associate justices of the supreme court; and the judges of the other courts be appointed by the chief justice of the supreme court, with the approval of a majority of the judges of the appellate courts for the respective districts within which the appointees are to serve. For all judges it recommends that the term of office be six or eight years.

Arguing on behalf of this proposal, the report reads:

Generally speaking, the entire responsibility for the administration of justice should be placed upon the courts themselves. It can best be placed there if the power of selecting judges is entrusted to that department. This is one reason for the recommendations we are making. But another and stronger reason is that the courts have the best possible opportunities for observing and judging

[1] *Journal of the American Judicature Society*, April, 1927.

the work of the lawyers and for selecting from the ranks of the lawyers the best judicial timber. It is perhaps best that no court should select its own members. But there seems to be no valid reason why the chief justice with the approval of the members of the supreme court, could not make the best possible selection of the appellate judges for the state, and why the chief justice, with the approval of the appellate courts of the respective districts in which vacancies occur, could not make the best possible selections for all courts inferior to the appellate courts. It is only by some such system as this that the maximum of responsibility for results can be placed upon the courts themselves, and it is only through some such system that the most intelligent selection of judges can be made.

Appointment by Chief Executive. Appointment by the chief executive is the method usually employed by foreign governments in selecting their judges. In the United States it is the one prescribed by the Constitution for the selection of all federal judges. If safeguarded by the provision that the power of appointment does not carry with it the power of removal, by the requirement that removals may be effected only by the process of impeachment or joint address on the part of the two houses of the legislature, the system, with the possible exception of the method of selection by appointment by the head of the judicial branch, more nearly meets the requirements of a desirable selective process than any other method. It is one where responsibility is definitely located and full opportunity is afforded to determine the qualifications of appointees. Certainly, experience indicates that under it better selections have been made than under the method of election by the people or by the legislature.

Present Conditions in the United States. In few features of our political system is there a greater diversity of practice than in respect to this matter of the method of selecting judges. In the federal judicial system selection through appointment by the President is universal. In the states, however, many different methods are employed. The following statement, prepared by the Legislative Reference Division of the Library of Congress, for Representative C. Bascom Slemp, shows the manner of selecting judges in the several states.[8]

[8] MS. dated December 14, 1926.

METHOD OF SELECTION OF JUDGES OF STATE AND COUNTY COURTS

Alabama		
Supreme Court	Elected	Const. VI–152.
Circuit Courts	Elected	Const. VI–152.
Probate Courts	Elected	Const. VI–152.
Courts of Chancery	Elected	Const. VI–152.
"Inferior courts of law or equity"	Elected or appointed	Const. VI–153.

The county courts are presided over by the probate judges of the respective counties (Crim. Code, § 6696).

Arizona		
Supreme Court	Elected	Const. VI–3.
Superior County Courts	Elected	Const. VI–5.
Arkansas		
Supreme Court	Elected	Const. VII–6.
Circuit Courts	Elected	Const. VII–7.
County Courts	Elected	Const. VII–29.
California		
Supreme Court	Elected	Const. VI–3.
District Courts of Appeals	Elected	Const. VI–4.
Superior Courts	Elected	Const. VI–6.
Colorado		
Supreme Court	Elected	Const. VI–6.
District Courts	Elected	Const. VI–12.
County Courts	Elected	Const. VI–22.
Connecticut		
Supreme Court of Errors	Legislature	Const. V–3.' Amend. XXVI.
Superior Court	Legislature	Const. V–3' Amend. XXVI.
Court of Common Pleas	Legislature	Public Acts, 1919, c. 114.
Probate Courts	Elected	Const. Amend. XXI.
Delaware		
Supreme Court	Appointed	Const. IV–2, 3.
Superior Court	Appointed	Const. IV–2, 5.
Court of Chancery	Appointed	Const. IV–2, 3.
Orphan's Court	Appointed	Const. IV–3, 11.
Court of Oyer and Terminer	Appointed	Const. IV–3, 5.
Court of General Sessions	Appointed	Const. IV–3, 5.
Florida		
Supreme Court	Elected	Const. V–2.
Circuit Courts	Appointed	Const. V–8.
County Criminal Courts	Appointed	Const. V–24.
"County Judge"	Elected	Const. V–16.

Georgia		
Supreme Court	Elected	Const. VI–2 (8).
Court of Appeals	Elected	Const. VI–2 (9).
Superior Courts	Elected	Const. VI–3 (2).
Courts of Ordinary	Elected	Const. VI–6 (3).
Idaho		
Supreme Court	Elected	Const. V–6.
District Courts	Elected	Const. V–11.
Probate Courts	Elected	Const. XVIII–6.
Illinois		
Supreme Court	Elected	Const. VI–6.
Appellate Courts	Elected	Const. VI–11, 13.
Circuit Courts	Elected	Const. VI–13.
County Courts	Elected	Const. VI–18.
Probate Courts	Elected	Const. VI–20.
Indiana		
Supreme Court	Elected	Const. VII–3.
Appellate Court	Elected	Burns' Ann. Stat., 1926, § 1348.
Circuit Courts	Elected	Const. VII–9.
County Superior Courts	Elected	Burns' Ann. Stat., 1926, § 1522.
County Criminal Courts	Elected	Burns' Ann. Stat., 1926, § 1683.
Probate Courts	Elected	Burns' Ann. Stat., 1926, § 1755.
Iowa		
Supreme Court	Elected	Const. V–3, 11.
District Courts	Elected	Const. V–5, 11.
Kansas		
Supreme Court	Elected	Const. III–171.
District Courts	Elected	Const. III–174.
Probate Courts	Elected	Const. III–177.
Kentucky		
Court of Appeals	Elected	Const. IV–3.
Circuit Courts	Elected	Const. IV–20.
County Courts	Elected	Const. IV–30.
Louisiana		
Supreme Court	Elected	Const. VII–7.
Courts of Appeal	Elected	Const. VII–19.
District Courts	Elected	Const. VII–33.
Maine		
Supreme Judicial Court	Appointed	Const. V, Pt. I–8.
Probate Courts	Elected	Const. VI–7.
Maryland		
Court of Appeals	Elected	Const. IV–3.
Circuit Courts	Elected	Const. IV–3.
Orphans' Courts	Elected	Const. IV–3.
Massachusetts		
Supreme Judicial Court	Appointed	Const. Pt. II, c. II, § 1 (9). Gen. Laws, 1921, p. 2261.
Superior Court	Appointed	Const. Pt. II, c. II, § 1 (9). Laws 1925, c. 304.

Probate Courts	Appointed	Const. Pt. II, c. II, § 1 (9). Gen. Laws, 1921, p. 2285.
"Trial Justices"	Appointed	Gen. Laws, 1921, p. 2366.
Michigan		
Supreme Court	Elected	Const. VII–2.
Circuit Courts	Elected	Const. VII–8.
Probate Courts	Elected	Const. VII–14.
Minnesota		
Supreme Court	Elected	Const. VI–3.
District Courts	Elected	Const. VI–4.
Probate Courts	Elected	Const. VI–7.
Mississippi		
Supreme Court	Appointed	Const. VI–145.
Circuit Courts	Appointed	Const. VI–153.
Courts of Chancery	Appointed	Const. VI–153.
Missouri		
Supreme Court	Elected	Const. VI–8.
Circuit Courts	Elected	Const. VI–25.
Criminal Courts	Elected	Const. VI–30.
Probate Courts	Elected	Const. VI–34.
County Courts	Elected	Const. VI–30.
Montana		
Supreme Court	Elected	Const. VIII–6.
District Courts	Elected	Const. VIII–12.
Nebraska		
Supreme Court	Elected	Const. VI–4.
District Courts	Elected	Const. VI–10.
County Courts	Elected	Const. VI–15.
Nevada		
Supreme Court	Elected	Const. VI–3.
District Courts	Elected	Const. VI–5.
New Hampshire		
Supreme Court	Appointed	Const. II–45, Chase's Pub. Public Laws, 1926, § 1288.
Superior Court	Appointed	Const. II–45, Chase's Pub. Public Laws, 1926, § 1292.
Probate Courts	Appointed	Const. II–45, 79.
New Jersey		
Supreme Court	Appointed	Const. VII–2 (1).
Court of Errors and Appeals	Appointed	Const. VII–2 (1).
Court of Chancery	Appointed	Const. VII–2 (1).
Circuit Courts	Appointed	Const. VI–5 (2), VII–2 (1).
Prerogative Court	Appointed	Const. VI–4 (2), VII–2 (1).
Court of Common Pleas	Legislature	Const. VII–2 (2).
New Mexico		
Supreme Court	Elected	Const. VI–4.
District Courts	Elected	Const. VI–12.
Probate Courts	Elected	Stat., 1915, § 1245.

New York		
Supreme Court	Elected	Const. VI–1.
Court of Appeals	Elected	Const. VI–5.
Surrogates' Courts	Elected	Const. VI–13.
County Courts	Elected	Const. VI–11.
North Carolina		
Supreme Court	Elected	Const. IV–20.
Superior Courts	Elected	Const. IV–20.
North Dakota		
Supreme Court	Elected	Const. IV–90.
District Courts	Elected	Const. IV–104.
County Courts	Elected	Const. IV–110.
Ohio		
Supreme Court	Elected	Const. IV–2.
Court of Appeals	Elected	Const. IV–6.
Courts of Common Pleas	Elected	Const. IV–3.
Probate Courts	Elected	Const. IV–7.
Oklahoma		
Supreme Court	Elected	Const. VII–3.
District Courts	Elected	Const. VII–9.
County Courts	Elected	Const. VII–11.
Oregon		
Supreme Court	Elected	Const. VII–1.
Circuit Courts	Elected	Const. VII–1, 3.
County Courts	Elected	Const. VII–11.
Pennsylvania		
Supreme Court	Elected	Const. V–2.
Courts of Common Pleas	Elected	Const. V–1, 15.
Courts of Oyer and Terminer and General Jail Delivery	Elected	Const. V–1, 15.
Courts of Quarter Sessions of the Peace	Elected	Const. V–1, 15.
Orphans' Courts	Elected	Const. V–1, 15.
Rhode Island		
Supreme Court	Legislature	Const. X–4.
Superior Court	Legislature	Gen. Laws, 1923, § 4622.
District Courts	Legislature	Gen. Laws, 1923, § 4733.
South Carolina		
Supreme Court	Legislature	Const. V–2.
Court of Common Pleas	Legislature	Const. V–1, 13.
Court of General Sessions	Legislature	Const. V–1, 13.
County Courts	Elected	Code of Civil Pro. 1922, § 81.
Probate Courts	Elected	Civil Code, 1922, § 2184.
South Dakota		
Supreme Court	Elected	Const. V–5.
Circuit Courts	Elected	Const. V–15.
County Courts	Elected	Const. V–19.

Tennessee		
Supreme Court	Elected	Const. VI–3.
Courts of Chancery	Elected	Shannon's Ann. Code, 1917, § 374.
Circuit Courts	Elected	Shannon's Ann. Code, 1917, § 374.
County Courts	Elected	Shannon's Ann. Code, 1917, § 385.
Texas		
Supreme Court	Elected	Const. V–2.
Courts of Civil Appeals	Elected	Const. V–6.
Courts of Criminal Appeals	Elected	Const. V–4.
District Courts	Elected	Const. V–7.
County Courts	Elected	Const. V–15.
Utah		
Supreme Court	Elected	Const. VIII–2.
District Courts	Elected	Const. VIII–5.
Vermont		
Supreme Court	Legislature	Const. II–42.
Courts of Chancery	Legislature	Pub. Stat., 1906, § 1231, 1234, 1342.
County Courts	Legislature	Const. II–42.
Probate Courts	Legislature	Const. II–35.
Courts of Insolvency	Elected	Pub. Stat., 1906, § 2412, Const. II–35.
Court of Claims	Elected	Pub. Stat., 1906, § 465.
Virginia		
Supreme Court of Appeals	Legislature	Const. VI–91.
Circuit Courts	Legislature	Const. VI–96.
Washington		
Supreme Court	Elected	Const. IV–3.
Superior Courts	Elected	Const. IV–5.
West Virginia		
Supreme Court of Appeals	Elected	Const. VIII–2.
Circuit Courts	Elected	Const. VIII–10.
County Courts	Elected	Const. VIII–23.
Wisconsin		
Supreme Court	Elected	Const. VII–4.
Circuit Courts	Elected	Const. VII–7.
Probate Courts	Elected	Const. VII–14.
County Courts	Elected	Stat., 1915, § 2441.
Wyoming		
Supreme Court	Elected	Const. V–4.
District Courts	Elected	Const. V–19.

It will be seen from this statement that thirty-six or three-fourths, of the forty-eight states select their judges by popular election. Of the remaining twelve; five, Delaware, Massachusetts, Mississippi, New Jersey, and New Hampshire, select their judges through appointment by the governor; five, Connecticut, Rhode Island, South Carolina, Vermont, and Virginia, through appointment by the legislature; and two, Florida and Indiana, by a mixed method.

It is a matter of no little importance that the very general adoption by the states of the method of selection by popular election represents in great part a change from prior practice. The nature of the change and the reasons for making it are interestingly set forth by Mr. W. S. Carpenter in his valuable study on judicial tenure in the United States. After pointing out that the states very generally changed from the system of tenure during good behavior to one for a term of years, he writes:[6]

> The abolition of tenure during good behavior for the judicial office was closely followed by the application of the elective principle in the selection of judges. . . . The adoption of popular election for the judges of the supreme court of Mississippi in 1832 marked the beginning of the change in the mode of selection. . . . It was not until New York in 1845 altered its constitution to give to the people the choice of judges that the expedient of popular election secured widespread acceptance. With the leading state in the union in the advance, no less than seventeen states in the following eleven years gave to the electorate the choice of judges, . . . and at the beginning of the Civil War the system stood in nineteen of the thirty-four state constitutions. . . . All attempts to supplant the mode of popular election for the choice of judges have failed. The New York constitutional convention of 1915 gave extended consideration to proposals to vest the choice of judges in the governor alone. The members of the legal profession from the urban districts at least favored an appointive judiciary. But the laity, especially in the rural districts, appeared irrevocably opposed to any change in the mode of selection. The professional politicians were equally vigorous in their opposition to the adoption of the appointive system. . . . After the subject had been fought out in the convention the friends of the appointive judiciary conceded that victory, if it ever comes to them, will be in the remote future.

Methods of Improving System of Selection by Popular Vote. Having stated the several methods of selection of judges and the

[6] Judicial tenure in the United States, 178, 181, 184 (1918).

arguments for and against each and described conditions in the United States in respect to the employment of these methods, it remains to determine the extent to which these conditions are satisfactory, and, if not, the direction that efforts for their change should take.

Students approaching the problem of the method of selecting judges from the theoretical or general standpoint, are in substantial agreement that the method of selection through appointment by the chief executive, or by the head of the judicial system, is best adapted to securing the double objective of an independent judiciary and judges of assured competence in respect to their technical and personal qualifications. To them, the improvement of the judicial systems of the states in respect to this feature lies in the abandonment of the method of selection by popular election or by the legislature, and the adoption of the federal system of appointment by the chief executive. With this position the present writer is in thorough accord. Unfortunately, however, there is little or no probability that the states can be induced, within any reasonable time, to adopt this policy. This being so, the practical problem of improving the judicial system of the states in respect to the method of selecting judges is that of improving the workings of the election system. In considering the problem from this restricted standpoint, one cannot do better than follow the arguments of the Committee on Judicial Selection in its report to the Conference of Bar Association Delegates, American Bar Association, July 7, 1924.[1]

That report starts with the assumption above made, that efforts to improve conditions in the United States in respect to the selection of judges, if they are to have a practical character, must be directed toward betterment of the method of selection by popular vote rather than in seeking to have that method supplanted by one of the other methods. As is well known, electorates do not directly select candidates for office: all that they do is to make a choice between two or three candidates who are brought forward by political parties, and more rarely by other organizations. The greatest opening for improving the popular vote system, therefore, lies in the development of practices and traditions to ensure that the candidates will be of a high character.

[1] Reproduced in *Journal of the American Judicature Society*, August, 1924.

The most effective means for securing this desirable end the committee finds to be that the organized bar shall play a dominating rôle in the nomination of candidates, or at least in passing upon the qualifications of candidates. In order that it may play this part, the bar must make definite provision in its constitution for the discharge of this function. In the United States this provision has taken three forms: (1) The whole matter of selecting, or passing upon the qualifications of, candidates for the bench is in effect turned over to a special committee; (2) use is made of a plebiscite vote of the entire membership of the bar association for the purpose of determining preferences in respect to candidates; and, (3) use is made of a plebiscite, but the committee is charged with the duty of collecting and furnishing to the members information regarding prospective candidates, and in some cases of adding its own recommendations.

The first plan where the matter is in effect turned over to a select committee is one that is adapted to large cities where the membership of the bar association is so large that the taking of a plebiscite is difficult and lacks in effectiveness due to the fact that the candidates to be voted upon will be personally unknown to a considerable proportion of the membership. This plan, sometimes known as the "New York Plan," is the one used by the Bar Association of the City of New York and the New York County Lawyers' Association. Its operations, as described by the Committee on Judicial Selection, are as follows:

Each has its Committee on the Judiciary and in each case the duty devolves upon the Committee carefully to consider the fitness of candidates nominated or proposed to be nominated for election and with the duty specially enjoined to confer with committees and conventions holding the power of selection. In the one Association, the committee reports its recommendations in turn to that Association for such action in respect to candidates as the Association might deem advisable, which recommendations, however, have been practically always approved and endorsed by the Association. In the other Association the committee reports "its recommendations to the Board of Directors for such action thereon as the Board may deem advisable." In neither is there taken a plebiscite of the Bar.

Philadelphia also makes use of this plan, though, if need be, a formal vote of the membership of the bar association in attendance at a special meeting may be taken.

There, selection rests primarily with the committee which may in its own discretion and upon its own initiative call a meeting of the Association, and this body, in turn, may then determine whether the occasion is such as to require its action. In the event such action is considered advisable, then at an adjourned meeting of the Association, ballots are submitted containing the names of candidates " proposed by the committee and also of candidates nominated by petition of at least fifty members of the Association," whereupon, subject to definite regulations, a vote is taken and the candidates thus chosen by two-thirds of the members present are deemed to be " the candidates of the Association." It will thus be observed that the expression of choice on the part of the Association as a whole is conditioned in the first instance upon the will of the designated committee.

The second plan, that where use is made of a formal plebiscite, is the one employed by Detroit, St. Louis, and Los Angeles.

Under the direction and supervision of a designated Committee, printed ballots are prepared, mailed to the members of the Bar or Bar Association, who return their votes by post enclosed within envelopes intended to assure their secrecy, or else, as the case may be, the ballots are deposited within the hours named in a locked ballot box and the proceedings conducted in a manner not unlike the official election. The ballots are likewise counted by the Committee and the results announced.

The third plan, where use is made of a plebiscite, but a committee collects and furnishes information regarding candidates and may even add its recommendations, is illustrated by the systems of Cleveland and Chicago.

In both Associations, the plebiscite of the Bar is retained and yet in each the designated committee is made to exercise duties important and helpful in the selective process. In the Cleveland Association the Committee is required to collect biographical data of the candidates and furnish these for the use and information of the members. Pertinent questionnaires are prepared and submitted to the candidates which, when answered, serve as the basis for the printed pamphlet which is posted with the referendum ballot. The recent success experienced by that Association in the selection of judges of the Municipal Court would stress the wisdom of the system in vogue. The plan adopted by the Chicago Bar Association differs only in degree. It accords to the judiciary committee even more enlarged functions, by virtue of which the power and duty reside not only to furnish information concerning candidates but

also to recommend. Based upon the report thus filed a vote of the membership is taken. Here are preserved in large measure the best features of each group, a definite expression from the committee, a referendum choice by the Association and yet with it all an elimination of those objectionable elements usually attendant upon the plebiscite in the very large associations. With a membership of exceptional proportions, the Chicago Bar Association has thus not abandoned the plebiscite, while at the same time it has utilized the functions of its committee quite as liberally as obtains under the "New York Plan." Prior to the Bar primary the Committee secures exhaustive information concerning the candidate, publishes a booklet giving a brief biography, likewise displaying his picture, and concludes with a recommendation characterizing the candidate as either "qualified," "fairly well qualified," "well qualified," "exceptionally well qualified," or as "unqualified" or "unfit," Again, after the nomination and prior to election the Committee published another pamphlet with its estimates of qualifications once more recorded. While the electorate has not always responded to the recommendations of the Association, nevertheless the successes achieved bear evidence of the possibilities of this system of selection. The virtue of the plan further lies in the elastic powers of the "Committee on Candidates" and in the reasonable assurance of the fairness of its personnel consisting as it does of nine members "preferably former presidents of the Association."

In seeking to perform its function as a selective agency to aid the bar and the public generally in making fit selection for the judiciary, the bar association must adapt its methods to the electoral system that is in force. Particularly must its procedure vary according as use is made of the convention or primary in the selection by party organizations of their candidates. As regards the general situation, the Committee on Judicial Selection says:

Other things being equal, the non-partisan principle of selection is to be preferred to the partisan, but no method can succeed unless definite responsibility is somewhere made to rest upon the legally constituted selecting power. The more completely and the more openly this responsibility can be placed, the more scrupulously will the selecting power respond to the higher ideal. It is this that speaks forcibly for judicial appointment as opposed to judicial election, or, if there be adopted the system of election, then for the open-convention as opposed to the boss-ridden primary, or if through either convention or primary, then under those conditions that make possible the selection of judicial candidates apart from the political candidates generally. Indeed, were it possible to accomplish but a single reform in the election laws of the several states,

that which would provide for the separate election of judicial candidates would stand out as the most potent factor for good.

In the convention states, the efforts of bar associations should be directed toward having the respective political parties select as their candidates for judicial office those who have received the approval of the bar association as determined by one or the other of the methods that have been described. In those states making use of the primary, the situation is more complicated. There influence must be exerted at three stages: the pre-filing date; the pre-primary date; and the pre-election date.

In respect to the first of these, the committee says:

It will be readily understood that it is quite as important a function for the Bar Association in the first instance to induce fit candidates to file for nomination as it is to aid in their selection thereafter. Without adequate material from which to chose the incentive for selection is lost. And here lies an important phase of the problem. For it is essentially true that there are those of the finest judicial temperament and yet of the finer sensibilities who hesitate to lend themselves to the scramble of the general primary, unless, indeed, they first have the reasonable assurance that they will receive the endorsement of their fellows; and this, of course, in advance of the filing date. To conduct a Bar primary for this purpose would be to encumber the machinery beyond measure and serve to wear out the patience of the Bar. Clearly it would seem that the function of thus inducing able candidates to lend their names and of giving to them at least the comfort of encouraging support should belong to the judiciary or other like committee of the Association.

The time for filing under the primary law having passed, the bar association may seek to influence the voting at the primary in various ways. As illustrative of this, the committee describes the procedure of the three bar associations of Detroit, Chicago, and St. Louis.

In Detroit, the bar association provides that each member of the association, irrespective of party affiliations, will vote " for as many candidates as there are vacancies or places to be filled." This plan is subject to the objection that some of the candidates endorsed may fail of nomination at the primary, with the result that at the election there may not be as many candidates receiving the endorsement of the association as there are positions to be filled.

In Chicago the bar association holds two primaries, one prior to the general primary and the other prior to the general election. At the first, candidates are classified according to party and each member, irrespective of political affiliations, is requested to vote for as many Republican and as many Democratic candidates as there are places to be filled. At the second, each member is requested to vote for as many candidates as there are positions to be filled. This system meets all the requirements of the situation, but it is subject to the objection that it calls for two votings on the part of the bar membership.

In St. Louis, the members of the bar association vote but once, and at this time they are directed to cast their ballots upon partisan lines, the members of each party indicating their choice of candidates to be nominated at the primaries of their respective parties. No attempt is made to guide members in making a choice between the candidates of the parties at the general election.

A matter of some importance is whether the bar association should seek to secure an expression of preference on the part of its members alone or of the entire bar, irrespective of affiliation with the association. The committee is in favor of the former system. This is on the assumption that the conditions of membership in the association are such that no reputable attorney is excluded and the effort is made to have the association include as far as possible all such persons.

Finally, the committee holds that the bar association has not completed its task in taking steps to determine and make known its choice in respect to the selection of judges, and that it should assert itself in a vigorous advocacy, if not campaign, in behalf of its choice. The successful campaign made by the Cleveland Bar Association in a recent election of judges of the Municipal Court is cited as an example. The steps taken in Cleveland are thus described:

(a) Advertisements were inserted in newspapers having a varied character of circulation.
(b) Some seventy-five local organizations were communicated with and their interest and assistance solicited.
(c) Editorial approval was had in the leading newspapers of the city.

(d) Fifteen thousand letters were mailed by the committee to the members of the Chamber of Commerce and kindred organizations.
(e) Lawyers were requested to address and mail fifty personal letters, each, to their friends and clients. In addition a multigraphed form of letter was furnished to various lawyers for their use.
(f) Three hundred and twenty-five thousand campaign cards were distributed. They were delivered to lawyers to be enclosed in their local mail and likewise to 475 factories in the city.
(g) Four thousand five hundred placards were posted and distributed.
(h) A speaker's bureau was established with thirty members of the bar enrolled for service.
(i) Approximately two hundred of the younger members of the bar responded to the call for workers at the precincts on election day.

The contention that remedial efforts should take the form of improving the method of selection by popular vote rather than of attempting to abolish the elective system, is supported by the Cleveland Crime Survey and also by the conclusions reached by Professor Carpenter in his able study from which we have quoted. The Cleveland Survey, thus, first states its preference for the method of selection through appointment by the chief justice in the following words:[8]

It is the consensus of opinion of the bar and the unanimous conviction of the ablest students of our legal institutions that strong and well qualified judges are most certainly secured when they are appointed by the Executive and hold office for life, subject, of course, to removal for misconduct. On the evidence, there is every reason to believe that this method of selection, or a modification of it, plus long tenure, would do more than anything else to revolutionize the present state of affairs. If it be within the field of possibility this is unquestionably the goal to be striven for.

The report goes on to state, however, that in most cases the public will not accept this, and consequently the practical problem is to improve the elective system.

The secret in obtaining good judges is that back of the method—whatever it is—there must be a tradition which makes the selecting

[8] Criminal justice in Cleveland, 364, 276.

group (*i. e.*, nominating influence) realize that it is a clear public policy to retain judges in office except for grave mental, moral or physical defects. This tradition has been built up in New York, Wisconsin, Vermont, Connecticut and elsewhere.

Its final conclusions are set forth as follows:

(1) The appointive method with provision for a retirement election whereby a judge runs against his own record.
(2) A modified appointive method, as, for example, an elective Chief Justice who appoints his associates.
(3) A modified elective system whereby judges are elected for a short first term, but if reëlected, then for progressively longer terms. Judges standing for reëlection should not run against other candidates, but only against their own records. The single question presented to the electorate should be, "Shall this judge be retained?"

Professor Carpenter's conclusions are as follows:[9]

The method of selecting judges is perhaps best determined by local conditions. The general conclusion to be drawn from "reports and opinions of leading lawyers throughout the country is that the character and ability of the bench are governed, practically, by the tone and demands of the average public sentiment in a given locality rather than by the particular system through which such sentiment asserts itself." (See the report of Simon Fleischmann: Influence of the Bar in the Selection of Judges. Proceedings of the New York State Bar Association XXVIII, pp. 60-130). In Vermont where the supposedly discredited system of legislative appointment is in vogue, the judiciary is one of the most satisfactory in the country. Although appointments are made for but two years, public opinion has long since taken a firm stand so that judges are as a matter of course reëlected from term to term during life. Rhode Island with the same system has a much weaker bench since members of the legislature are frequently chosen without regard for legal ability or personal character. Like contrasts are to be found in the states in which the judiciary is appointed, as well as in those in which it is popularly elected. In Wisconsin the elective judiciary has achieved unusual distinction.

The fact that an elective system can be made to work with satisfaction, is, however, no conclusive argument in favor of the elective system. It will be noted that this system works in Wiscon-

[9] Judicial tenure in the United States, p. 212.

sin primarily because, while the system is elective in theory, it is in fact appointive, the real selection being made by the Bar. The same or even better result could be had if the selection were made by the governor through appointment, being guided by the recommendations of the bar, as he in fact is in making interim appointments. Under existing conditions, the elective process adds nothing, while introducing an element of uncertainty that can do harm.

Selection Through Promotion. In the administrative field the principle of filling superior positions by promotion of officers already in the service is very generally employed and with good results. It is rather remarkable that this system is used only to a comparatively slight extent in the United States in the selection of judges, for it would seem to be of special applicability in the case of the federal judiciary where there is a hierarchy of courts running from the district courts, through the circuit courts of appeal, to the Supreme Court. It is unusual, however, to fill vacancies in the Supreme Court by the appointment of judges of the circuit courts of appeal or vacancies in the latter tribunal by the appointment of men filling the position of district judge. In the great majority of cases, the appointees are selected from among practicing attorneys. The same practice very generally obtains in respect to judicial appointments in the states.

It is difficult to see why this practice is so general. In other countries, and particularly in Germany and France, the promotion system is the one generally, if not invariably, followed. It should be noted, however, that in those countries the judiciary is recognized as a distinct profession apart from the practice of the law, and that men prepare themselves specially for this branch of legal work. The principle of filling judicial offices by promotion is thus a logical feature of that system. Though there is little likelihood that such a system will ever be established in the United States, there is no reason why this special feature of that system should not be adopted. Its advantages are that, it gives greater assurance that only men of assured competence will be selected for high judicial office, and it acts as a stimulus to good work on the part of judges holding the subordinate positions.

Judicial Office as a Profession. It is impossible to study the problem of judicial administration without being impressed with

the extent to which the proper functioning of courts is dependent upon the securing of proper incumbents for the office of judge. There is complete agreement that this office is one calling for special technical attainments of a high order and peculiar personal qualifications, such as the judicial temperament, ability to disentangle complicated issues and to distinguish between the essential and the non-essential or immaterial; and experience in the performance of duties of the office is of great value.

Yet there has never been any marked tendency in either England or the United States to view the office of judge as a distinct profession. No provision has been made in our law schools or elsewhere for special instruction in the duties of judges or for the development of those personal traits and methods of thought which all are agreed judges should have. No distinction is made between the training of men for the bench and for the bar, and entrance to the former is exclusively attained through the latter, although the attitude of the two toward judicial issues are, or should be, fundamentally different. The attorney is a partisan or advocate, but the judge must avoid anything in the nature of advocacy. Furthermore, little consideration is given to the factor of experience. The tenure of office in the states is usually for but a period of years, often relatively short, and as has elsewhere been pointed out, only to a slight extent does the practice obtain of looking to persons holding inferior judicial positions for the selection of men to hold the superior judicial positions.

This whole system is in marked contrast with that obtaining in many European countries. In Germany, for example, the whole theory of the judicial system, from the personnel standpoint, rests upon the principle that the three fields of work: that of the bar or private attorney, that of the states attorney or public prosecutor, and that of the bench or judge, constitute distinct professions calling for different qualifications, knowledge, and experience and requiring special preparation. Though all students at law pursue at the outset the same course of studies and serve the same apprenticeship as assistants to practicing attorneys, public prosecutors, and judges, the time comes when they must decide as to which of the three branches they intend to adopt and follow as a profession. Thereafter, their work lies in their chosen field. In the case of those selecting the profession of judge a beginning is made through re-

ceiving appointment at the bottom of the ladder as assistant judge at a moderate salary. Thereafter, advancement is had through appointment on the promotion principle to the successive grades of judgeships for which the judicial system makes provision. A necessary feature of this system is the existence of the principle of permanency of tenure, that is, of having all appointments for life or during good behavior, except as appointment is made to a superior position.

Though there is little or no likelihood that the United States will soon change its existing system, in the sense of going over to one so radically different as that of Germany, it is nevertheless desirable to know that there is in practical operation a system under which the principle of treating the office of judge as a distinct profession receives full recognition, and there is a strong argument in favor of at least accentuating this principle in seeking to improve methods of judicial administration in the United States.

CHAPTER XXVIII

TENURE OF OFFICE OF JUDGES

From the standpoint of securing an independent judiciary, the matter of tenure of office is as important as the method of selection. The choice lies between three tenures: (1) During the pleasure of the appointing power; (2) during good behavior; and (3) for a term of years. The distinction between tenure during pleasure of the appointing authority and tenure during good behavior is that, while both are without terms, or for life as it is sometimes termed, the former can be terminated at any time by the appointing power, while the latter can be terminated only for cause, the validity of which must be determined by a formal procedure whether through impeachment or address by the two houses of the legislature.

In the administrative field much can be said in favor of the tenure during pleasure for positions corresponding in importance to that of judges, for the appointing power is directly responsible for the work of his immediate subordinates, and it is desirable that subordinates shall be in full harmony with the policies and plans of their superiors. Instead of independence, subordination is desirable. No such condition obtains in the judicial branch. Here, as has been abundantly shown, it is of the essence of the judicial office that action shall represent independent and uninfluenced judgment. In this branch there is, therefore, no place for tenure during executive pleasure, as experience has fully demonstrated. Not until the power of the English King arbitrarily to dismiss judges was taken away by the Act of Succession following the Revolution of 1688, was an independent judiciary secured in England.

The undesirability of judicial tenure during pleasure is now generally recognized in the United States. The issue is between tenure during good behavior and tenure for a term of years. This issue has, in general, been decided one way by the federal government and another way by the states. As a result of constitutional provision, all judges constituting a part of the federal judiciary,

strictly speaking, hold office during good behavior and can be removed only through the process of impeachment. In the states, the prevailing tenure is that for a term of years, the length of the term varying greatly.

It is significant that the adoption of this tenure represents in great part a change from the original system. Speaking of this change, Professor William S. Carpenter says:[1]

In theory it was universally agreed that the judges must be independent and to this end the usual tenure in the early constitutions was during good behavior. This was the tenure provided in the constitutions of Massachusetts, Delaware, Maryland, Virginia, North Carolina, South Carolina, and in those drawn up in New Hampshire and Vermont. New York had the same tenure except that there the judges retired at the age of sixty years. In Pennsylvania and New Jersey the appointments were for seven years. In Connecticut and Rhode Island where they did not frame constitutions but continued their charter governments the judges were still appointed annually by the legislature. In Georgia the people elected their judges annually.

But the principle of legislative supremacy which in 1776 was so dominant both in England and in the colonies caused much influence over the judiciary to be exercised by the assemblies. In most of the states the legislature controlled the appointment of the judges. In Connecticut, Rhode Island, New Jersey, Virginia, North Carolina and South Carolina, the legislature appointed directly. In New Hampshire, Massachusetts, Pennsylvania and Maryland, the governor acted with a Special Council of Appointment. Judicial appointments in Delaware were made by the legislature and the executive.

Whatever may have been the causes which induced particular states to abolish the tenure during good behavior, the movement spread rapidly throughout the entire country. Following the lead of Alabama, Mississippi in 1832 altered the tenure of judges in that state to a term of six years. Between that date and the outbreak of the Civil War in no less than twenty-one states was the term of the judicial office limited to a period of years. Many of the changes occurred in the new constitutions which were adopted in the western states as they gained admission to the Union. These states uniformly preferred a term of four or six years but it is a striking feature of constitutional development in the older states that they embodied similar changes in their reconstructed charters.

[1] Judicial tenure in the United States, 4-5, 176.

The objections to the tenure for a term of years, as opposed to that during good behavior, are that it lessens the independence of the judge, who is always confronted with the fact that failure on his part to make his decisions conform to the opinions or wishes of the selecting power may jeopardize his reappointment or reëlection, and also that it is more difficult to get men of the desired qualification to accept office for a term of years. Both of these objections are especially serious where the method of selection is by popular election, and both have added weight according to the shortness of the term of office.

The merits of tenure during good behavior are generally recognized, and the fact that it has given good results in practice in the federal judiciary is generally accepted, yet the overwhelming opinion in the states is in favor of tenure for a term of years in combination with the method of election through a popular vote. This is due to two causes: the exercise by the courts of the power to nullify legislation by declaring such legislation to be in contravention of constitutional provisions; and the difficulty that is encountered under the tenure during good behavior of getting rid of judges who for physical reasons or misconduct prove to be unsatisfactory.

That this opinion has considerable basis there can be no doubt. In regard to the first cause the following should be borne in mind. The legislation whose constitutionality is most frequently called in question is that which is designed to accomplish what is believed to be social reform. It represents the will of the people as expressed through their representatives in the legislative branch. In many cases the question of the validity of this legislation turns upon questions of fact or at least of personal judgment in respect to facts, such, for example, as to whether hours of labor of a particular duration are or are not injurious to the health of workers in such a way as bring their regulation by law within the police power of the state. In general, such legislation seeks to resolve the conflict between the strict support of individual rights and the promotion of social welfare in favor of the latter. Due to the part played by the courts in determining and limiting the action of the state in the field of social reform, the feeling is widespread that the existence of a system under which judges, whose bent of mind may be such, or whose adherence to the principle of individual rights may be so rigid, as to make it difficult if not impossible for the

will of the people to find expression in positive law, are practically irremovable, presents a real danger. Under the system of tenure for a term of years, it is possible to substitute for such judges men having a more liberal outlook.

An alternative remedy is that of amending the constitution so as to permit of the passage of the desired legislation in a form that will meet judicial objections. Unfortunately, the process of amending American constitutions is an exceedingly difficult one to operate. It has long been the belief of the writer that this difficulty in securing the modification of our constitutional provisions so as to make them conform to new conditions or new ideas in respect to the scope and character of governmental powers, is a serious defect in our political system. No such condition of affairs exists in other countries and there is no evidence that the greater ease with which their constitutions may be modified leads to unwise action or results in an unstable political system. The removal of this ground for opposition to the tenure of judges during good behavior is, therefore, to be found in changing the provisions governing modification of our constitutions.

The second reason for preferring tenure for a term of years, is, a valid one so long as present conditions governing the removal from office of unsatisfactory judges exist. The remedy lies in devising better methods for effecting such removal. A consideration of this question forms the subject matter of the next chapter.

CHAPTER XXIX

METHOD OF REMOVAL OF JUDGES

It has been pointed out in the chapter on an independent judiciary that security of tenure and protection against arbitrary removal are essential if any independent judiciary is to be secured. On the other hand it has been shown in the preceding chapter that one of of the prime objections to life tenure is the difficulty in getting rid of judges found to be unsatisfactory. One of the problems of judicial administration is, therefore, to devise a system under which judges who for any reason may prove to be incapacitated, incompetent, or unfitted for the discharge of their duties, may be removed from office without too much trouble, and which at the same time presents guarantees that the power of removal will not be employed for improper reasons, and especially that it will not be employed as a means of controlling or interfering with the exercise by the judge of his judicial discretion. This problem, it may be stated at the outset, is one that has not been satisfactorily solved in the United States.

Examination of existing conditions reveals that four methods of removing judges are employed, or advocated, in the United States: (1) The process of impeachment; (2) the process of address of the two houses of the legislature; (3) the abolition of the court over which the judge whom it is desired to remove presides; and (4) the dismissal from office or "recall" of the judge by popular vote. The first two methods are much more important than the last two, since they constitute the normal methods employed in securing the removal of judges. The last two, as will be shown, are ones to be employed only under exceptional circumstances and thus are relatively of little importance. The problem resolves itself into a comparison of the advantages and disadvantages of the first two methods and of the modifications that it may be desirable to effect in reference to them.

Impeachment. Under the method of removal through impeachment a judge may be removed upon being convicted of any one of

certain constitutionally enumerated offenses. Such conviction must be secured upon charges formulated by the lower house of the legislature, and tried by the upper house sitting as a high court of justice. This is the system that has been adopted by the United States in respect to all federal civil officers, including judges. The sections of the Constitution making such provision read as follows:

The President, Vice President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. (Art. II, Sec. 4).

The House of Representatives . . . shall have the sole power of impeachment. (Art. I, Sec. 2, Par. 5).

The Senate shall have the sole power to try impeachments. When sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present. (Art. I, Sec. 2, Par. 6).

Judgment of Impeachment shall not extend further than removal from office and disqualification to hold and enjoy any honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law. (Art. I, Sec. 3, Par. 7).

The provisions in state constitutions are substantially the same.

The prime characteristic of this system is that it partakes wholly of a judicial character. In the first place the lower house acts as a grand jury. It investigates charges that have been raised, and, if it finds sufficient evidence to warrant such action, formulates what is in effect an indictment. It thereupon selects one or more of its members to act as prosecuting attorneys to represent it in the trial of the charges that ensues before the upper house sitting as a court of justice. The accused judge is informed of the specific charges that are preferred against him; is allowed the services of counsel to protect his interests, and is given all the rights that he would have in a court of law to produce evidence in his behalf and to refute the evidence that is produced against him. It will be noted that here, as in the case of procedure by address, action is taken by the legislative branch.

Joint Address of Two Houses of the Legislature. The procedure of removal on joint address of the two houses of the legislature is that whereby a judge is removed by the two legislative houses voting

affirmatively to that effect. In the United States, it would be effected by the passage by the legislature of what is known as a concurrent resolution. It is to be noted that this method may, but does not necessarily, call for the giving to the judge against whom it is directed an opportunity to be heard in his own defense; that the proceeding need not necessarily have the character of a trial; and that the preceding is wholly a legislative one, since no intervention on the part of the executive is provided for, either in the way of initiating the proceeding or in approving the action taken.

This method was first developed in England, provision being made for it in the Act of Settlement as one of the means of securing the independence of the judiciary from the arbitrary action of the Crown. Its effect was to change the tenure of judges from one during the pleasure of the Crown to one during good behavior, and to vest the power of removal in the legislative branch of the government, instead of the executive. As might be expected, this method was very generally adopted by the states in the drafting of their early constitutions. Though provision for this method is still to be found in many of the state constitutions, it has been largely discarded, preference being given to the method of removal through impeachment, for which provision is also made. Thus, Professor William S. Carpenter writes:[1]

> As a matter of fact, removal on legislative address has become in nearly all the states obsolete. Short terms and popular elections have made the judges more responsible to public opinion and have at the same time rendered them more independent of legislative control. Then too the exercise of the power of removal on address has been hedged about by many constitutional restrictions. In most states a majority of two-thirds of both houses of the legislature is required to pass on address, while in many states the judge is entitled to a hearing and a statement of the causes of removal. The procedure is thus made as cumbersome and unwieldy as an impeachment and legislatures have hesitated to undertake its exercise. In recent years the tendency has been to free the judiciary from legislative control and to this end Alabama, Florida and Mississippi have removed the provisions relating to legislative address from their constitutions.

Comparison of the Two Methods. If the effort is now made to contrast the merits of these two methods, it will appear that each

[1] Judicial tenure in the United States, 134.

has its advantages and disadvantages. The impeachment method is superior in that it gives to the accused the greater protection resulting from the judicial nature of the proceedings and provides that the accused must be charged with a specific offense; that he must be informed of the nature of the charge; that this charge shall be for an offense covered by the provisions of the constitution setting forth the grounds upon which impeachment may be had; that the accused may be represented by counsel; that he shall have full opportunity to be heard in his own defense through his own testimony or such other legal evidence as he may desire to produce; and that the burden of proof rests upon the prosecution. Furthermore, as a necessary consequence of the foregoing, this system has the great merit that it practically precludes proceedings being taken against a judge for purely political reasons or because the legislature may be dissatisfied with his attitude toward the constitutionality of legislative acts or the soundness of his judicial decisions. None of these safeguards are present in the case of the method of address by the two houses unless there is incorporated in the constitution requirements similar to those enumerated above, in which case this method becomes practically the same as that of impeachment, differing little from it except in name. In England, where the system of address has no such collateral requirements, Parliament has full power to remove a judge for any reason that it sees fit, and in reaching a decision to employ such procedure as it deems proper. This means that while the judiciary is independent of the executive, it is not independent of the legislature. This system may be thoroughly consonant with the fundamental principle of the English political system, that of the supremacy of Parliament.[2] It does not, however, accord with the American principle of the separation of powers or with the belief on the part of the American people that the independence of the judiciary of legislative influence and control should be as complete as its independence of executive action. The American governments, federal and state, have thus shown wisdom in preferring the method of procedure through impeachment even when the possibility exists for the use of the method of address.

[2] It is only proper to state, however, the Parliament exercises this function in a highly judicial manner.

Failure of Impeachment to Meet All Requirements. In giving a verdict in favor of impeachment, it is not intended to indicate that this method is in all respects satisfactory. In point of fact several grave objections may be urged against it, at least in the form in which it has existed during the greater part of our history and still exists in large degree. First, it is a procedure that may be invoked only in those cases specifically enumerated in the constitution. The federal Constitution thus provides that impeachment will lie only for "treason, bribery or other high crimes and misdemeanors." Strictly construed, a judge may be removed through impeachment proceedings only when he has been convicted of a criminal offense. There are many other circumstances which may render it desirable that the office of a judge should be vacated. The cases giving trouble are those in which the element of grave misconduct is absent but the incumbent of judicial office is believed to be unfitted for his post as the result of failing physical or mental powers, or demonstrated unfitness from the temperamental or technical standpoint. Cases have not been infrequent where a judge has suffered impairment of his mental faculties, where his lack of physical powers has prevented him from properly attending to the work of his court, or where his attitude toward the bar and cases coming before him has been such as to make it impossible to secure a proper administration of the law. It was due largely to cases such as these that the states, many if not the majority, of which started with a judicial tenure during good behavior, abandoned that system for the tenure for a term of years. Thus, Judge Simeon E. Baldwin writes:[3]

> The change from life tenure to that for a term of years was partly due to several instances which occurred early in the Nineteenth Century in which it was evident that the judges had outlived their usefulness. Judge Pickering of the District Court of New Hampshire lost his reason and to get rid of him it became necessary to go through the form of impeachment. In 1803 Judge Bradbury of the Supreme Judicial Court of Massachusetts, who had been incapacitated by paralysis was displaced in the same way, though only a few months before his death. In 1822 an old man who was the chief judge of one of the judicial districts of Maryland was presented to the grand jury as a "serious grievance" on account of his habitual absence from court. His physician certified that

[3] Baldwin, The American judiciary, 323.

his life would be hazarded if he undertook to attend, but the natural answer was that he should resign.

The question of physical or mental incapacity, moreover, does not exhaust the cases in which the retention in office of a judge may be highly detrimental to the public interest. No matter what the method of selection, with the possible exception of promotion, or the care used in making selections, it is certain that some persons ill fitted for the position will be selected. These are the cases most difficult to handle, since neither moral misconduct, nor physical or mental incapacity can be alleged. Often, the basis of the objection to a judge is indolence, lack of care, lack of decision, or other failings of a general character that make him a misfit. Though, as has been elsewhere pointed out, the primary causes for the delay, uncertainty, and expense in the administration of justice are organic in that they are to be found in the faulty system of courts and procedure employed, responsibility for these evils in no small degree, also attaches to the judges themselves. Thus, to mention but one personal failing of judges that is too often in evidence, there is the practice of taking cases under advisement and postponing their decisions for long periods of time. To quote from former Senator Joseph W. Bailey:[4]

Our trial judges have fallen into a habit—a habit which, I regret to say, is growing despite its manifest evils—of taking so many cases under advisement that they find themselves with more to do in chambers than in their courtrooms. Any good trial judge ought to be able to decide a case at the conclusion of the argument, assuming that the lawyers have argued it properly. Certainly he ought to be better able to decide it then, when the impression made on his mind by the evidence and the arguments are distinct, than when he reaches it six weeks or six months later after having disposed of the others previously taken under advisement, and when those impressions have been almost completely effaced.

In many other ways the faulty administration of justice in the United States is due to the personal failings of the judges. Too often they do not properly control attorneys in the presentation of their cases and permit proceedings to drag out for days, weeks, or even months. They permit conduct on the part of attorneys which,

[4] The American judiciary, Report, American Bar Association, 1915, p. 341.

to say the least, is unethical. They grant continuances and postponments for inadequate reasons and in many other respects fail to discharge their duties in a vigorous and efficient manner. It is safe to say that the danger to the public welfare resulting from these causes far outweigh that due to positive misconduct of a character sufficiently grave to lay the basis for impeachment proceedings. It is undoubtedly due to these considerations that, in the national government itself where all the traditions are in favor of the tenure during good behavior, Congress, whenever it has had the option, as in the cases of creating courts for the territories and dependencies, has adopted the tenure for a term of years instead of during good behavior. The real objection to the impeachment procedure is that it is exceedingly elaborate and throws upon an already overburdened legislature an additional task that may interfere materially with the performance of its legislative duties. To use the words of Justice Stone,[5] "the removal by impeachment is a cumbersome and unwieldly proceeding so difficult of application that it is likely to be invoked only in the most flagrant cases of judicial misconduct."

It would seem to be clear that the judicial system of the United States is defective in that it makes practically no provision for handling these cases, which in the aggregate are of great importance. The attempt to meet the needs of the situation through the abolition of tenure during good behavior and the adoption of tenure for a term of years, is an effort in the wrong direction. At best, it is only a partial remedy; for as a rule, judges are allowed to serve out their terms instead of being relieved immediately upon the necessity therefor arising. The form that action should take is that of broadening the grounds upon which resort to impeachment proceedings may be had. The first step in this direction should be that of giving a non-legal or non-technical construction to the phrase "other high crimes and misdemeanors." Such a construction was adopted by Congress in the successful impeachment, in 1913, of Judge Archbald of the United States Commerce Court. In this case the charges were of a character, that if proven, would obviously render the defendant unfit for the performance of his judicial office, but they were not technically offenses covered by the criminal code.

[5] Harlan F. Stone, Law and its administration, 187.

The defense rested almost entirely upon the claim that the charges did not allege an impeachable offense. The Senate, however, took the position that impeachment would lie in any case of a serious offense involving moral delinquency even though such offense was not recognized by the criminal law. In doing so, it created a precedent that will undoubtedly be influential in all future impeachment proceedings whether before Congress or a state legislature.

Even broadened in this way, the impeachment proceeding is still inadequate to meet the many other cases in which the public interest would be served by the removal of a judge. There have been cases where a judge had become so enfeebled by age that he slept most of the time while on the bench and the trial was in course, and where a judge continued to serve after he had lost the use of his mental faculties. In neither of these cases was the judge guilty of misconduct or any act that would warrant impeachment. After all, however, cases such as these are relatively rare. Much more frequent are cases where a judge shows himself to be incompetent or to lack the will properly to perform his duties. This condition can only be met by rewording the constitutional provision setting forth the grounds upon which impeachment will lie so as to make it cover all cases where in the interest of the due administration of justice resort to it should be had. In effecting this rewording a clear distinction might well be made between those causes which involve charges of moral turpitude and those carrying no such stigma, so that in proceeding under this provision it will clearly appear whether the charges brought are ones reflecting upon the moral character and conduct of the defendant or merely alleging facts carrying no such reflection upon the accused.

Abolition of Courts as a Means of Removal of Judges. The third method of removing judges that has been mentioned is that of abolishing the courts over which the judges whom it is desired to remove preside. The repeal by Congress, in 1802, of the act of 1801 providing for the appointment of sixteen additional circuit judges, largely for the purpose of removing from office judges who had been appointed at the end of the preceding administration, definitely established the power of the legislative branch to bring about the removal of judges through this method and thus to avoid

resort to the impeachment process.[6] The same power has been asserted and successfully exercised in one or more of the states. Manifestly, this method is not adapted to meeting the great majority of cases where the removal of a judge is thought desirable. It should be, and in fact has been, employed only when the circumstances are exceptional. It scarcely figures, therefore, as one of the methods available for meeting the problem of the removal of judges.

Recall of Judges. A final method of removal of judges is through their "recall" by vote of the electorate. Advocates of the adoption of this method, while holding that it may properly be employed when the personal conduct of the judges is unsatisfactory, have had chiefly in view its use for the purpose of removing judges whose decisions in respect to the constitutionality of social legislation or the enforcement of certain laws, has not conformed to the wishes of the electorate. It has already been pointed out in the chapter on the necessity for an independent judiciary, how destructive the possibility of such action would be to the independence of the judiciary. As Justice Taft has so clearly pointed out in the communications there quoted, judges are not representatives of the people in the way that officers of the other two branches of the government are: on the contrary one of their prime functions is the protection of the minority against the majority. It would be unwise in the extreme, therefore, to make any provision whereby a judge may be removed from office by popular vote simply on the ground of the manner in which he has exercised his judicial discretion.

The objections to the use of this method for the removal of judges whose personal conduct is not approved, are equally weighty.

[6] In United States v. Haynes, 29 Fed. Rep. 696, the court said:

"The original jurisdiction of the Supreme Court is conferred by the Constitution and Congress has no power to enlarge or restrict it. But the jurisdiction of the inferior courts is derived from and is subject to the absolute control of Congress and may be changed or taken away at pleasure. Existing courts may be abolished and their jurisdiction and all cases pleading in them, whatever their condition, transferred to other existing courts or to new courts."

The abolition in 1913 of the United States Commerce Court that had been established in 1910 is another example of the removal of judges through the abolition of the court, though here belief in the lack of need for this tribunal as well as discontent with its decisions was a motive for the action.

All of the objections to the impeachment method as being cumbersome, expensive and difficult of operation, apply with equal if not greater force to this method. In addition, there is the danger that the recall will be employed for purely political motives. It is fortunate, therefore, that the movement for the adoption of this method, which was so strong a few years ago, has largely lost its force and is now little urged.[1]

[1] Though not involving the question of the removal of judges it is pertinent to say a few words regarding the proposal, which was strongly urged a few years ago, that the electorate should have the power to override a decision adverse to the constitutionality of a legislative act. How strong was the movement for the adoption of this device, known as the recall of judicial decisions, can be seen from the fact that its adoption constituted one of the planks of the platform of the Progressive Party in 1912: "The Progressive Party demands such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy. To secure this end it pledges itself to provide: 1. That when an act passed under the police power of the state is held unconstitutional under the state constitution by the courts the people after an ample interval for the deliberation shall have an opportunity to vote on the question whether they desire the act to become a law notwithstanding such decision. . . ." The constitutions of Arizona and New Mexico, as first drafted, contained sections providing for this device, and as a result the resolution providing statehood was vetoed by President Taft. It was not until they had been omitted that the two territories secured their admission as states.

All of the objections that may be urged against the recall of judges apply with equal force to the recall of judicial decisions. The vital objection to both is that they necessarily tend to destroy the independence of the judiciary. Furthermore, they tend to throw the whole function of adjudication into the arena of partisan politics. The present writer is in thorough sympathy with the feeling that led to the advocacy of these devices; namely, that many judges had unwisely exercised their judicial discretion. The remedy lies, however, in resort to the process of constitutional amendment; and to this end, as has already been pointed out, the process of constitutional amendment should be made easier. Another method of meeting the situation would be to have the constitution provide that legislative enactments could be nullified by the courts only upon the affirmative vote of two-thirds or three-fourths of the judges of the court of last resort. There is substantial unanimity of opinion that the benefit of the doubt should always be in favor of validity of the will of the legislature when properly expressed. The fact that certain of the judges passing upon the issue are of the opinion that the act in question is valid raises such a doubt. It would seem, therefore, that it would be logical and it is believed without any element of danger, if the provision existed that something more than a majority would be required to declare an act invalid. It is recognized that this question is one in regard to which great differences of opinion exist. Limitations of space prevent, however, its more thorough consideration here.

General Summary. It is evident from the foregoing that this problem of devising a satisfactory removal system for judges is by no means an easy one. The general conclusion is that in the impeachment process is to be found the best method of procedure, but that the constitutional provisions providing for this process should be modified so as to cover all classes of misconduct and all cases of incapacities resulting from any cause whatever, physical, mental, or temperamental, a clear distinction being made between the two classes of grounds of removal, those carrying with them the stigma of moral misconduct and those which do not. To meet those cases where the decisions of a judge in respect to the constitutionality of legislation are seriously out of harmony with the wishes of the people as well as for other reasons, it is desirable that our constitutions should be amended so as to make the effecting of modifications in them easier. In conclusion it may be noted that should our states adopt the desirable reform of unifying their court systems along the lines of the English Judicature Act, it may be feasible to grant to the chief justice of this unified court the power to inquire into the conduct of inferior judges, and if need be to remove them from office after opportunity has been given them to be heard in their own behalf.[8] The institution of a proper retirement system under which judges reaching a certain age are retired with a pension will also do not a little in the way of removing from the bench judges who, account of failing powers, are more or less incapacitated for the performance of their duties.

[8] In considering this problem the system in Germany for handling such cases offers many points of interest.

In Germany, the judicial tenure is for life or during good behavior. Notwithstanding this provision is made for the removal of judges who for any reason are unable, or fail, properly to perform their duties. One method is that of compelling the retirement under the pension system. If, for example, a judge of the Reichsgericht, due to physical disabilities, fails to apply for retirement under the pension system, the full bench of that court may compel his retirement after a hearing at which he and the states attorney have been given an opportunity to be heard. When this has taken place he is allowed a pension equal to one-third of his salary if he is retired before he has served ten years with an increase of one-sixtieth for each additional year of service, the period of public service being counted from the time the judge first entered service whether as a referendar or in any other capacity. When the ground for action is lack of industry, failure to exhibit the judicial temperament, incompetence from the technical standpoint or other like cause the matter is handled by a special court of inquiry.

CHAPTER XXX

THE BAR

From the personnel standpoint, the prime requisite of an efficient system of judicial administration is upright, capable, and courageous judges. The efforts of these officers will be seriously handicapped, however, if they are not aided by an equally honest and technically competent bar. The legal principle has always obtained that attorneys are officers of the court before which they practice, and that as such it is their duty to aid the courts in the ascertainment of the facts and the determination of the law. The effective application of this principle requires two things: first, that the members of the bar shall possess the intelligence, knowledge of the substantive law, and familiarity with the rules of judicial procedure which will facilitate the proceedings before the court and assist the judges in the exercise of their judicial function, and, second, that they shall at all times and in all respects exercise their functions in a conscientious and upright manner.

Fundamental Requirements. If these two requisites are to be met the following action must be taken. In the first place, standards of requirements must be established, the meeting of which shall be a condition precedent to the person being given the status of attorney with the right of appearing before the courts as a representative of parties to a litigation, and these standards must be of a nature that will ensure that those meeting these requirements have the moral character, general intelligence, education, and the technical qualifications that will fit them to discharge their duties properly as officers of the court. Secondly, a procedure must be provided by which candidates for admission to the bar may be tested for the purpose of determining whether they meet these standards and for the formal admission to the bar of those successfully meeting such test. Thirdly, rules of conduct must be drafted and prescribed which will set forth clearly the manner in which those admitted to the bar should conduct themselves in respect to their relations to the court, their fellow bar members, and their clients.

Finally, provision must be made for the examination into those cases where there are grounds for believing that members of the bar may have failed to conform to these rules of conduct, or have in any manner misconducted themselves in respect to the performance of their duties as officers of the court, and the imposition of such penalties, involving if need be the revocation of the right to appear as attorney before the court.

Though there is no disagreement regarding the status, functions, and general obligations of members of the bar and no differences of opinion regarding the necessity for the making of the provisions that have been set forth, there is a wide diversity of practice in the United States in respect to the character of these provisions and the manner in which they are, in practice, administered. It is only too well known that in many jurisdictions the standards of requirements for admission to the bar are so low or so laxly administered that the bar in those jurisdictions now embraces many members possessing neither the technical qualifications, the general education, nor the moral qualities fitting them for the performance of their duties; that improper conduct, often of a gravely unethical character, on the part of members of the bar is frequent and that such misconduct is engaged in with impunity, due to the absence of proper means for inquiring into such conduct and taking the action that the findings would render desirable. It is impossible to estimate the damage that results from this condition of affairs. Apart from the personal injustice that is often thereby caused, it renders more difficult the whole task of administering justice and does the incalculable injury of bringing into disrepute the administration of the law.

These evils are well recognized by both the bench and the bar, and important efforts are now being made for bringing them under control. The following paragraphs describe these efforts, and set forth the extent to which they are meeting success.

Movement for a Legally Organized Bar. Undoubtedly the most important effort now being made to improve the character of the bar of the United States consists in the movement for the enactment of legislation by the states which will provide for an official organization of the bar in each state upon which will be conferred the function of determining, in the first instance at least, the re-

quirements for admission to the bar, and of administering the system for determining the meeting of these requirements by candidates; formulating the rules of conduct to govern the bar in the performance of their duties; and organizing and administering a system for the disciplining of members guilty of violating the provision so laid down.

This demand for a statutory organization of the bar, with legally defined duties and powers, rests upon the claim that not only have the courts and the voluntarily organized bar failed to meet the requirements of the situation, but that they are inherently unfitted to do so. The courts, though they very generally have the power to control admission to the bar and to discipline members of the bar found guilty of misconduct, can do comparatively little on their own initiative. They are compelled to rely upon the voluntary action of the bar, both in the holding of tests for determining qualifications for admission to the bar and in bringing to their attention and presenting the facts regarding misconduct on the part of members of the bar. If all cases of misconduct which require disciplinary action were made the subject of a formal trial, the courts would have thrown upon them a burden of work that would seriously interfere with the performance of their primary duties. The existing voluntarily organized bar associations suffer from the serious defect that they embrace only a relatively small proportion of the entire membership of the bar, and thus cannot speak for the entire bar; and that they do not have brought home to them in a sufficiently affirmative way their obligations in respect to controlling the character and conduct of the bar.

The remedy, it is believed, is to be found in the organization by law of the entire bar of each state into a body having the character of a public corporation, and of entrusting to it primary responsibility for the formulation and administration of the rules to govern admission to the bar, the conduct of bar members, and their discipline in cases of misconduct.

The movement for the organization of a self-governing bar of this character was inaugurated by the American Judicature Society. In its first bulletin it made suggestions for legal reform, among them one reading as follows:[1]

[1] Causes for dissatisfaction with the administration of justice in metropolitan districts: an analysis, Bulletin 1.

It is suggested that what is needed is a legally incorporated society which shall include all lawyers by the simple process of fixing the fees to be paid and the requiring of every lawyer, as a condition to continuance in practice, to keep up his membership in the society; that the governing board of such society should be composed of representatives elected for a considerable term and that the governing board should have power conferred upon it to enforce the rules of the highest court of the state as to admissions to the bar; also to enforce any authoritative code of legal ethics and disbar members.

In its Journal for December, 1918, was published an article, entitled "Redeeming a Profession: Introducing a Practical and Logical Plan for Bar Organization which will Enable the Bar to Realize Its Highest Ideals," elaborating upon this proposal and including a draft of a model act providing for putting it into effect. This at once attracted attention and received the support of many leaders of judicial reform in the United States. Of it, Dean Roscoe Pound wrote:[2]

The general principle of a self-governing profession seems to me a distinctly good one, and I believe it would be a step in advance to incorporate the legal profession and commit to the profession its own regulations as was done from time immemorial at common law, and as is still done in most English-speaking countries.

There seems to me to be three possibilities: (1) An unregulated profession with free admission and no discipline, leaving everything simply to litigation between attorney and client or to criminal prosecution as a last resort. We tried this system for a long time in this country and I do not think it can be said that our experience was such as to commend it. (2) Regulation of admission to the profession through commissions or examining boards appointed by courts to administer statutory requirements of admission leaving matters of discipline to the voluntary and extra-legal action of bar associations, but leaving the profession legally unregulated as before. Such is the situation in most of our states at present. (3) The original common-law idea of an incorporated profession regulating itself. I should have no fear that a self-regulating profession would regulate itself in its own interest rather than in the public interest because the lawyer is so continually under fire that the legislative steam-roller would be invoked at once were any such tendency to appear. The advantages of a self-regulating profession seem to me to be that regulation of the profession be-

[2] *Journal of the American Judicature Society*, June, 1920.

comes somebody's business and not everybody's business, and thus a real professional tone and spirit can be kept up. Our codes of professional ethics are important by way of declaration of ideals, but if they are to be put into action they must have something more behind them than their intrinsic authority.

Of the proposal, Charles E. Hughes wrote:[3]

The movement for legislation providing for the official organization of our state bars is one of the most hopeful means for the attainment of a more orderly and efficient administration of justice and it ought to command our earnest and self-sacrificing support.

Elihu Root from the beginning, has been a strong supporter of the proposal. Largely at his instance, the Conference of Delegates of the American Bar Association, in 1919, made provision for a Special Committee on State Bar Organization to which was entrusted the work of considering the proposal and draft model act as prepared by the American Judicature Society. This committee has submitted six annual reports, in all of which the proposal has been strongly endorsed.[4] The committee has also reviewed the draft of the model act as originally prepared by the American Judicature Society.[5] The chief changes made were in eliminating the provision that the state bar be organized as a corporation by a special statute and that the organized bar have final authority in respect to the discipline of bar members. These provisions were open to the objection that in a number of states the granting of charters by special act is prohibited by the constitution, and that it was not feasible, even if desirable, that the final authority of the supreme court of the state in respect to the disciplining of members should be disturbed. The revised draft thus provides for the organization and functioning of the existing state supreme court bar and the entrusting to the bar as so organized the function of determining and administering the rules to govern admissions to the bar and the disciplining of bar members, leaving to the

[3] Letter as Chairman of the Conference of Bar Association Delegates, February 8, 1926, calling a meeting of the conference.

[4] For copies of these reports, see *Journal of the American Judicature Society.*

[5] For a copy of this model act, see *Journal of the American Judicature Society,* December, 1926.

supreme court final authority in respect to the latter matter. Under this system all that was sought by the original draft can be equally well accomplished.

The organization of the bar is to be effected by providing by statute for the creation of a board of commissioners of the state bar of fifteen members, to be elected by the members of the bar by ballot by mail, and providing that each member of the bar, as a condition precedent to voting and acting as attorney, shall pay a license fee, the proceeds of which shall constitute a separate fund for meeting the expenses of the board of commissioners. This board is made the governing body of the organized bar, and to it are given the following powers:

The Board of Commissioners shall have power to determine, by rules, the qualifications and requirements for admission to the practice of the law, and to conduct examination of applicants, and they shall from time to time certify to the Supreme Court the names of those applicants found to be qualified. Such certifications shall entitle such persons to be enrolled in the Bar of the State and to practice law. The Board shall formulate rules governing the conduct of all persons admitted to practice and shall investigate and pass upon all complaints that may be made concerning the professional conduct of any person admitted to the practice of the law. In all cases in which the evidence, in the opinion of a majority of the Board, justifies such a course, they shall take such disciplinary action by public or private reprimand, suspension from the practice of the law, or exclusion and disbarment therefrom, as the case shall in their judgment warrant. The Supreme Court may in any case of suspension or disbarment from practice review the action of the Board, and may on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment.

The Board of Commissioners shall also have power to make rules and by-laws not in conflict with any of the terms of this act concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the Board and of the State Bar.

Other sections provide for the procedure to be followed in enquiring into complaints regarding the professional conduct of members, and empower the board to subpœna witnesses, call for the production of papers, etc.

Following the recommendations of the Special Committee of Delegates of the American Bar Association, the bars in a large

number of states have formulated and promoted the passage of bills for putting these recommendations into effect. Acts of this character have been passed by North Dakota, 1921, Alabama, 1923, Idaho, 1923, New Mexico, 1925, California, 1925, and Nevada, 1928. In view of the fact that this system has received the endorsement of the bar associations of a large number of other states, it is to be anticipated that it will be extensively adopted in the immediate future. With its extension, the basis will be laid for the correction of the evils now so prevalent in this branch of judicial administration, and the system for the regulation of the bar by the bar itself will conform to the practice that exists in all other modern governments.[6] The movement for a more integrated and strengthened bar is further evidenced by the steps taken in a number of states to bring together, through a process of affiliation or federation, the local bar associations as constituent members of the state bar association.[7]

Training for the Bar. Another line of attack in the effort to improve the American bar is that of strengthening the requirements in respect to general education and technical training of candidates for admission. The United States began its national existence with a strong prejudice against lawyers as a class and a belief that any man of ordinary intelligence was qualified for the practice of the law. Such special training as was needed, it was believed, could be secured through work for a relatively short period of time in the office of a practicing attorney and the reading of a few general works, chief of which was Blackstone's famous Commentaries. This feeling found expression in the absence of, or the imposition of but slight, requirements for admission to the bar. At least one state, Indiana, put in its constitution a provision that all citizens should have the right to practice law, a provision which is still found in that document.

[6] "We call attention of the conference to the fact that this is the only civilized nation in the world in which the judicial bar is not a self-governing, responsible body politic, and it is likewise the only civilized nation in which the title of a lawyer does not carry with it a guarantee of professional integrity and responsibility."—First report of the Special Committee on Bar Organization, Conference of Delegates, American Bar Association, *Journal of the American Judicature Society,* October, 1920.

[7] See *Journal of the American Judicature Society,* December, 1928, and February, 1929.

Whatever the justification for this position in early times, when conditions were relatively simple, it passed away with the increasing complexity of the economic life of the people and the corresponding increase in the complexity of legal questions arising therefrom. In response to the demand for a better training of the bar, the subject of law became one of the studies at the universities, and, in time, special law schools came into existence. The first professorship of law in the United States was that established at Columbia University, then King's College, in 1773. In 1794, Justice Kent, afterwards Chancellor Kent, was appointed to this chair and his lectures were published as his Commentaries, a work which exercised a profound influence upon the development of the law in the United States. The first special law school, in the modern sense, was the Litchfield Law School established at Litchfield, Connecticut, in 1784. The Harvard Law School was founded in 1817 and the Columbia Law School in 1858. The establishment of other law schools followed, until today they are to be found throughout the country.

For many years these schools were responsible for the training of but a small proportion of those admitted to the bar, the great majority of lawyers receiving their training, as in the past, through the reading of law in the office or under the direction of a practicing attorney. Steadily, however, the position has been increasingly taken that a satisfactory training for the bar can only be secured through attendance at an adequately equipped and properly run law school, and efforts have been made to make such attendance a condition precedent to candidates presenting themselves for admission. In this effort to make the educational requirements for admission to the bar more rigid, the American Bar Association has taken the lead. In this it has been supplemented by the Association of American Law Schools, which has sought to improve and maintain at a high level, the standards of the law schools, no law school being admitted to its membership that does not conform to its standards.

The early efforts of these two organizations to raise the standards of legal education and admission to the bar have been summarized by the Carnegie Foundation for the Advancement of Teaching as follows:

The first pronouncement of the American Bar Association in regard to law school entrance requirements was made in 1897 and called for no more than the completion of the equivalent of a high school course. This standard was reiterated, more emphatically, in 1908. In this same year the Association of American Law Schools, which had recently made it incumbent upon its member schools to require of candidates for the degree, at the time of their admission to the school, either the completion of a four years' high school course or a preparation that would admit to the principal colleges and universities of their states, expressed "the earnest hope" that ultimately all its members would require at least two years of college work. Finally, in 1918 the American Bar Association "approved the action taken by many of the law schools in requiring two years of a college course as a condition of admission to their courses of study" and "expressed the conviction that this should be the minimum requirement recognized by law schools of the first class. . . . It was not until 1897 that the American Bar Association formally approved the lengthening of the course of instruction in law schools to three years. Three years later the Association of American Law Schools, by a rule effective in 1905, required its numbers to maintain a three-year course.

The foregoing action had reference primarily to raising the standards of law schools. Concurrently, the American Bar Association was laying increased emphasis upon the necessity for candidates for admission to the bar having taken a minimum of instruction in a school conforming to such standards. Efforts in this direction came to a head in 1921, when the Association adopted the following significant resolution:[8]

1. The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:
   (a) It shall require as a condition of admission at least two years of study in a college.
   (b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.
   (c) It shall provide an adequate library available for the use of the students.

[8] Annual Report, 1921.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

2. The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

A further resolution directed its Council on Legal Education and Admission to the Bar to call a Conference on Legal Education in the name of the American Bar Association, to which state and local bar associations should be invited to send delegates, for the consideration of these resolutions and for the purpose, if possible, of reaching a general agreement on the part of the bar of the country in respect to this question of educational requirements. In pursuance of this resolution, a notable conference of Bar Association Delegates on Legal Education was held at Washington in 1922, at which forty-four state and over one hundred local bar associations were represented. At this conference the resolution of the American Bar Association, which has been reproduced above, was approved, but certain observations were appended to such approval to meet the objection that the requirements set forth, if too rigidly insisted upon, might tend to set up a monopoly in the practice of the law in a restricted class. These observations, in part, read:

Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class.

We endorse the American Bar Association's standards for admission to the bar because we are convinced that no such monopoly will result from adopting them. In almost every part of the country a young man of small means can, by energy and perseverance, obtain the college and law school education which the standards require. And we understand that in applying the rule requiring two years of study in a college, education experience other than that acquired in an American college may, in proper cases, be accepted as satisfying the requirement of the rule, if equivalent to two years of college work.

If account is taken of the large membership of the American Bar Association and of the wide representation of the bar generally

at the Washington conference, the foregoing may be taken as the matured opinion of the American bar regarding the educational requirements that should be met by candidates for admission to the bar. The standard set up is high, if viewed from the standpoint of existing conditions in respect to requisites for admission to the bar. In point of fact, such a standard had not been reached by a single state of the Union at the time of its adoption. Its adoption, however, has had great influence, and one state after another has strengthened its requirements. This standard will undoubtedly be very influential with the legally organized bars in performing their duty of fixing and administering standards for their respective states.

Code of Legal Ethics. In the same way that it has sought to determine the minimum educational requirements for admission to the bar, the American Bar Association has also sought to formulate those rules which should govern the professional conduct of members of the legal profession after they are admitted to practice. After considering the subject for a number of years, it formulated in 1908 a "Code of Ethics," which was not only formally adopted by the American Bar Association, but has subsequently been approved by the state bar associations of practically all of the states. In this code the legally organized bars of the states find the general standards to guide them in performing their duty of devising rules for the government of the professional conduct of their members.

PART V

PROCEDURE

CHAPTER XXXI

SOME GENERAL CONSIDERATIONS

With a judicial organization effected and provision made for its manning with a proper personnel, there is then presented the problem of determining the rules that shall govern the manner in which this organization shall actually function. Though this problem is essentially the same as that confronting both the legislative and administrative branches, it is one of peculiar importance in the case of the judicial branch, since the character of these rules affects not merely the efficiency and economy with which the machinery is operated, but also the extent to which justice is done to the individual parties litigant. In probably no country in the world is this more true than in the United States where, as will be shown, the rules are of a highly complicated and technical character and their rigid observance is one of the controlling factors determining the outcome of litigation.

In few respects has the system of judicial administration in the United States been more severely criticized than as regards the character of the rules governing the practice and procedure of the courts and the manner of their application. They are generally complicated and technical in the extreme. Though conditions in the federal courts are admittedly superior to those in most of the state courts the Senate committee in reporting a bill providing for a reform in the federal system characterized the existing system in the following terms:[1]

> The system of procedure which now prevails in the Federal Courts is complicated, unscientific and results in great and unnecessary delay in the administration of justice. It is almost as important that litigation in the courts shall be disposed of promptly as that it shall be disposed of justly. That cases should be delayed month after month and sometimes year after year, should be reversed and tried and retried, upon mere matters of practice that in no way touch the essential merits, is one of the reproaches in the administration of the law which has had a greater tendency to bring the practice of the courts into disrepute than any other thing.

[1] 64 Cong., S. rep. 892.

The defects here characterized in general terms are many. One is the persistence of archaic forms of expression and the wholly unnecessary circumstantiality with which simple facts are set forth in legal documents. Though some improvement has been effected in recent years, these documents are still largely expressed in a legal jargon that is almost incomprehensible to the ordinary layman and with a detail that multiplies greatly the possibility of inadvertent error. This is especially so in the field of criminal jurisprudence, and finds its most striking illustration in indictments. In the words of a president of the American Bar Association:

A Bill of Indictment was a marvel of a legal craft. It was specific to a degree suggesting great delight on the part of the draftsman in the horrible details of the crime he was describing. If it was murder, he described the defendant and his victim, the time and place, the manner of committing the offense, with what sort of weapon, the value of the weapon, in which hand it was held, the number of wounds inflicted, upon what portion of the body, how long, how wide and how deep and much more of the same sort. As the more detailed the description the greater the liability to mistake, to avoid the objection of variance he multiplied his counts, the differences in them being as to the kind of weapon used, or as to the hand in which it was held or the position of the body upon which the wound was inflicted and so on until the indictment was expanded into thirty or forty counts and all in Latin.[2]

That this policy and archaic form of statement still persists, though no longer in Latin, is evidenced by the following indictment that was used at a comparatively recent date in the courts of the State of New York:

The Grand Jury of the County of Kings, by this indictment, accuse John Johnson of the crime of murder, in the first degree, committed as follows:

The said John Johnson, late of the Borough of Brooklyn, of the City of New York, in the county aforesaid, on the 15th day of October, in the year of our Lord one thousand nine hundred and nine, at the borough, city, and county aforesaid, with force and arms, in and upon one Peter Smith, willfuly, designedly, premeditatedly, feloniously, and from a deliberate and premeditated design to effect the death of said Peter Smith, did make an assault.

And the said John Johnson a certain pistol then and there charged and loaded with gunpowder and one leaden bullet, which said pistol

[2] Frederick W. Lehman, Address before the Oklahoma Bar Association, 1909.

he, the said John Johnson, in his right hand then and there had and held, then and there willfuly deliberately, premeditatedly, feloniously, and from a deliberate and premeditated design to effect the death of the said Peter Smith, did discharge and shoot off, to, at, against, and upon the said Peter Smith, and the said John Johnson, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the said John Johnson shot off and discharged as aforesaid, then and there wilfully, deliberately, premeditatedly, feloniously, and from a deliberate and premeditated design to effect the death of the said Peter Smith, did strike, penetrate, and wound him, the said Peter Smith, in and upon the said, chest, lung, body, and vital parts of him, the said Peter Smith.

How unnecessary is this prolixity, is shown by the fact that under the reformed practice of New York, this indictment, which contains 911 words, is replaced by the following form which contains but sixty words.

The Grand Jury of the County of Kings by this indictment accuse the defendant of the crime of murder in the first degree committed as follows:
The defendant on October 15, 1909, in the County of Kings, wilfully, feloniously, and of malice aforethought, shot Peter Smith with a revolver, thereby inflicting injuries of which he died on October 18, 1909.

That the same sort of language is employed in other documents is shown by the following form, used in Rhode Island, where the action was one for breach of promise to marry:

A. B. being then sole and unmarried, in consideration that the plaintiff (then also sole and unmarried) at the special insistence and request of the said defendant had then and there promised the said defendant that she would marry and take to husband the said defendant when thereunto requested; has the said defendant then and there forthwith promised the said plaintiff that he would marry and take her to wife when thereunto requested; and altho the said plaintiff, confiding in the aforesaid promise of the said defendant, has always from thence hitherto refused to marry or contract matrimony with any other man whatsoever and still remains sole and unmarried, and always from the time of making said promise was ready and willing and offered to marry and take to husband the said defendant; viz on ——— at the said ——— yet the said defendant, not regarding his said promise but continuing to deceive and defraud the said plaintiff in these particulars

and totally to hinder her from the preferment and good fortune she would have met with by such marriage hath not taken her the said plaintiff to wife, tho the said defendant afterwards, to wit on the ———— and often before and after that time hath been thereto requested by the said plaintiff. But the said defendant hath always hitherto refused so to do. To the damage of the plaintiff $50,000 as laid in her writ of ————. Wherefore she sues.

The persistence of primitive and long outworn practice is evidenced by the long retention of Latin as the language of legal documents. For centuries after English became the language of the country, the courts of England continued to make use of an alien language. Pleadings and writings were in bad Latin and reports of adjudicated cases in Norman French. This continued until the time of Cromwell and the Commonwealth, when the use of Latin was abolished. With the Restoration, however, Latin was restored and continued in use for the pleadings and records in all cases, civil and criminal, until 1730, when English was again made the language of the courts by act of Parliament. This, however, was accomplished only after a bitter fight led by Raymond, the Chief Justice of the Kings Bench. A generation later, Blackstone in his famous Commentaries, regretted the change, and Ellenborough at a still later date preferred to his own English the use of a language which had never been the vernacular of any people.

Closely allied with use of an archaic language is the emphasis that is laid upon matters purely of form. Almost every step has to be taken in a certain prescribed way, almost every departure from which constitutes a fatal defect. The common law procedure, as it developed in England and was adopted in the United States, provided a particular form of action for each wrong and a particular procedure for prosecuting this action. If mistake was made in selecting the action to be pursued, the case was thrown out of court and proceedings had to be begun again. It is in the rules governing the production of evidence, however, that formalism and intricacy reached their peak. So complicated are these rules that it is almost impossible for even the experienced lawyer to observe them with certainty or the trained judge to enforce them with accuracy.

Still other defects are: the inadequate provision, through the use of masters on the English model, for the handling of matters

collateral to the main issue, and the complete development of the facts alleged before the case comes on for formal trial to the end that the time and energies of the court may be economized and delay and unnecessary expense avoided; the inadequate powers exercised by the judge in respect to the control of proceedings before him and the advising of the jury in respect to its duties; the excessive right that exists for the defeated party to carry his case to a superior court through the process of appeal and the lack of power on the part of such appellate tribunals fully to consider the merits and to make final disposition of the cases coming before them.

After all, however, the fundamental defect of the American judicial procedure system lies in the doctrine, which generally prevails in the United States, that these rules of procedure should have as controlling force in the administration of the law as those determining substantive rights, and that, as a consequence, any error in their application, no matter how trivial in character, vitiates proceedings and lays the ground for reversal of the action had under them. To such an extent is this true that actions in court to a large extent, have degenerated from proceedings in which the main effort is directed to determining the facts and the substantive law applying to such facts to ones of a battle of wits between opposing counsel over the mere procedure to be employed, each attempting to secure a technical advantage by entrapping opposing counsel or the judge into the commission of an error in respect to procedure to lay the ground for a reversal of the decision, should such decision go against him. That this is not an exaggerated statement, is shown by the following statement by Mr. Justice Sutherland of the Supreme Court of the United States in a hearing on a bill having for its purpose to improve procedural conditions in the federal courts.[3] Calling attention to an investigation made under the auspices of the American Bar Association of the extent to which the decisions of courts turned upon matters of procedure, instead of the substantive law, he said:

They found by going over the digests for a period of three months that more than one-third of the time of the courts, take the country at large, was devoted to practice questions; that is, devoted to finding out how they should reach the final decision which was the im-

[3] Hearings before Sub-Committee of the Senate Judiciary Committee, February 2, 1924.

portant thing. In Delaware for example, out of the various points decided, 64 per cent of them were procedural points. In the Federal courts, 49 per cent, nearly one-half. I do not mean to say that as much time would be devoted to those questions of procedure as would be devoted to substantive questions, but as nearly as we could estimate at the time at least one-third of the time of the appellate courts was devoted to those questions.

This attitude by the courts, which made adherence to form and procedure as important as the substantive rights involved, has persisted throughout the whole history of Anglo-American jurisprudence, though, strangely enough, it has been materially weakened in its country of origin, England, while persisting with little impairment in the country adopting it, the United States. Like so many other features of our judicial system, this unfortunate condition is due wholly to the historical conditions under which this system developed and not to a belief in its intrinsic merits. The situation is thus one where a system, having a justification at the time of its development, utterly fails to meet the requirements of changed conditions. To quote one of our leading students of jurisprudence:

Elaborate, formal, detailed procedure (at one time) served a substantial purpose. It antedates the systematic development of substantive law. It goes back to a time before the thorough working out of a system of individual legal rights. Before the time of a body of substantive law, before the evolution of the system of legal rights, the only check on the tribunal, the only security for liberty, was in strict rules of procedure rigidly administered.[4]

No such conditions obtain at the present time and whatever justification this system of elaborate rules may once have had has passed away. Professor Pound continues:

Today, our real check upon the judiciary, our real security against judicial willfulness and magesterial caprice is in the detail of the substantive law and the detailed system of individual legal rights which the substantive law recognizes or establishes and seeks to maintain and enforce.

Nowhere, so far as the writer knows, is this fundamental defect in our system of judicial procedure, and the action required to correct it, more clearly stated than in the article from which we have

[4] Roscoe Pound, The canons of procedural reform, *American Bar Association Journal*, August, 1926.

just quoted. After declaring that "nothing is more important in any program of procedural reform than to put procedure in its proper relation to substantive law" Professor Pound summarizes his conclusions in the following four canons:

1. Legal procedure is a means not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action. That procedure is best which most completely realizes the substantive law in the actual administration of justice. . . . Nothing is so subversive of the real purposes of legal procedure as individual, vested rights in procedural errors such as were asserted and enforced in our courts in the last quarter of the nineteenth century. The spectacle of rules of evidence made to prevent waste of public time, used as a means of obtaining new trials, to the utter waste of judicial time; of rules meant to assure the orderly course of judicial business used as rules of a game to enable litigants to thwart or delay the orderly presentation of the meritorious claims of their adversaries—such abuses as these had much to do in bringing about widespread popular dissatisfaction with the administration of justice at the beginning of the present century. Their relation to the way our substantive law developed out of procedure is clear enough. That they have no place in the maturity of law where substantive law and procedure are differentiated is no less clear.

2. There should be no such thing as an individual procedural right, *i. e.* a recognized absolute claim to a procedural advantage merely as such. It follows that it should be for the court, in its discretion, not for the parties, to indicate rules of procedure intended solely to provide for the orderly dispatch of business, the saving of public time and the maintenance of the dignity of tribunals; and that exercise of judicial discretion in such cases should be reviewable only for prejudicial abuse. . . . It should not be possible for a litigant to defeat his opponent or to throw him out of court and compel him to begin anew because of procedural rules.

3. The ideal of mechanical disposition of one narrow issue or of one simple application for a specific remedy should be replaced by an ideal of complete disposition of entire controversies in one proceeding in which all remedies of the legal system are available to give full effect to the substantive rights of the parties.

4. The ideal of appellate procedure should be, not a separate proceeding in a distinct tribunal but an application for rehearing, new trial, vacation, or modification, as the case may require, made in the same cause before another branch of the same tribunal.

The proposals now being brought forward and the efforts now being made to accomplish these fundamental reforms, are made the subject matter of the chapter that immediately follows.

CHAPTER XXXII

LEGAL BASIS AND CONTROLLING FORCE OF RULES

The first, and in many respects the most important, question to be decided in framing the rules for any government agency is as to the organ by which such rules shall be formulated and prescribed. Specifically, the issue here presented is whether such rules shall be prescribed by the constitution, by legislative enactment, by order of the agency itself, or partially by one authority and partially by another.

Constitutional Determination. In the case of the legislative branch in both our national and state governments, this question has been answered by the constitution laying down only the most general rules in respect to a relatively small number of essential matters and leaving to the legislative bodies themselves the right of determining the rules that shall govern them in the performance of their duties. The same is generally true of the administrative branch. Only in exceptional cases has the constitution or the legislature sought to prescribe in any detail the rules and regulations that shall govern the methods of procedure to be employed by the operating services. When we turn to the judicial branch, however, we find quite a different condition of affairs. Not only do most of the American constitutions contain provisions governing many of the most essential features of judicial procedure, but the legislatures have very generally taken to themselves the task of framing in considerable detail the procedure to tbe followed by the courts. Only to a limited extent, therefore, do the courts work under a system of rules that has been framed by themselves.

One can readily understand the historical justification for the insertion of most, if not all, of the provisions of the federal and state constitutions governing matters of judicial procedure. It is more than open to question, however, whether the justification for certain of these provisions has not passed. Certain it is that their existence has rendered much more difficult the reform of judicial procedure in this country. It is significant that proposals for con-

stitutional amendments in the states in recent years have related more to the judiciary articles of their constitutions than any other. It is not our purpose to attempt any general consideration of the character of these constitutional limitations except as they come up incidentally in examining specific questions. All that it is sought to do here is to point out the existence of these provisions and to indicate their bearing upon the movement for securing an improvement in the methods of judicial administration in the United States. No such obstacle stood in the way of the British Parliament when, through the enactment of the Judicature Act of 1873, it effected a revision of its judicial system that was revolutionary in respect to the improvement of existing conditions.

Legislative Determination. The situation, made difficult by these constitutional provisions, has been rendered still more difficult by the extent to which the Congress and the state legislatures have sought to prescribe in almost the last detail the procedure to be employed by the courts and the rules to be followed. No one doubts that the policy pursued in respect to the legislative and administrative branches, leaving to these organs the power to adopt their own rules—is the correct one. The question is thus raised as to whether the same policy should not be adopted in respect to the judicial branch. This question can be unhesitatingly answered in the affirmative.

Argument for Judicial Determination. In the first place all of the general or a priori arguments that can be brought forward in favor of this policy as regards the legislative and administrative branches, apply with equal if not greater force to the judicial branch. These arguments, stated briefly, are: (1) The greater competence of the service having actual responsibility for the performance of work to determine the manner in which such work shall be performed; (2) the greater ease with which the rules as originally framed may be modified from time to time as new needs arise and experience is gained; (3) the greater flexibility in the application of the rules to particular cases; (4) the subordination of the controlling force of such rules to the substantive rights or interests involved; and (5) the relief of an already overburdened legislature.

As regards the first of these arguments, the relative competency of the legislature and the judicial establishment as a rule drafting agency, there would seem to be no room for doubt. In one case, an agency not in immediate contact with the work to be done and not responsible for the details of operation, is seeking to determine the procedure to be employed. In the other, the agency is acting upon full information regarding needs and conditions to be met and with responsibility for results. As Professor Edson R. Sunderland has pointed out in an exceptionally able consideration of this subject:[1]

Rules of procedure laid down by legislative mandate do not grow spontaneously out of the exact requirements of actual practice, and they fail to show that delicate adaptability to circumstances which distinguishes a professional technique. They embody legislative theory, not judicial experience, and often tend to destroy by their clumsy abstractness the very purposes which they are created to serve. The subtle appreciation of the conditions of litigation which can come only to those who spend their lives in the active administration of justice, is not possible among the members of a popular assembly who meet to make the laws. Even though bills dealing with legal procedure may be drawn up by lawyer members, the political atmosphere of a legislative body is not friendly to the close and painstaking study of an intricate mechanism.

Equally beyond question is the validity of the second argument. As Justice Sutherland of the Supreme Court of the United States, in testifying before the Senate Judiciary Committee in favor of the bill conferring power upon the Supreme Court to adopt rules for cases at common law, said:

Now one of the big advantages about turning it (the framing of rules) over to the courts is that the power of amendment is readily exercised. Every man who has ever served in a state legislature knows how difficult it is to get through the legislature amendments that are needed with reference to procedure without getting them loaded down with things that are not needed—you introduce a bill in the legislature to simplify practice that is needed and every lawyer in that body who has got some pet theory loads it on, and the result is that confusion has grown instead of simplicity. Under a system of this kind (where the rule making authority is conferred upon

[1] The exercise of the rule making power, Report, American Bar Association, 1926; *American Bar Association Journal,* August, 1926.

the courts) whenever a defect appears in the rules the court can take it up, have a conference and determine upon it, and a new rule or amended rule, put in operation in a week or two weeks instead of going through a long process in the legislature to have it done. Now there is no reason why such a law should not obtain. The courts would not be called upon to make law. They would be called upon to determine how they should discharge their duties. Among all the various bodies that are engaged in governmental activities the courts are the only ones, so far as I know, that are not permitted to do that.

The Massachusetts Judicature Commission, which made a careful study of the steps to be taken to improve the judicial system of the state, was equally emphatic upon this point. After commenting upon the fact that in England since the Judicature Acts of 1873-5, and in New Jersey since 1912, the rule-making authority had been conferred upon the courts and that excellent results had followed from the adoption of this policy, it said:[2]

We believe it to be a sound proposition that so far as practicable, the power and responsibility for rules of procedure and practice should be given to the courts themselves, so that they may apply the lessons of experience and by reasonable experiments without the necessity of legislative action.[3]

Analogous to the advantage of being able readily to modify rules as need arises is that of the greater flexibility that exists when the rules are framed by the courts in adjusting the rules to varying conditions. A procedure that may be eminently satisfactory in some cases may utterly fail to meet the requirements of other cases. It is a waste of energy to apply the same detailed formal procedure requisite in the trial of important and complicated issues to that of

[2] Final Report, 1921.

[3] Notwithstanding this endorsement in principle of the policy of vesting rule-making powers in the courts, the Commission refrained from recommending legislation to effect this in Massachusetts, due, as the report states, to the comparatively satisfactory conditions as regards this phase of the administration of justice in Massachusetts, the broad rule-making powers already possessed by the Supreme Judicial Court and the Superior Court in virtue of Section 3, Chapter 158 of the Revised Laws and Chapter 213 of the General Laws, and to its belief that the Judicial Council the creation of which was being urged by the Commission would be an efficient agent for recommending the changes in practice and procedure that experience showed to be necessary.

relatively unimportant and simple issues, and the attempt to do so means a practical denial of justice, since the delay and expense involved more than offsets any possible gain, even if a favorable decision is secured. To a considerable extent, each class of cases requires a special procedure for its best handling. It is impossible for a legislature to provide in advance for all these varying needs. Only that body having in charge the actual performance of the work can, by a process of gradual action, develop rules of procedure adapted to such varying needs. As is pointed out in the chapter dealing with the development of municipal courts in the United States, the success of these tribunals has in no small degree been due to the fact that legislatures have wisely conferred upon them large discretionary powers to work out and modify from time to time the procedure to be employed in performing their duties. They have thus been able to frame special rules to govern the hearing of petty cases, to provide for special divisions to hear cases of juvenile delinquency, to make provision for the use of the method of conciliation, and in various other ways to mold their methods of procedure to the requirements of the different classes of cases coming before them. If a practical demonstration were needed of the desirability of the policy of entrusting the duty of framing rules upon the courts, it would be found in the experience of these courts under this policy.

After all, however, the greatest advantage of having the rules of judicial procedure prescribed by the courts instead of by the legislature or by constitutional provision is that it gives them merely the force of rules, while, if enacted by the legislature, they have the status of law the rigid observance of which is mandatory upon the courts and any failure in respect to observance lays the basis for an invalidation of the proceedings. As the Journal of the American Judicature Society puts it, the fixing of the rules of procedure by legislative enactment, "exalts mere procedural rules to the realm of substantive rights thus multiplying the number of issues to be tried and making our litigation more and more an inquisition into non-essentials." [1]

It is difficult to exaggerate the evils of this situation. More than anything else it is responsible for the prevalence of appeals from

[1] June, 1917.

trial courts to courts of review, with the consequent added delay and expense in reaching a final decision, and to the practical denial of justice in many cases due to the fact that the decision rests so often upon the mere technicalities of procedure employed rather than the substantive rights involved. As has been pointed out, a committee of the American Bar Association which investigated the subject in 1887 found that new trials were granted in 46 per cent of all cases brought under review in the appellate courts of the country. The New York State Commission on the Laws Delay, authorized by act of the legislature in 1903, found that the proportion in that state was 42 per cent, while Professor James A. Garner reported that the result of an examination made by him of the decisions of the Supreme Court of Illinois covering the period 1903-1905 showed 40 per cent of criminal cases reversed mostly for errors of practice and procedure in the trial court.

The extent to which mere technical errors in procedure have controlled the decisions of courts in this country is shown in part by the following quotation from an article by Professor James A. Garner on "Criminal Procedure in the United States."[5]

Some of the trivial reasons that have actually been assigned by the appellate courts of our states for allowing new trials are the following: because the name of the state was abbreviated in the indictment; because the word "feloniously" was omitted from the indictment, altho the evidence showed that the crime was committed with felonious intent; because the indictment merely stated that the victim "did then die" instead of stating that he "did then and there die"; because the word "maliciously" was omitted from an indictment charging the accused with arson altho it stated that the offense was committed "wilfully and feloniously"; because the indictment charged the defendant with "killing and murdering" instead of stating that he "did kill and murder" (the word "did" being held essential to a valid indictment); because the indictment charged the defendant with intent to "kill or injure" instead of to "kill and injure"; because the words "person or human being" were omitted from the indictment; because the defendant was allowed to offer evidence as to his good reputation for honesty and integrity but not as to his reputation for truth and veracity (thus assuming that the jury might not believe the testimony as to the former but might believe it as to the latter); because the judge was absent from the trial three minutes; because the words "on oath" were omitted from the indictment;

[5] *North American Review*, January, 1910.

because the officer who summoned the jury was not specially sworn; because the evidence on which a notorious robber was convicted failed to show whether the money stolen was coin or bills; because the property stolen (in this case 800 pounds of cotton) was not alleged to have any value; because the indictment which charged the defendant with burning a creamery described the offense as "arson" whereas arson is the burning of a dwelling; because an indictment charging the defendant with committing a crime at Westminster failed to state that it was the "town" of Westminster, etc."

This attitude of the courts toward mere technical errors had its historical justification. Early English criminal law was exceedingly cruel. The death penalty attached to petty offenses. Guarantees against oppression by the Crown were inadequate. More and more the people began to look to the courts for protection against the Crown and to the modification of the rigors of the criminal law. The only way open to the judges was to take advantage of every loophole to protect the defendant. These they found in the failure of the public prosecutor rigidly to comply with all the formalities of procedure.

This historical justification for placing the same or even greater importance upon mere technicalities of procedure as upon substantive rights has wholly passed away. The bench is now independent of any arbitrary sovereign, and the law has been humanized to such an extent that if anything too great regard is given to the defendant's interests as compared with those of the public. What at one time served a useful purpose, under existing conditions too often means the very negation of substantive justice.

The final argument in favor of entrusting the rule-making function to the courts is the incidental benefit that will accrue through the lessening of the burden upon our legislative bodies. Students of political science are now generally agreed that one of the fundamental reasons for the admittedly defective operation of American legislatures is that they have had placed upon them, or rather have assumed, the performance of tasks which they are not fitted to perform. James Stuart Mill long ago declared in his classic essay on representative government that the proper function of the legislature was to give general direction and see that its directions were properly carried out and not to attempt itself to specify the details of procedure. After pointing out that there is a radical

distinction between directing and controlling the business of government and actually doing it, and that the latter is a task that no numerous assembly with a constantly fluctuating personnel should attempt to perform, he said: "It is equally true though only of late and slowly beginning to be acknowledged that a numerous assembly is as little fitted for the direct business of legislation as for that of administration. . . . The proper duty of a representative assembly in regard to matters of administration is not to decide them by its own vote but to take care that the persons who have to decide them are proper persons." Again, "Instead of the function of governing, which it is radically unfit for, the proper office of a representative assembly is to watch and control the government, and throw the light of publicity on its acts, to compel a full exposition and justification of all of them which anyone considers questionable, to censure them if found condemnable, and, if the men who compose the government abuse their trust or fulfill it in a manner which conflicts with the deliberate sense of the nation to expel them from office and either expressly or virtually appoint their successors." "This," he continued "is surely ample power and security enough for the liberty of the nation." And, concluding this remarkable chapter, he said: "Nothing but the restriction of the function of representative bodies within their rational limits will enable the benefits of popular control to be enjoyed in conjunction with the no less important requisites (growing ever more important as human affairs increase in scale and in complexity) of skilled legislation and administration."

The history of legislative assemblies since this was written, nearly three-quarters of a century ago, has more than justified the views quoted. It may be laid down as a general rule that legislatures should not attempt to do anything that can be equally well done by another agency. Any departure from this rule lessens by just so much their effectiveness in the performance of their primary and essential function of determining policies, entrusting the execution of them to other agencies, and exercising such general supervision over such agencies as will ensure that they are properly performing their duties.

One does not, however, have to rest his advocacy of the system of vesting the rule-making power in the courts upon a priori considerations such as have been given. Everywhere, where this system

has been applied, it has given results of the most beneficial character. One has but to contrast conditions in England, where this system has always obtained, with those existing in the United States to appreciate both the importance of the question and the superiority of the system under which the duty of framing rules of procedure is entrusted to the courts. As one of our chief students of the problem has written:[6]

For 800 years the Anglo-Saxon conception of a court had been that of a dynamic agency clothed with the power to supply the people with every necessary means for enjoying the protection of the laws of the land. England chose to confirm and sustain that power, and in every one of the procedure acts which were passed in the course of her long struggles for reform, she expressly recognized and reserved the authority in the judges to make general rules and orders, even to the extent of changing the form of proceedings established by Parliament. In the Judicature Act of 1873 the theory of professional responsibility found its final recognition in a statute which frankly abandoned even the form of a legislative mandate and substituted a schedule of Rules of Court.

America, on the other hand, chose to repudiate the doctrine of professional control. No more striking contrast in political theory could be conceived than is afforded by the procedure acts of the last century in England and the almost contemporary legislation in the United States beginning with the Field Code in 1848. The New York legislature believed that the courts could be entirely regulated by the clumsy and alien hand of the popular assembly, and yet suffer no loss either in technical skill or in capacity to respond to the public demand for service. It was a political and economic blunder of the first magnitude, and set a precedent which changed the American judicial establishment from a living stream into a stagnant pool. Deprived of all initiative in devising new means and methods, and safely concealed under the political shadow of the legislature, our courts have become lifeless and bureaucratic, substituting regularity for efficiency as an operating ideal.

Of the English system, Lord Bowen, one of the great English judges was able, in his jubilee essay on "The Administration of Law," in connection with the celebration of the fiftieth anniversary of Queen Victoria's ascension of the throne, to write:

A complete body of rules—which possess the great merit of elasticity, and which (subject to the vote of Parliament) is altered

[6] Edson R. Sunderland, The exercise of the rule-making power, *American Bar Association Journal*, August, 1926.

from time to time by the judges to meet defects as they appear—governs the procedure of the Supreme Court and all its branches. In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes—upon oral evidence or affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading or proceeding, that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move.

No one for a moment would think of making a corresponding appraisal of our system of judicial procedure. On the contrary, practically all students of our judicial administration unite in picturing the evils now existing as the result of our seeking to have judicial rules of procedure determined by the legislature. Thus, Harlan F. Stone in his interesting volume, "Law and Its Administration," writes:[1]

In the effort to secure simplification of civil procedure we have not been as fortunate (as England). The experience in New York may be taken as typical of that of a good many other jurisdictions. In 1848 the effort to simplify procedure in this state bore fruit in the adoption by legislative enactment of a code of procedure prepared by David Dudley Field and commonly known as the Field Code. In 1876 this was revised and the revision enacted into the present code of Civil Procedure. This code now consists of some 3500 sections of statute law, comprising over 1000 finely printed pages, all relating to procedure in the Supreme, City, County, and Surrogate courts. To this code there have been added the 366 sections of the Municipal Court Code relating to procedure in the municipal courts, 963 sections of the Code of Criminal Procedure regulating procedure in the criminal courts, and the 84 general rules of court which supplement the various provisions of the code. Thus the effort to simplify procedure in New York has resulted in the creation of some 5000 sections of written law, filling about 2000 printed pages. These laws be it remembered relate, not to the substantive rights of individuals, but only to the

[1] Pp. 118-22.

process by which the individual may secure or protect his rights. The result of our efforts to render our legal procedure simple would be laughable were it not so tragic in its effect on the administration of justice.

But the trouble does not end with the mere mass of practice statutes which have been accumulated by successive legislative enactments since the adoption of the simplified procedure in 1848. At every session of the legislature hundreds of bills are introduced to amend the sections of the code or to add new sections. These bills are often crudely drawn without reference to the harmonious operation of new sections with old sections of the code or with the judicial interpretation of the amended sections. Many of these bills pass so that each year new sections are added to the code and the old sections undergo revision which is rarely scientific and is usually crude and haphazard.

Thus our Code of Civil Procedure ponderous and complex as it was at the beginning, is constantly increasing in size and complexity. In the past twenty years, 1600 sections of the code have been amended; some of them many times.

* * * *

The effort to regulate every procedural step explicitly and minutely has greatly increased the burden of practice and has resulted in constant resort to the courts for judicial settlement of questions which might well have been left to the discretion and good sense of counsel and which never could have arisen under the highly technical common law system. . . . The effort to prescribe by formal legislation minute regulations so that the practitioner may find in the code a rule for every contingency which may arise is never ending. Once embarked on this course, new situations and the application of existing rules in a manner not foreseen demand perpetual legislative tinkering, until as in our state today, the lawyer is lost in a wilderness of special, arbitrary and rigid provisions, often inconsistent, or at least inharmonious, always changing and always increasing in number and complexity.

The formulation of a system of procedure and its future amendment is primarily a matter for experts and preëminently for the judges themselves who are qualified by special training and experience for this important and delicate work.

The New York Board of Statutory Consolidation in one of its reports has written:

The present code system in this state of regulating details of practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms, that it may be passed by without further comment.

That the system of legislatively prescribed rules of procedure is unsatisfactory is further evidenced by the fact, as pointed out in the article of Professor Sunderland from which we have already quoted.

Every new court which Congress has created since the advent of the Field Code has been given express power and authority to make and amend its own rules for the regulation of practice and procedure. This was true of the old Court of Claims, established in 1855, and its authority to control its own procedure was continued when it was given full judicial powers in 1863. The United States Court for China was established with full rule-making power in 1906. The Court of Customs Appeals was organized with similar authority in 1909. The Commerce Court, during its short career, exercised the same power. Finally, in 1920, Congress enacted a new code for the District of Columbia, and therein conferred upon the Supreme Court of the District authority to "establish written rules regulating pleading, practice and procedure, and by said rules make such modifications in the forms of pleading and methods of practice and procedure prescribed by existing law as may be deemed necessary or desirable to render more simple, effective, inexpensive and expeditious the remedy in all suits and proceedings," provided that its equity rules shall not be inconsistent with the equity rules issued by the Supreme Court of the United States. . . . For forty years the Interstate Commerce Commission has possessed and exercised the power to make general rules and orders regulating its own procedure. The Board of General Appraisers, the Board of Tax Appeals, the Federal Trade Commission, and the Federal Power Commission, all operate under full rule-making authority. . . . Every reason for giving special courts and quasi-judicial tribunals the rule-making power applies with still greater force to the ordinary courts. Their tasks are more varied and intricate, they affect the lives and fortunes of the people much more intimately, and their failure to function properly is a more conspicuous and damaging example of governmental inefficiency.

Finally, mention has already been made of the fact that the laws recently enacted for the creation of unified municipal courts have had as one of their conspicuous merits the large grant of authority to these tribunals to determine their own rules of procedure and that their success has been due in no small degree to this factor.

Movement in the United States for Vesting Rule-Making Powers in the Courts. The motives underlying the adoption of the system of legislatively formulated codes of judicial procedure were thoroughly commendable. The inconsistencies, unwarranted technicalities, and other features of the procedural system were so grave as to demand action. Unfortunately, the attempt to correct these defects took the wrong direction. This is now becoming generally recognized and recent years have witnessed a strong effort to remedy this mistake by restoring to the courts the power, they originally possessed to frame their own rules of procedure.

Federal Judiciary. Much the most important effort in this direction is that to have conferred upon the Supreme Court of the United States the same power to prescribe the rules of procedure for all federal courts in respect to actions at law that it has enjoyed from the beginning in respect to suits in equity. This power on the part of the Supreme Court to prescribe the rules of equity procedure in the federal courts, as now embodied in the law, reads as follows:

> The Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees and of proceeding before trustees appointed by the court and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit and district courts.—R. S., Sec. 917.

On November 2, 1912, the Supreme Court, on the initiation of Chief Justice White, who was one of our great law reformers, promulgated a set of "Rules of Practice for the Courts of Equity of the United States," the first general revision of these rules since 1842, that marks an epoch in the reform of judicial procedure in the United States. Their issuance, and the cordial reception that they received, immediately raised the question of the desirability of having the same thing done in respect to the procedure of the federal courts while sitting as courts of law. Unfortunately, the Supreme Court did not have this power, since the Judiciary Act in respect to such proceedings provided that:

The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held any rule of court to the contrary notwithstanding.—R. S., Sec. 914.

It was hoped by this provision to secure a measure of uniformity of procedure as between federal courts and the state courts in each of the several states. This, however, has not been obtained, with the result that not only is there a difference of procedure between the federal courts and the state courts but between the several federal courts sitting in different states. The situation was thus put by Justice Sutherland in arguing before the committee of Congress in favor of a bill to confer upon the Supreme Court the same rule-making powers in respect to actions at law that it possesses in respect to proceedings in equity and admiralty.[8]

Now one difficulty with the present system is that although the conformity provision of the federal statutes was intended to simplify the thing and it was said would enable the practicing lawyers to study one system, as a matter of fact it compels him to study three. The conformity provision, I think Section 914 of the Revised Statutes, provides that the federal court shall conform "as near as may be" to the state practice. Now that has resulted in this, that whenever a district judge thinks that the state rule is a bad one he follows the provisions "as near as may be" and says that it is not applicable. The result is that the practicing attorney has first of all to study the rules of procedure in the state. He then has to study the provisions of the statutes of the United States to see how far there have been specific provisions which override the provisions of the state law; and then, third, he has to study the decisions of the federal courts in order to see how many of these state rules have been departed from because the court, under this latitude, thought that they would not apply. And the result is that there has been a great deal of confusion about it.

Immediately following the promulgation on November 2, 1912, of the revised rules of equity procedure, President Taft, in his annual message to Congress on December 6, 1912, urged that

[8] Senate Judiciary Committee Hearings, February 2, 1924.

powers be conferred upon the Supreme Court to prepare and issue similar rules to govern proceedings at law in the federal courts. In this message he said:

I am glad to bring to the attention of Congress the fact that the Supreme Court has radically altered the equity rules governing the procedure on the equity side of all Federal courts, and though, as these changes have not been yet put in practice so as to enable us to state from actual results what the reform will accomplish, they are of such a character that we can reasonably prophesy that they will greatly reduce the time and cost of litigation in such courts. The court has adopted many of the shorter methods of the present English procedure, and while it may take a little while for the profession to accustom itself to these methods, it is certain greatly to facilitate litigation. The action of the Supreme Court has been so drastic and so full of appreciation of the necessity for a great reform in court procedure that I have no hesitation in following up this action with a recommendation which I foreshadowed in my message of three years ago, that the sections of the statute governing the procedure in the Federal courts on the common law side should be so amended as to give to the Supreme Court the same right to make rules of procedure in common law as they have, since the beginning of the court, exercised in equity. I do not doubt that a full consideration of the subject will enable the court while giving effect to the substantial differences in right and remedy between the system of common law and the system of equity so to unite the two procedures into the form of one civil action and to shorten the procedure in such civil action as to furnish a model to all the State courts exercising concurrent jurisdiction with the Federal courts of first instance.

Under the statute now in force the common-law procedure in each Federal court is made to conform to the procedure in the State in which the court is held. In these days, when we should be making progress in court procedure, such a conformity statute makes the Federal method too dependent upon the action of State legislatures. I can but think it a great opportunity for Congress to intrust to the highest tribunal in this country, evidently imbued with a strong spirit in favor of a reform of procedure, the power to frame a model code of procedure, which, while preserving all that is valuable and necessary of the rights and remedies at common law and in equity, shall lessen the burden of the poor litigant to a minimum in the expedition and cheapness with which his cause can be fought or defended through Federal courts to final judgment.

This received the endorsement of the American Bar Association, which adopted the following resolution:

WHEREAS, Section 914 of the Revised Statutes has utterly failed to bring about a general uniformity in the federal and state proceedings in civil cases; and

WHEREAS, It is believed that the advantages of state remedies can be better obtained by a permanent uniform system with the necessary rules of practice prepared by the U. S. Supreme Court.

Now, therefore, Be It and it is hereby Resolved, That a complete uniform system of law pleading should prevail in the federal and state courts; that a system for use in the federal courts and as a model, with all necessary rules or provisions therefor should be prepared and put into effect by the Supreme Court of the United States; that to this end Section 914 and all other conflicting provisions of the Revised Statutes should be repealed and appropriate statutes enacted.

Following this up, it drafted the following bill which was introduced in Congress as Senate Bill 2061, Sixty-eighth Congress, First Session:

A Bill to Give the Supreme Court of the United States Authority to Make and Publish Rules in Common Law Action.

Be it enacted, etc.:

That the Supreme Court of the United States shall have the power to prescribe by general rules for the district courts of the United States and for the courts of the District of Columbia the forms of process, writs, pleadings and motions and the practice and procedure in actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation and thereafter all laws in conflict therewith shall be of no further force or effect.

SEC. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

This bill has the support of the American Bar Association, the state bar associations of forty-six of the forty-eight states, and the Supreme Court of the United States itself.

One of the strongest arguments in favor of this bill is that it would result in the working out by the Supreme Court of the

United States of a model set of simplified rules that would inevitably be copied by the states, thus improving conditions there and at the same time accomplishing the desirable end of unifying practice and procedure throughout the United States. Regarding this phase, the Senate report concludes its presentation of arguments in favor of the bill with the following paragraph:

The federal government should lead rather than lag behind the various states in this great reform. If this bill shall be passed the Supreme Court will adopt rules of so simple and workable a character, that they will constitute models for the various states with the result that in the course of a few years we shall have a uniform system of simple procedure in operation in all the courts of the country federal and state alike.

The general support for this bill and the fact that, if enacted, it would be copied by the states, was shown at the hearings February 2, 1924, by the statement of Mr. Thomas W. Shelton, Chairman of the Committee on Uniformity of Judicial Procedure of the American Bar Association.

Now as I have argued so many times in the presence of Senator Overman and all of you, it follows that the states are going to adopt that model system—it would rather be a reflection on them to think otherwise—but if you had any doubt about it and those people may be permitted to speak through their bar associations, I have on this desk here the resolutions adopted by forty-six state bar associations endorsing this plan and agreeing that it is the way to do it.

Final enactment of this bill has not yet been secured. There is every reason to hope, however, that its passage will not be long delayed.

If the opinion of our leading students of judicial administration is taken that the rule-making power should be restored to the courts the question is presented as to whether this power should be exercised by the courts acting individually, by the supreme courts of the several states acting for all the courts, or by a special body representing the courts, such as if afforded by a properly constituted judicial council. The prevailing opinion is that the last named is the method that should be employed.

Movement to Abolish Controlling Force of Rules. As has been pointed out the adoption of the policy of vesting the rule-making power in the courts, as regards all but fundamental principles, would have as one of its most important benefits the removing of the basis upon which courts give to these rules the same controlling force as provisions of substantive law. Recent years have witnessed efforts to attain this particular end by the enactment of laws declaring that infractions of these rules, even though statutorily enacted, shall not be deemed to be grounds for a new trial unless the substantive rights of the parties have thereby been affected. Thus, after eight years of strenuous effort on the part of the American Bar Association, Congress was induced, in 1919, to pass an act providing that:

In any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not affect the substantive rights of the parties.

Similar laws have been passed by a number of the states. The latest to act is Louisiana which, in its new code of criminal procedure, adopted in 1928, provides:

No judgment shall be set aside or a new trial granted by any appellate court of this state, in any criminal case, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right.

The wording of this provision follows the draft of the committee of the American Bar Association and the act of Oklahoma.

Unfortunately, these laws have in great part failed of their purpose due to the persistence on the part of the courts to treat all errors of procedure, no matter how trivial, as material. Thus, Marcus A. Kavanaugh, Judge of the Superior Court of Cook County, Illinois, writing in the American Bar Association Journal:[9]

[9] Improvement of administration of criminal justice by exercise of judicial power, April, 1925.

The people of New York by their legislature sought to cure this reign of technicality by providing that "After hearing the appeal the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." No language could be plainer, no intention could by any words be made clearer manifest. But in the case of People vs. Corey, 148 N. Y. 494, following its previous decisions, the highest court of New York deliberately nullified that statute by practically holding that any technical error—receiving or rejecting evidence necessitates a new trial. The court got around the law by saying that the statute was in effect little more than a codification of the old rule; if the higher court could see that by no possibility the error could have hurt the defendant then the judgment would stand; but error once shown is presumed to be prejudicial. The people of most of our states have tried by laws similar to the New York statute to rid their courts of this evil. Some states have even put these provisions into their constitution. But so steadfast and so powerful is the sentiment against sweeping legal reform on the part of the bench and bar that the courts of last resort in most states have followed the New York court and often nullified their salutary laws.

This attitude of the courts is difficult, if not impossible, to justify. No such position is taken by the judges in England. There, the settled rule is that a judgment or verdict of a trial court shall not be disturbed or a new trial granted for error if the evidence admitted is sufficient to justify the judgment or verdict, or, if evidence erroneously excluded would not, in the opinion of the appellate court, have led to a different result. In short, judgment is rendered on the merits of the case. In like manner any error committed in the preparation or presentation of a case or during its trial, instead of having fatal consequences, can be corrected at any time before final decision is rendered.

The Rules of Civil Procedure drafted by the American Judicature Society as supplementary to its State-wide Judicature Act included the following section which the society recommends should be incorporated in the rules of procedure of all states:

SEC. 11. Substantive Rights. Any error or defect in the proceedings which does not affect the substantial rights of the adverse party shall be disregarded, but all necessary amendments shall be made or allowed by the court to secure the giving of judgment according to the very right and justice of the cause.[10]

[10] American Judicature Society, Bulletin XIV. Following the section quoted, reference is made as follows to instances where this rule is found:

The correction of this evil of giving undue weight to matters of mere procedure lies in three directions: the adoption of the principle of delegating to the courts the power to draft all rules of procedure except those determining in broad lines the nature of the proceedings; the passage by the states which have not already done so of acts directing that errors not affecting the substantial rights of the parties shall not be deemed material; and the radical change on the part of the courts themselves in respect to their attitude toward this matter.

In concluding the consideration of this question, attention should be drawn to the fact that it has an important relation to two other reforms that have been urgently advocated in these pages; namely, the establishment in each of the states of a unified supreme court of judicature, and the creating of a judicial council. So long as the judicial systems of the states embrace a number of independent, uncorrelated judicial tribunals and there is no agency through which their work and procedure may be correlated and unified, it will be difficult to secure a uniform procedural system. Under a unified court system or with a strong judicial council, the formulation and adoption through action by the courts themselves of a set of rules that will have general applicability in so far as general principles are concerned will be greatly faciliated. Particularly will this be so if Congress takes the action urged and confers upon the Supreme Court of the United States the power to draft rules of procedure to govern the federal courts in handling cases on the law side of their dockets. A set of rules so drafted will be sure to be followed as a model by the state courts if power to draft and modify their rules of procedure is conferred upon them. In this way uniformity of procedure will be secured, not only as between the courts within a state but also to a considerable extent as between the courts of different states and the federal tribunals.

"Compare Federal Equity Rule 19; New Jersey Act Sec. 23; California Code Sec. 475; Missouri Code Sec. 659; Rodenbeck Act Sec. 10; Rodenbeck Rule 2; rule 16; Statute of Elizabeth; English Order 228, rule 12; Ontario Rule 183."

CHAPTER XXXIII

PREPARATION OF THE CASE

In a work of the present scope it is manifestly impracticable to attempt any detailed consideration of the substantive character of the rules now governing the practice and procedure of American courts. Any system of procedure should, however, rest upon certain principles, and it is pertinent to seek to determine what these principles are and the extent to which they may be modified with advantage.

In entering upon this consideration, it is well to distinguish between rules to determine: (1) The manner and form in which actions will be brought before the courts for adjudication; (2) the manner in which the courts will handle these actions, or, as the expression is, conduct the trial; and (3) the character of the action taken in deciding the issues presented. A further distinction should be made between actions falling within the field of the administration of the civil law and that of the criminal law. This is so, if for no other reason, because of the fundamentally different attitudes of the government toward the enforcement of these two classes of law. In the present chapter consideration will be given to the single question of the rules that govern, or should govern, in the formulation of civil actions and in the bringing of them before the courts for adjudication.

Single Form of Action. In few respects has our system of judicial administration suffered more from the circumstances of its historical origin than from that of the process of appealing to the courts for redress. As is well known, common law from the procedural side early developed, as one of its most characteristic features, a system under which each wrong for which redress was sought had its special or particular form of action. If the collection of an ordinary debt was sought, one form of action was employed; if damages for failure to carry out an agreement, another form; if possession of real estate wrongfully denied, still another; and so on through almost every conceivable instance where redress

for a grievance was sought. Each of these actions had its technical name and its use was governed by special rules. There were actions of ejectment, assumpsit, replevin, trover, and so many other kinds that only the special student of English historical jurisprudence can hope to list them completely. To aggravate the situation, the correct choice of the action to be begun in a case was essential. Any mistake was fatal. As a prominent jurist has put it:[1]

As it developed, it was formalism run mad. There was a form of action for each particular species of injury and the form was essential. The three general classes of action, real, personal and mixed, were further subdivided until, according to some enumerations there were fifty-nine distinct forms and around these grew up a vast amount of learning the possession of which was the chief equipment of the lawyer. If suit was brought in the wrong form there could be no change but it must fail altogether, and the unfortunate litigant was not even advised how to bring his new suit for the judgment against him told him only that he could not recover in the particular form he had adopted. Even where more than one form was open to use great care must be exercised for the book taught that by a judicious choice of the remedy the defendant may be frequently precluded from availing himself of a defense which he might otherwise establish. The injustice of precluding a proper defense or permitting a proper one in any form of action does not seem to have received much consideration.

Discussing this same point, Justice Harlan F. Stone writes:[2]

Common law procedure was developed during a period when in all human activities great emphasis was laid on formalism. The form of the transaction was thus often quite as important and significant as its substance. . . . This tendency toward legal formalism reached its height in the system of procedure at common law. . . . In all there were some forty recognized forms of common law writs in common use, each highly technical in character, having a distinct form of its own; and these were supposed collectively to cover the whole field of legal rights. When the plaintiff had once chosen his form of writ, his declaration, that is the pleading in which he stated his cause of action must conform to the writ, so that for every form of writ there was a corresponding form of declaration. The plaintiff must needs state his cause of action in one of the established forms of pleading. One might

[1] Frederick W. Lehman, Conservatism in legal procedure, *Green Bag*, March, 1909.

[2] Law and its administration, 110-12.

have a perfectly good cause of action, yet if he mistook his writ and the corresponding form of pleading, there was no opportunity for correcting his mistake but judgment must go against him. He might or might not begin over again, according to the nature of the mistake, but in any event there was loss of time and effort and money, and in many cases a substantial denial of justice.

This system developed refinements of distinctions and subtleties of form until human ingenuity was practically exhausted. From being one beyond the comprehension of the layman, it became one that was difficult for the professional lawyers themselves at all times to understand. In despair, the practice developed of appealing directly to the King as the fountain of justice for redress where it was claimed that an adequate remedy could not be had in the courts as they then existed. These petitions the King referred to his Chancellor for action, and in this way developed a new set of tribunals, courts of chancery or equity, and a new form of action, a suit in equity. Though the development of these courts promoted the administration of justice it added a new form of action and a new choice to be made. A decision had first to be made as to whether proceedings should be begun in law or in equity, and, if the former, the particular action to be brought.

This system, with all its complexities, all its subtleties of distinction, and all its formalism, was transplanted to the American colonies and became the foundation upon which this part of the problem of administration of justice was made to rest and to a considerable extent still rests in the United States.

It is possible that this system had the justification of meeting conditions existing at the time of its development. It is impossible, however, to justify it as a modern institution. It violates one of the prime requisites of efficiency—simplicity. It is certain that if a community could start with a clean slate, uninfluenced by prejudgments, it would not for a moment think of bringing into existence such a complicated system for the doing of what after all is a simple thing. Though there may be an infinite variety in the grievances for which redress is sought, the problem of stating those grievances and asking for a remedy is in all cases the same. It is merely stating the nature of the grievance and the character of the redress sought. The only additional requirement needed is that this statement shall be in as direct and clear a form as possible.

Modern opinion has become general that a fundamental feature of a reformed procedural system should be that of a single form of action. By the adoption of this one feature, an enormous improvement would be effected. At one stroke, a vast mass of legal technicalities would be relegated to the historical archives. Simplicity would replace complexity, and justice would be promoted by abolishing the many cases of miscarriage of justice resulting from the failure of litigants, as represented by their attorneys, to find their way through the maze of technicalities involved in the mere act of inaugurating a judicial proceeding.

Considerable progress has already been made in this direction. The establishment of a single form of action constituted one of the reforms accomplished by the New York Code of Civil Procedure, enacted in 1849, and the codes of other states that followed New York's example. Much however still remains to be done to make this principle of universal application in the United States, and organizations such as the American Bar Association and the American Judicature Society place it in the forefront of reforms that they are urging.

Much the same question is presented in respect to the form of actions employed in criminal prosecutions. It is more than questionable whether the refinements that have been introduced in the definition of crimes and the consequent use of a multiplicity of distinct actions charging guilt does not embarrass rather than facilitate the administration of the criminal law. The broad distinction between misdemeanors and felonies probably serves a useful purpose. When one passes to such distinctions as those between grand larceny, petty larceny, burglary, embezzlement, etc., or even between different grades of homicides, the question is presented as to whether it is not better to abolish them so far as the form of action is concerned, leaving it to the court or jury to pass upon the heinousness of the offense in fixing the penalty. Though it is probable that it is not advisable that all these separate forms of action should be abolished in favor of a single form of action as is recommended in the case of civil actions, conditions are undoubtedly such that it is desirable that the whole subject of criminal action should be subjected to careful study with a view to eliminating distinctions now obtaining and providing for a fewer number of actions.

Simplified Pleading. The preparation of the statement of grievance and the character of the redress desired constitutes but the first step in the bringing of an action in a court of law. Just as this essentially simple operation had become, under the common law, a complicated matter, where a choice had to be made between two score or more different kinds of actions and rigid adherence to form was essential, so the subsequent steps of the filing by the defendant of an answer to such statement, and the reply to such answer, became an operation in respect to which ingenuity was almost exhausted in the way of making it complicated and full of technicalities, any failure in the observance of which was fatal. In framing his defense, the defendant had first the option of filing an answer dealing with the subject matter of the controversy, or of interposing any one of a number of "pleas," many of which had to do with matters of procedure or points of law rather than the merits of the claim. To a considerable extent, use could be made of one of these pleas after another as earlier pleas were acted upon adversely by the court. To these pleas, or answers, the complainant then made reply, and to such reply, if it was to an answer, the defendant might rejoin, and the controversy thus continued through a considerable number of steps. This whole process of determining the form in which an action should be brought and the character of the defense that should be made, became a distinct branch of legal knowledge and was known as the science of pleading. Volumes were written dealing with this subject alone and whole courses were given upon it in schools of law.

Apart from the fact that the system greatly complicated and made more difficult the operation of appealing to the courts for a redress of grievances, other evils necessarily resulted. Among these were the fact that proceedings could be greatly delayed, since one plea after another could be filed, often purely for the purposes of delay, time being given for each party to answer the last statement made by the opposing party, and the time of the court was taken in passing upon the issues involved one at a time. Conditions were made still worse by the possibility which existed in many cases, of an appeal being made from the decision of the trial court to a court of appellate jurisdiction. In this way the mere proceeding of getting a controversy before the court for trial on its merits might be almost indefinitely prolonged.

In precisely the same way that the old multiplicity of forms of action served no useful purpose, so this whole complicated system of pleading has no logical justification and should be replaced by the requirement of a single reply by the defendant, in which he should set up all the grounds, legal or material, upon which he relies for his defense. This would at once eliminate the great mass of technicalities that have developed in respect to this matter of getting a controversy before the court for adjudication, reduce expenses and delay to a minimum, and enable the court to consider the case in all of its aspects at one time instead of piece-meal at widely different times. The adoption of this practice is a logical consequence of that providing for a single form of action, and states that have adopted the latter have in general adopted the former as well. Action in this way has the strong support of the American Bar Association and the American Judicature Society, and, generally, of commissions and individuals which have made a special study of means for improving our system of judicial administration. That the system gives good results in practice is demonstrated by the experience of England where the system prevails.

Abolition of the Demurrer. Many controversies that get into court involve questions both of law and fact. If a defendant has a complete defense at law, it should be unnecessary to put him to the trouble and expense of contesting the facts or the court to the necessity of passing upon the issue of facts. The old system of common law pleading permitted the defendant to raise the question of his technical, legal defense by filing what was known as a "demurrer." This demurrer, in effect, stated that, admitting that the facts are as charged in the complaint, the complainant has no legal ground of action. When use was made of a demurrer, the trial took place first upon its validity. If finally sustained, no trial was required on the facts. Against the decision of the trial court on this issue, an appeal would lie to a court of appellate jurisdiction, unless the case was one where the decision of the trial court was final.

There is unquestionably an advantage in thus obviating the necessity for a trial of the facts when a complete defense in law exists. Unfortunately, however, the possibility of raising the issue of law separately by means of a demurrer can, and frequently is, availed of merely for the purpose of delay. Through it, the trial

of a case on its material merits may be postponed for months, and if the docket of the appellate court is crowded, as is often the case, even for years. Due to this fact, the opinion is now generally held by those seeking to expedite and simplify judicial proceedings that the use of the demurrer should be abolished, and that the defendant should be required to raise in his answer all defenses that he has, whether of a legal or material character. By this requirement all the issues involved in a case will be examined by the court at one time and be reviewed by a superior court in a single appeal. This is the system that has existed in England since 1883.

Segregation of Simple from Complicated Cases. A court is primarily a formal body. It requires for its proper operation the coöperation of a number of officers, one of whom at least should receive a high salary. It must observe a more or less formal procedure and its operations are carried on in relatively extensive quarters. It results from this, that the work of adjudication, when performed by a court, is at best an expensive process in which the dispatch of business is difficult to attain. Under these conditions it is a wasteful expenditure of money, time, and energy to make use of this institution for the adjudication of those cases which, on account of their relative simplicity, could be handled by a less formal and more expeditious process. One of the merits of the English judicial system is the provision for the careful segregation of those cases, which on account of their character do not require the formal action of the courts, and their handling by a simpler, summary and more expeditious process. The large majority of actions for the collection of debts fall in this category. In relatively few of such cases are questions of law involved, and the determination of the facts, even where they are not admitted by the parties, is easily effected. All of these cases can be, and, in England are handled by officers of court known as " masters," the courts themselves being relieved of all work in connection with them except as they are called upon to give formal approval to the masters' action; and in a few cases to hear appeals from their decisions.

Disclosure and Discovery of Facts Prior to Trial. As has been pointed out in the preceding section, one of the objects to be striven for in devising a system of judicial procedure is that of economizing as far as possible the time and energies of the courts.

The segregation of the simpler cases and their settlement by special officers of the court without formal trial by the courts themselves, represent but one means by which relief may be given to the courts. Another means, which likewise is a characteristic feature of the English, German and French systems, is that of requiring a large part of the task of determining the facts to be performed prior to the case being put upon trial in the courts.

In a proceeding, one of the essential purposes of which is to determine the facts, it would seem to be self-evident that the obligation should rest upon all parties to make known all material facts of which they have knowledge. Plain as this is, it is one that does not obtain in the United States. Due to the pernicious influence of the idea, which still dominates all judicial proceedings in this country, that an action in court partakes of the nature of a judicial duel, each party is held to be justified in making known only those facts in his possession which are believed to be favorable to his contentions, and to suppress all other facts, except as his adversary, by the skilful use of the rules of the game, may succeed in extracting them from him. Indeed, an attorney is permitted to keep concealed favorable facts in order to gain the advantage of surprise by springing them upon the opposing counsel during the trial of the case when adequate opportunity does not exist for meeting them.

No such action is permissible under the English system. There, it is one of the fundamental purposes of the system of preliminary proceedings before a master to secure complete discovery of all material facts. As far as possible, the principle followed is to eliminate the elements of surprise. In England, a mere letter of inquiry from the solicitor of one party to the other is all that is required in order to elicit information desired and any refusal to furnish such information is submitted to the master who, if the fact is material, will compel discovery.

To quote from Professor Sunderland's able "Appraisal of English Procedure":[3]

Having eliminated from the trial docket the cases calling for summary and declaratory judgments, the next problem is to provide the parties to the cases which must be regularly tried with all the information which is necessary to enable them to prepare for trial. Instead of conniving at the instinctive desire of counsel to keep his adversary as far as possible in the dark, lest by obtaining infor-

[3] Report, American Bar Association, 1925.

mation he should become more formidable, the English rules provide for the most thorough disclosure and discovery.

Discovery is one of the primary titles in the books on English procedure. From a minor doctrine in the chancery practice it has grown into a controlling principle embracing all litigation in the High Court. Practically every case, commenced in the ordinary way, is sent at once to a master on a summons for directions, who makes an order mapping out the course which it is to follow, and the main purpose of this order is to specify and direct the discovery which must be made forthwith.

If there are facts which either party believes will not be actually disputed, although formally in issue, and which he wishes to avoid the expense of proving, he may have an order calling upon his adversary to admit them. Unreasonable refusal to make such admission will load the cost of proof, after it has been successfully produced, upon the party who refused to admit. The practice is admirable, for such admission not only saves expense to the parties but saves the time of the courts in hearing proofs.

If there are matters regarding which either party wishes to obtain information from the other, he may have an order allowing him to put interrogatories which must be answered under oath.

And most important of all, each party is entitled, almost as a matter of course to an order requiring the other party to furnish a sworn list of all the documents—whether admissible in evidence or not—which he now has, or ever has had, in his possession, relating to the matter involved in the suit. This list must embrace everything in writing or printing capable of being read. It must be set forth in two schedules. The first must contain all the documents that are in the possession or power of the deponent, and must be subdivided into those which he is willing to produce and those which he is not willing to produce; the second must contain all the documents no longer in the dependent's possession, with a statement as to what became of them and in whose possession they now are. Upon the receipt of this list, the party usually gives notice in writing to produce such documents as he wishes to inspect, and within a few days, subject to the possibility of an argument regarding the documents not willingly produced, by this simple and effective means, each party is supplied with copies of all the documents which he is entitled to inspect and which are known to be in existence, bearing upon the case.

There is nothing in the English court system which proceeds under such speed and pressure as a hearing before a master on a summons for directions. The solicitors are not allowed the luxury of a seat, but stand at a sort of high desk before the master, and are hardly given time to gather up their papers before the next group of solicitors has crowded forward to take their place. Each of the masters has a docket of sixteen or eighteen cases per hour, and he usually finishes the list on time. The summons for direc-

tions, by which the vast scheme of discovery is largely administered, is thus a tremendously efficient instrument.

It is, of course, impossible to determine how much court time is saved by these preliminary admissions, answers to interrogatories, and disclosures of documents but an observer who compares the time used in an English trial with that ordinarily consumed by a similar trial in the United States, and notes the points at which speed is secured by reason of prior discovery, might perhaps estimate a fifty per cent saving. With the facts on each side mutually understood by both parties when the trial opens, leading questions no longer become objectionable on many features of the case, and the witness is brought at once to the point in controversy with no waste of time over formal preliminaries; the necessity for cross-examination is greatly reduced, and it is frequently omitted altogether; the formal introduction of evidence is largely dispensed with for complete typewritten sets of copies of the documents previously inspected are already in the hands of the judge and of counsel on each side when the trial begins, and they are usually introduced by consent; formal admissions of facts, and answers to interrogatories, eliminate entirely many features of the case which with us would call for extensive proof. With the element of surprise largely out of the case at the opening of the trial, there is no occasion for that elaborate maneuvering for advantages, that vigilant and tireless eagerness to insist upon every objection, with which we are so familiar, and which not only prolongs and complicates the trial, but helps to make the outcome of an American law-suit turn as much upon the skill of counsel as upon the merits of the case.

There are few features of the English system of judicial procedure which it is more important should be adopted in the United States than this of securing full disclosure prior to the trial, of all important facts to be relied upon or claimed in the course of the trial.

Discovery Where Defense Is Insanity or an Alibi. Important in all cases, it is especially desirable that when reliance is to be placed by the defense upon insanity or an alibi, this fact should be made known prior to the trial in order that the prosecution may be prepared to meet it. Under conditions generally prevailing in the United States, no such requirement exists. As the New York Joint Legislative Committee on the Coördination of Civil and Criminal Procedure has put it, in respect to the defense of insanity:[4]

[4] Report, 1926, p. 31.

As the law now stands the defendant's attorney opens the case to the jury on the trial of his client after the direct evidence of the people has been presented and then, for the first time, may interpose the defense of insanity and take the prosecuting officer completely by surprise, securing not only an unfair advantage but a prejudiced presentation of the whole case to the jury. The practice in civil cases is for such opening to be made before the introduction of any evidence. We believe that the practice in criminal cases should be changed; that the opportunity for a fair presentation by both the people and the defendant will more adequately protect the interests of the people generally for whose protection after all laws are made, and at the same time safeguard all the rights and interests of the defendant by a speedy and public trial to which he is entitled. Accordingly we recommend that the defendant be required to interpose the plea of "not guilty on the ground of insanity" at the time of his arraignment if he intends to rely on such defense. . . . We believe there also should be added in the same article a section providing that a defendant interposing such a plea be forthwith confined for observation in a state hospital for the care of the criminal insane for a period of thirty days.

Speaking of the need of discovery where the defense is an alibi, a recent writer on procedural reform writes:[5]

A chief need in this regard concerns the defense of alibi. That the manufactured alibi is one of the main avenues of escape of the guilty needs no demonstration. Moreover, the amount of perjury that is annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked and the fabricated alibi rendered most difficult, if the accused were to be required to give the prosecution such notice of the intended defense as would enable it to confirm or refute the accused's assertion. Such is the practice in Scotland, where a defendant is not permitted to prove an alibi unless he pleads it as a special defense. In so doing, he must specify the place where he intends to show he was at the time in question.

Most if not all of the reports of commissions appointed in recent years to inquire into the administration of criminal justice in the United States, contain the recommendation that notice be given when insanity is to be set up as a defense.[6]

[5] Robert W. Millar, The modernization of criminal procedure, *Journal of the American Judicature Society*, February, 1926.

[6] See especially the reports submitted in 1927 by the Michigan Commission of Inquiry into Criminal Procedure, the California Commission on Reform of Criminal Procedure, and the Missouri Crime Survey. The new code of criminal procedure, adopted by Louisiana, in 1928, requires the plea

There is, in point of fact, no reason why the defendant should not be compelled to set forth in his plea a full statement of the character of the defense upon which he intends to rely, whether it be insanity, an alibi, or other defense. A writer on this subject has expressed this principle in the following way:[7]

Professor Millar (R. W. Millar, the Modernization of Criminal Procedure 11 Jr. American Institute of Criminal Law and Criminology, 345, 350, 351) in a report to the Institute of Criminal Law and Criminology has made a suggestion which seems to be entitled to thoughtful consideration, namely, that the defendant be required to give notice of the matters of his defense—especially in case the defense is insanity, self-defense, alibi, former jeopardy, or the statute of limitations. Several states require notice to the prosecution that the defense of insanity is to be set up; in Scotland a defendant cannot prove an alibi unless he pleads it as a special defense, and must give notice of a defense of insanity or self-defense—and at common law former conviction or acquital had to be specially pleaded. There is no reason why the state should not be aided in preparing for trial by definite information as to the character of the defense just as we require that the defendant be not left in the dark but be informed of the nature of the offenses charged against him. The manufacture of prejudiced evidence in support of the defense of alibi, or of self-defense, might also be much reduced by the requirement of such notice, which would allow the prosecution to make an immediate investigation of that phase of the case.

Office of Master. The adoption of the system here advocated of relieving the courts, as far as possible, of the burden of adjudicating cases which can be settled more summarily and simply without formal trial and of having all claims and facts, as far as is feasible, set forth prior to trial, requires not only the adoption of the principle of full discovery, but also the provision of means by which such discovery may be enforced.

In England this requirement has been admirably met by the creation of the office of master, an officer who acts as the assistant to the court with the duty of attending to all matters having to do with the preparation of causes for trial and the actual adjudication

of insanity to be set up as a special and separate plea and to be tried and disposed of before trial of the case on the plea of "not guilty."

[7] Charles Kellogg Burdick, Criminal justice in America. Address before the St. Louis Bar Association, April 6, 1925, published in *American Bar Association Journal*, July, 1925.

of cases that may be settled by a summary procedure. The duties and work of this officer are admirably described in a letter addressed by an eminent English lawyer, Mr. Newton Crane, to the American Ambassador Choate and reproduced in the report of the New York Commission on Laws Delay, 1904.[8] After calling attention to the large amount of business handled by a relatively few judges in England, the writer continues:

The English Judges are enabled to thus quickly discharge their duties by reason of a system of procedure which, in my opinion, has three essential advantages over that embodied in the New York Code.

1. The trial court is relieved of all preliminary and interlocutory work, so that when the case is called for trial the judge has nothing to do but to try it.

2. The trial judge permits of no continuances or adjournments; no time is wasted in technical objections to evidence; the verdict is followed by immediate judgment, and in a large majority of cases there are no appeals.

3. The Appellate Courts discourage technicalities, give their judgments at the close of the arguments by counsel, and rarely remand a case for new trial, the law empowering them to administer that justice between the parties, which, if there was error below, the circumstances of the case appear to them to warrant.

The preliminary work up to the threshold of the trial is conducted by an efficient staff of Masters. Of these there are seven on the King's Bench, or common law side, of the courts, and twelve in the Chancery Division. They must be members of the Bar, or solicitors, of over ten years' standing, and they receive £1500 salary. The position is one of importance and dignity and is highly prized. From the time a writ is returnable until issue is finally joined, the Masters deal with the proceedings, and it is impossible to underrate the efficiency, celerity, and usefulness of their work. If a defendant fails to enter an appearance the plaintiff may take his judgment before a Master. If the palintiff is suing for a liquidated sum, for a tradesman's bill, for instance, or upon a promissory note, or even for the rent of premises, or the possession of land, he may endorse upon his writ the nature and amount of his demand. Immediately upon the entry of appearance by the defendant, which must be within eight days, the plaintiff may take out a summons for judgment, which is returnable in four days. This summons is heard by a Master and immediately disposed of, the evidence being confined to a brief affidavit by the plaintiff that the money sued for is due and payable and that the defendant has no defense to the action, and the affidavit of the

[8] Pp. 106-14.

defendant stating his defense. If the Master is of opinion that the defendant's affidavit does not disclose a meritorious or substantial cause of defense, he at once gives judgment for the plaintiff. If he is of opinion that the defendant has some answer to the plaintiff's demand, three or four courses are open to him: (a) he may, if the parties consent, try the case himself, in which event the hearing will be without pleadings and upon oral evidence, in the Master's private room; or (b) he may, whether the parties consent or not, put the case in the "Short Cause List," to be heard, probably during the ensuing week, by a judge in open court, and in this case also, without pleadings and upon oral evidence; or (c) he may give leave to defend upon the condition that the defendant forthwith pay the sum in dispute into court, or unconditionally, and in such case the action will take its usual course.

It will thus be seen that in every instance where a plaintiff is suing upon demand of this nature (and in every country the bulk of litigation must be of this character) final judgment may be obtained within from two weeks to a month from the date of the service of the writ.

In all other actions on contract, and in tort, the plaintiff is compelled before taking any step in the action, other than an application for an injunction or for a receiver, or the entering of judgment in default of defense, to take out a "summons for directions." This is returnable within four days and is heard by one of the Masters, who has power thereon to direct whether or not there shall be pleadings, and the place and mode of trial, and also whether there shall be "particulars," admissions, discovery, interrogatories, inspection of documents and commission for the examination of witnesses. All of these things are open to the application of either party and are granted or refused in the discretion of the Master. If he directs pleadings he may at any time subsequently, if he is of opinion that such pleadings do not sufficiently state what the respective parties contention will be at the trial, order that particulars be given of any averment. For example, if an agreement is alleged he will order that its date be given, and whether it was oral or in writing, and if it is oral who it is alleged it was made between, and if in writing that the document be identified.

The Master has also power to order each party to make a list of all documents in his possession which are material to any question in issue in the action, and to permit his opponent to inspect and take copies of such documents. This disclosure is technically known as "discovery of documents," and undoubtedly tends to save expense and shorten litigation. The Master may, furthermore, order either party to answer on oath before the trial certain questions submitted by his opponent, upon the terms that if the party to whom the interrogatories are addressed is the paintiff, the

action be stayed until he answers them, or, if defendant, that, in default of answering, his defense be struck out.

Finally the Master has power upon the application of either party to strike out the whole or any part of a pleading which he deems irrelevant, or he may give leave to enter judgment if the defendant by his defense admits the statement of claim.

The proceedings before the Master are of the simplest kind. He sits behind an office table in his room, and the solicitors or counsel who appear to support or oppose summons, stand before him and argue their points in a conversational tone. In this business-like way he gets through twenty or thirty cases in the course of a day, and although his decisions may involve summary judgments for thousands of pounds, his orders are made while the parties are before him, being endorsed upon the summons itself. There is an appeal from him to a judge who sits in Chambers to hear such appeals, but in the great majority of cases the decision of the Master is final.

There are also other preliminary procedures which enable the parties, acting independently of the court, or the Masters, to save time and expense at the trial. For example, any party may, by notice in writing at any time, not later than nine days before trial, call on the party to admit for the purpose of the cause, any specific documents or facts mentioned in the notice. In case the party to whom such notice is addressed refuses to make the required admission within six days after the service of the notice, he must, whether successful or not, pay the cost of proving at the trial, the fact which he has refused to admit, unless the judge certifies that his refusal to admit was reasonable. In like manner each party is entitled to serve the other with a "notice to produce" at the trial, "all books, papers, letters, copies of letters, and other writings and documents," in his custody containing any entry, memorandum or minute in relation to the matters in question in the action. These notices to inspect and to admit and to produce, are so generally employed and with such excellent results that the great majority of cases, even those of an intricate commercial character, are heard without any formal proof of correspondence or other documents.

The ground being thus cleared for trial the judge is able to proceed at once with the hearing of the first case on his calendar. His time is not wasted with applications or interlocutory motions of any kind. No request to have a case stand over, or to go to the next term, merely for the convenience of counsel, would be listened to. The fact that counsel for the plaintiff or defendant was actually on his feet in another court might lead to the case going to the foot of the day's list, but it would not be likely to procure any greater indulgence.

CHAPTER XXXIV

THE TRIAL: RÔLE OF THE JUDGE

With proper provision made for relieving the courts of the necessity for hearing in open court that large class of cases which, due to the fact that they present no question of unsettled law or are of a simple character, can be effectively handled by masters making use of conciliatory and summary processes; with adequate provision made for securing of full discovery of the claims of the contesting parties and the documents or other evidence relied upon for the support of such claims; and with the presentation of these facts in simplified forms of actions and pleading, a long step is taken in the direction of providing an efficient and economical system of adjudication. The next step is to work out a satisfactory system of rules to govern the court in the handling of those cases which require its direct action. Here, no attempt is made to consider other than the basic principles which determine the general character of the system employed.

Among these basic principles, none is of more fundamental importance than that of the rôle to be occupied by the judge in the conduct of the proceedings in court. Concretely, the question presented is whether the judge shall affirmative assume responsibility for seeing that all facts are fully and properly brought out and, when use is made of a jury, of advising and aiding the jury in weighing those facts, or whether he shall restrict his functions to those of a mere moderator, with the duty of seeing that the rules of the contest are properly observed by the contending parties or their attorneys. It is difficult to exaggerate the importance of the issues here presented. The decision reached in respect to it determines the whole character of judicial proceedings. In general it may be said that England follows the first, and the United States the second. Here, at the threshold, as it were, is the feature which more than anything else is responsible for the radical difference in judicial procedure between the two countries.

In England, the judge is in control at all stages of the proceedings. Upon him rests the primary responsibility for seeing that a

proper jury is selected. He does not hesitate to stop counsel if they pursue a wrong line of questioning or seek in any way to becloud the issue or mislead or improperly influence the jury. He, himself if need be, may put interrogatories in order better to bring out the facts and clarify the real point at issue. Finally, it is recognized as a part of the duties of the English judge after the evidence is in, to comment upon such evidence for the purpose of sifting out the material from the immaterial, and to sum up the facts in such a way that the jury can reach an intelligent decision.

This system was inherited by the United States. Unfortunately, however, it has been largely abandoned in so far as the state courts are concerned, and, in its place, has been erected one under which the judge is little more than a moderator or umpire, with the restricted function of seeing that the rules of the contest are followed. As one of our leading students of jurisprudence has expressed it:[1]

> The central point [in England] in the legal polity was the common law judge. He dominated the whole administration of justice. Towering over counsel, controlling the trial, he was the pivot of the legal system. We adopted the system. But we reduced the judge to the level of the practitioner in his court. By legislation, beginning in North Carolina in 1795, in most jurisdictions we tied him down by elaborate procedural legislation so as to prescribe in advance almost everything he should do and how he should do it, from the time he entered the court house except, it has been said, the peg on which he should hang his hat.

The result of this unfortunate innovation is to accentuate still more the judicial duel character of litigation. It is the counsel, rather than the judge, that assumes the burden of selecting the jury. Only in extreme and exceptional cases does the judge seek to control the introduction of evidence or the character of examination of witnesses, provided counsel keep within the technical requirements of the rules. Attempts to becloud the issue, mislead the jury, or bring improper influence to bear upon it through appeals to sentiment rather than to reason, go largely unchecked. Attempts on the part of counsel to take advantage of purely technical and immaterial provisions of the rules and to provoke error

[1] Roscoe Pound, The American attitude toward the trial judge, *Dakota Law Review*, February, 1928.

in following such rules either by opposing counsel or the court itself are recognized as part of the game. Only to a very slight extent does the judge seek to aid the jury in finding its way through a mass of conflicting evidence.

Regarding the relative merits of these two systems there can be no doubt. The English system is right and the American system wrong. Both theory and experience affirm this. In principle, the affirmative duty rests upon the government to see that justice is done and it fails in its duty if the issue is left to depend upon the relative skill with which the contestants conduct the contest. The whole idea of a judicial duel, which underlies the system of judicial procedure in the United States, is radically wrong. As Professor Edson R. Sunderland has somewhere written:

> There is no difference in principle between a decision based upon a contest of procedural skill between two attorneys and a decision based upon a contest of strength between two armed champions. We smile when we are told that trial by battle, although actually obsolete, was a lawful method of trying cases in England until abrogated by Parliament only about a hundred years ago, and we marvel that a sensible nation should so long tolerate such an anomaly. But while in England trial by battle existed only in the musty pages of the law books, and was rediscovered there by accident, in the United States trial by battle flourishes throughout the length and breadth of the land, with the court rooms as the lists, the judges as the umpires, and the attorneys, armed with all the weapons of the legal armorer's cunning, as the resourceful champions of the parties. It is a system which is steadily destroying the confidence of the people in the public administration of justice.

Experience under the two systems more than confirms the principle at stake. The writer knows of no instance where an American, familiar with American practice, has had an opportunity to view the English courts in action without coming away deeply impressed with the superior dignity, speed, and efficiency with which proceedings are conducted in comparison with action in American courts. The long wrangles, often consuming days and at times weeks, in selecting a jury are unknown in England. The real points at issue are speedily determined and proceedings held to such issues. Attempts to influence the jury through appeals to

passion or prejudice are quickly stopped. Where the facts are involved, the judge by pertinent questions, or later in summing up, clarifies the situation and presents the case to the jury in such a way that it can render an intelligent decision. There is little or no wrangling by counsel over points of procedure and practice. The judge with a firm hand controls at all times.

In view of the importance of this subject, it is a matter of congratulation that the superiority of the English system is coming to be recognized and that efforts are being made to have the principles underlying that system adopted in the United States. The recent surveys of criminal justice in the states and cities all contain recommendations along this line. The code of criminal procedure drafted by a committee of the National Crime Commission, thus, contains a section which provides that:

In the conduct of the trial, including the examination of witnesses, the judge shall have the same powers as at common law. He shall instruct the jury as to the law applicable to the case and in said instructions may make such comments on the evidence and the testimony and character of any witness as, in his opinion, the interests of justice may require—provided, however, that the failure of the court to instruct on any point of law shall not be ground for setting aside a verdict of the jury unless such instruction is requested by the defendant. Such instructions and comments by the trial court shall be reduced to writing, before delivery, unless a stenographic record is made at the time of delivery.

The California Commission for the Reform of Criminal Procedure, in its able report submitted in 1927, recommends the enactment of a statute providing that:

It shall be the duty of the judge to control all proceedings during the trial and to limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

Commenting on this recommendation, the report reads:[2]

This is probably only declaratory of the power which the courts now have but which is far too little exercised. The purpose of the statute is to make it mandatory upon the court to control its pro-

[2] P. 18.

ceedings to the end that justice shall be done. As heretofore noted, one of the great defects in our criminal proceedings has been that it has been too much a game between opposing counsel with the court acting merely as umpire. It has frequently been declared that in our country it is better to have a poor case and a good lawyer than a good case and a poor lawyer. This may not be entirely sound, but there certainly is an element of truth in it. The aim of judicial proceedings should be to arrive at the truth, regardless of the ability of counsel for the respective parties. To accomplish this, as well as to expedite the proceedings, it is essential that the court be more than a mere umpire. He should at all times control the proceedings. It is believed that the enactment of this statute will be very helpful in attaining this object.

This proposed statute, as well as one providing that the selection of the jury should be done by the judge rather than by opposing counsel, were enacted by the state legislature in 1927. California, thus, takes front rank in seeking to have this important feature of judicial administration put upon a sound basis. Louisiana in its new code of criminal procedure, adopted in 1928, among other important reforms, provides that the examination of prospective jurors shall be by the judge alone.

A special feature of this question of the rôle of the judge in jury trials is that of the right, or to state it more strongly the duty, of the judge, not merely to instruct the jury in respect to the law, but to summarize and comment upon the evidence that has been given in regard to the facts. It is in respect to this feature that the English and American systems are markedly in contrast. In England, this duty of the judge to aid the jury in arriving at conclusions regarding the facts is strongly emphasized, and to it is in no degree to be attributed the more successful working of the jury system there than in the United States. To quote again Professor Sunderland:[3]

The secret of English efficiency probably lies in another feature of their system, which exercises a profound influence upon the entire conduct of the case in court, namely, nonpartisan control by the judge rather than partisan control by the attorneys. . . . The value of a summing up is not appreciated in the United States, but in England it is considered the most important function of the judge. Doubtless that strange and anomalous rule followed by most of our State courts, which forbids comment by the judge

[3] Edson R. Sunderland, An appraisal of English procedure, Report, American Bar Association, 1925, pp. 250, 253-54.

on the weight of the evidence, has created so great a risk of error in summing up that our judges hesitate to take the chance, and either omit the summing up entirely or make it quite formal and perfunctory. A few weeks spent in watching jury cases tried in England will convince one that the summing up does more to secure a verdict based on the merits of the case than all the rules of evidence which legal ingenuity has devised.

The judge not only recalls to the jury the various parts of the evidence and the different witnesses who testified but he suggests such inconsistencies and improbabilities and such elements of corroboration, as he has observed, and cautions the jury in regard to such evidence as is likely to appear entitled to too much or too little weight, such as admissions, testimony of accomplices, proof of a bad reputation for veracity, testimony colored by interest, evidence admitted for a limited purpose, and evidence inherently weak or strong. He warns the jury against improper remarks of counsel or facts improperly brought to their attention, and in general undertakes to present to the jury a full, discriminating and well-balanced summary and analysis of the whole case proved before them. Naturally his presentation will have weight with the jury, as it ought to have, for there can hardly be any doubt about the immense value of a nonpartisan summary after counsel have urged their antithetical views upon the jury.

"Trial by jury," says Dicey in his Law of Constitution, "is open to much criticism; a distinguished French thinker may be right in holding that the habit of submitting difficult problems of fact to the decision of 12 men of not more than average education and intelligence will in the near future be considered an absurdity as patent as ordeal by battle. Its success in England is wholly due to, and is the most extraordinary sign of, popular confidence in the judicial bench. A judge is the colleague and the readily accepted guide of the jurors."

Even more novel to an American lawyer is the English practice as to instructing the jury upon the law. Counsel have no more to say about the judge's charge than about his summing up. Instead of being a mere phonographic instrument for reading the instructions which counsel have prepared, the English judge makes his own statement of the law to the jury. The principles involved in the case are pointed out, briefly and simply, in the course of the summing up, wherever they are applicable, rather than in the form of elaborately constructed paragraphs read to the jury one after another in a tiresome and unintelligible series. Counsel are not expected to even intimate to the judge how they would like to have the jury charged, and I once saw a learned barrister make a subtle effort to convey such a suggestion through his argument

to the jury, only to be instantly stopped by the judge, who said, "Sir Edward, I think you may assume that I have sufficient knowledge to charge the jury properly without the assistance of counsel."

In the United States, so far as the state courts are concerned, this right of the judge to comment upon the evidence, though originally possessed, has been largely taken away by statute. To quote further from Professor Sunderland:[4]

As early as the year 1796 this novel doctrine found its way into the constitution of Tennessee in the following language "The judges of the superior and inferior courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." In 1822 a similar provision was enacted by the legislature of Mississippi which was repealed in 1830, but reappeared again in an even more drastic form in the statutes of 1860. In 1836 Arkansas introduced the Tennessee provision into its constitution. The next year North Carolina enacted a statute still more explicit in its prohibitory language—"No judge in giving a charge to the petit jury either in a civil or criminal action, shall give an opinion whether a fact is fully or, sufficiently proven, such matters being the true office and province of the jury." The movement was thus indiginous to the South. It was nearly 50 years before the first Northern state, Illinois, took it up. Then two more Southern states adopted it—Georgia in 1850 and Texas in 1853. Georgia went so far as to prohibit courts from intimating opinions even in equity cases when juries were called in. During the next thirty-five years, fourteen more states enacted statutes or adopted constitutional provisions embodying in various phrases this restriction on the power of judges. These were in Massachusetts in 1860, California in 1862, Nevada in 1864, Oregon in 1865, Colorado in 1867, South Carolina in 1868, Maine in 1874, North Dakota in 1877, Florida in 1877, New Mexico in 1880, Arizona in 1887, South Dakota in 1887, Indian Territory in 1889 and Washington in 1889. That marked the end of the movement toward legislative and constitutional restrictions on the powers of courts in charging juries. . . .

While considerably less than half of the states have enacted legislation on the subject, the courts in about half of the remaining states have by judicial decision adopted the same restriction so that the rule is now actually in force in two-thirds of the American jurisdiction. Only federal courts and a minority of the state courts which were unaffected by statute have remained true to the common law.

[4] The inefficiency of the American jury, *Michigan Law Review*, February, 1915, pp. 307-09.

At the present time the original common law rule permitting the judge to comment upon the evidence exists in but ten states. In eight states this practice is prohibited by constitutional provision, in sixteen by statute, and in thirteen others by way of judicial decision.[5]

There is almost a consensus of opinion on the part of those who have made a special study of the reform of judicial procedure in the United States that this movement for lessening the power of the judge to aid the jury in performing its function of determining the facts was a great mistake and has been responsible in no small degree for discrediting and rendering inefficient the jury system in this country. Thus, Elihu Root, in commenting upon the tendency to make the judge a mere umpire or moderator writes:[6]

The most striking illustration of this tendency is presented by the provisions found in many states, and quite recently urged upon Congress, prohibiting the judge from expressing an opinion to the jury upon questions of fact. From time immemorial it has been the duty of the court to instruct juries as to the law and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and explanation regarding the facts which stands any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? It is to make it certain that the individual advantages gained by having the more skillful lawyer shall not be taken away. It represents the individual's right to win if he can and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game.

On the same subject Chief Justice William H. Taft writes:[7]

The power of the court to comment on the evidence, to point out its strength or weakness, can never take from the jury its

[5] Kenneth M. Johnson, Province of the judge in jury trials, *Journal of the American Judicature Society,* October, 1928. This article gives citations to the constitutional provisions, statutes, and court decisions relative to the matter.

[6] Public service by the Bar. Report, American Bar Association, 1916, pp. 363-64.

[7] Delays and defects in the enforcement of law in this country, Address Civic Forum, New York City, April 28, 1908; reproduced in Reinsch, Readings on American state government.

authority to decide upon the facts. The restoration, therefore, of the procedure which obtained at the common law, and which still obtains in England, in the courts of the United States and in some state courts, by which the verdict rendered is the result of the independent judgment of the jury guided both by instructions by the court as to the law and also by suggestions and comments as to the facts, could work no injustice to any person brought into court, and would secure not only greater efficiency in the enforcement of the criminal law, but also much greater speed in the disposition of cases.

Judge Baldwin said: [8]

Without the guidance of an intelligent judge a jury will frequently come to unfortunate and even unjust conclusions. That there should be such guidance is an essential part of the jury system and it is generally given most effectually where the judges are the ablest and the most independent.

Mr. Joseph H. Choate, in an address in 1898 devoted to the petty jury,[9] quoted Mr. Justice Miller [10] to the effect that "It is of the highest importance that in a jury trial the judges should clearly and decisively state the law which is his peculiar province, and point out to the jury with equal precision the disputed questions of fact arising upon the evidence, which it is the duty of that body to decide. Without this a jury trial is a farce"; and continued:

It is impossible for twelve jurymen, laymen of average or even of superior intelligence, unaccustomed to the application of evidence to issues, called from their several vocations for the service of the court, however patient and attentive they may be, without aid from the court to carry along all the evidence as it falls from the lips of witnesses for a week or a month, to apply each piece of testimony to the issues, and pack it away in their minds as they go along, to measure the results of cross examination upon the direct testimony, to weigh the evidence of the one side against that of the other. They are necessarily intent for the moment upon each word of testimony as it drops from the lips of witnesses. In a long trial the general effect of the evidence upon their minds is vague and indefinite, their memory of details far from clear, the conflicting arguments of counsel confusing, and they naturally look to the judge to be the light, as Lord Bacon says, to open their

[8] The reform of civil procedure, Proceedings, Academy of Political Science, July, 1923.

[9] Report, American Bar Association, 1898, pp. 300, 308-09.

[10] Samuel F. Miller, The system of trial by jury, *American Law Review*, XXI, 859.

eyes to see their way through the labyrinth, and find clews that shall conduct them to the truth.

Professor James W. Garner writes: [11]

In England, the judge occupies a commanding position in the trial which is wholly denied him in America. He is not only vested with large powers in the selection of juries but is allowed to review and sum up the evidence, sift out the immaterial from the material, put the evidence before the jury in intelligible and coherent form, and if the jury has been confused and misled by the arguments of counsel, to set them right before giving the case into their hands. There is really no danger in this principle, since it does not in the slighest degree take away from the jury its power to determine the question of fact, but only helps it toward an intelligent decision by a sifting and clearing up process. In America as Judge Grosscup has remarked the judge is practically not allowed to take part in the trial of criminal cases. His position is that of an umpire or moderator rather than a judge in any real sense. The truth is the Americans have gone to the extreme in exalting the function of the jury at the expense of the judge.

And Professor Sunderland declares: [12]

As long as the ultimate decision rests with the jury there can be no serious encroachment by the judge. His advice will be taken when it appears to be justified by the evidence; otherwise it will fail of effect. The jury will be quick to see and resent any attempt on the part of the judge to be unfair to either party and the concurrence of the jury in the advice of the court, will be good evidence that his advice was sound.

Practically all, if not all, of the surveys of the administration of justice in the United States that have been made in recent years, comment upon the evils of this system and urge that the right of the judges of our state courts to comment upon the evidence be restored to them.[13] On this subject the California Commission for the Reform of Criminal Procedure, expressed itself with exceptional force. After pointing out that the power to comment on the

[11] Criminal procedure in the United States, *North American Review*, January, 1910.

[12] *Michigan Law Review*, February, 1915, p. 310.

[13] Missouri Crime Survey; Michigan Commission of Inquiry into Judicial Reform; Minnesota Crime Commission; California Commission for the Reform of Criminal Procedure; and Committee on Criminal Procedure and Judicial Administration of the National Crime Commission.

evidence was originally possessed by the state judges and was an essential feature of the jury system in its early development, the commission said: [14]

It is probably true that one of the main reasons for the greater efficiency of jury trials in the courts of England and of Canada and in the courts of the United States over that existing in our state courts is the fact that there the jury can receive the benefit of the comments of the trial judge. The fundamental test to be applied to this as to other questions of procedure is: What rule will be most likely to insure that the proceedings will arrive at the truth? The Commission believes that, both as a matter of sound principle and by the demonstration of long experience, a jury is more likely to arrive at the truth when it is permitted to have the benefit of the comments of the trial judge upon the evidence than when it is deprived of them. One of the most important functions of citizenship is jury service. Nothing is more essential to the welfare of society than that those who serve upon a jury should return a true verdict. We draw our juries from all walks of life. Generally speaking, they are not familiar with the processes of adducing evidence in a courtroom, the slow and somewhat cumbersome method of question and answer, the objections and arguments of counsel, and the various matters that arise in the conduct of almost every criminal case. They may listen for days, or even weeks, to the evidence. At the conclusion counsel for the people and counsel for the defense may argue to them at length (in passing, it should be noted that this argument is not to permit counsel to display their talent, but for the reason that their comments on the evidence may assist the jury in arriving at the truth). At the conclusion of it all, the jury must sift the evidence, accept this and discard that, believe this and reject that, and by its verdict arrive at the truth. Can it be denied that in the great majority of cases they will be more likely to arrive at a true verdict if they are permitted to have the benefit of the comments on the evidence not only of counsel, but also of the one trained and impartial man in the courtroom, the representative of the people of the state in a true sense, the judge upon the bench?

Objection may be made to the proposed plan on the ground that it would be possible for the trial judge to abuse his power in commenting on the evidence. It must be conceded that an occasional abuse is a possibility. There can be no power without it being possible that such power may be abused. The pardoning power, the veto power, the power to grant probation and parole, the power of city councils and boards of supervisors, of railroad commissions, of legislatures, and even of the Congress may possibly be abused and perhaps in some instances have been abused. That is

[14] Report, pp. 34-35.

no reason for destroying the power or abolishing such bodies. There is no reason to believe that the power proposed to be given to our judges would be abused to any substantial degree. Indeed, any attempted abuse of the power, any attempt to influence the jury unfairly in favor of one side or the other, would be more likely to react against the desired result. Any marked abuse of the power by a judge would probably result in his soon ceasing to be a judge.

The New York State Crime Commission in its report submitted in 1927 says:[15]

Probably the most important recommendation which this Commission has to offer is that which proposes to restore to the court that control of the trial which the court should always have had. We have been told much about the success in England in the administration of its criminal laws and those who have studied the English system realize that a large part of their success in that country is due to the part played by the judge in the conduct of the trial. . . . One reason for the better administration of the law by the federal courts than by our state courts is, in the view of thoughtful observers, to be found in the fact that in the federal courts the judges do control the trial and are able to guide the jury properly in their determinations. . . . We recommend the enactment of a simple provision of law under which the judge will have his true powers restored to him to conduct the trial, to instruct the jury as to the law applicable to the case and in such instructions to make such comments on the evidence and the testimony and character of any witness as in his opinion the interests of justice may require.

Commenting on the proposal contained in the revised code of criminal procedure drafted by a committee of the National Crime Commission, Mr. Herbert S. Hadley, its chairman, wrote:[16]

Judged from a practical or theoretical standpoint it is difficult to understand why there should not be provided for every jury trial, a disinterested expert authority to advise and assist the jury in dealing with the facts as well as the law. In the absence of such an authority the jurors look to the lawyers for advice and direction and the result is that a trial becomes a contest between opposing counsel, in which the ablest lawyer usually wins. The argument

[15] Pp. 57, 60, 61.

[16] Outline of code of criminal procedure, *American Bar Association Journal*, October, 1926.

usually offered against this reform is that it might lead to official oppression and injustice. Why should we, the greatest self-governing nation in the world, be more concerned over the fear of official oppression and injustice than any other people? Why should we be more solicitous than any other nation as to devising privileges for those accused of crime, which do not obtain in the system of other countries? In short, why in the prosecution of offenders against our laws should we maintain provisions in criminal procedure that are opposed to the judgment of the past, present expert authority and the rest of the world?

Incidentally, it may be remarked that the commissions of inquiry urge that the right be extended to judges and also to counsel to comment in their addresses to the jury upon the failure of the accused to testify, if he refuses to take the stand. To quote from but one of these reports: [17]

We believe that there is ample protection for the defendant by the courts under the ordinary rules of evidence without this added immunity. An innocent person need have no fear from taking the stand as a witness, nor from the comments that may be made because he refrains from taking the stand. Of course, a guilty person must expect a searching examination within the rules of evidence under the guidance of the court, and is assured that his rights will not be unduly invaded. We see no good reason why the prosecuting counsel, in summing up, may not refer to the fact that a defendant has refrained from testifying in his own behalf because the intelligence of the jury will measure the weight of any such comment and appraise it as its proper value.

The new code of criminal procedure adopted by Louisiana in 1928, in addition to providing for other important reforms, confers upon the judge the right to instruct the jury both on the law and the facts and to comment upon the weight and sufficiency of the evidence and the credibility of witnesses.

[17] New York Joint Legislative Committee on Coördination of Civil and Criminal Procedure, Report, 1926, p. 11.

CHAPTER XXXV

THE TRIAL: PRODUCTION OF EVIDENCE

In our analysis of the functions of courts, it was pointed out that the determination of facts not only constitutes a distinct function that can be clearly segregated from the other functions of courts, but that in the performance of this function courts have developed a procedure radically different from that employed by administrative bodies. This procedure consists of having the facts brought out by witnesses, who are produced by the parties, and testify as to facts supposed to be within their knowledge. From such testimony it is the duty of the court or the jury, where use is made of that agency, to reach a decision regarding the facts.

Complexity of Existing Rules. In the operation of this procedure the courts have developed a body of rules governing the persons who are competent to appear as witnesses, the nature of the testimony that they are permitted to give, and the character of interrogatories that may be addressed to them. These rules abound in subtle distinctions, many of which are of an arbitrary character. Some idea of the extent of this complexity may be gained from the statement that five volumes, each several hundred pages in length, are required in one of the latest and best treatises on the subject [1] fully to make known the character of these rules. Of it, one of our leading writers on the practical phases of American jurisprudence says: [2]

> The science of special pleading is usually pointed to as the climax of legal refinement, but the science of evidence pays a much greater tribute to the microscopic discrimination of the legal mind. It is an elaborate and comprehensive system for excluding evidence from the jury, based upon the fundamental idea that the jury cannot be trusted with all the facts of the case, but only with such as the courts think are not likely to mislead. Fearful that the jury will

[1] Wigmore on Evidence (1923).

[2] Edson R. Sunderland, The inefficiency of the American jury, *Michigan Law Review*, February, 1915, pp. 311-12.

draw false conclusions or will become confused in regard to the issues submitted to it, the law devises a protective scheme which is so complex and so infinitely refined that the labors of a lifetime are hardly sufficient to master it. It is a labyrinth set with pitfalls at every turn. No lawyer fully understands it; no judge can accurately administer it. Errors in the admission and exclusion of evidence are not only common but inevitable, and they bring with them appeals, reversals and retrials. No such rules are necessary to protect the judge when he tries the facts, for he is deemed to have sufficient knowledge, judgment, and experience to understand the probative force of whatever is presented to him. But the juror is presumed to be an easy prey to illegal influences and suggestions and if he might have gone wrong by reason of such an error it is usually presumed that he did go wrong.

The following, taken from a recent address by a justice of one of our important courts, brings out in a graphic way the illogical character and the evil results of this system:[3]

I next ask you to consider whether the time has not come for a radical and sweeping change in our whole attitude toward the law of evidence. It was during the last half of the eighteenth century that the jury came to rely upon evidence adduced before it and not in part upon private sources of information. Then there came the first manifestation of our law of evidence, which has rapidly developed from an orderly method of procedure, designed to assist the jury, into a complicated set of rules too often designed to befog both judge and jury. Most of the time in our courts of law is not consumed with the adducing of evidence; it is largely occupied with controversy and discussion as to the manner in which the evidence shall be adduced.

And here again I venture the assertion that in this practical country, immeasurably more than in any other civilized country in the world, there are consumed in the courts vast quantities of priceless time with wholly impractical contention regarding forms of questions, the attempt to draw a sharp dividing line between fact and opinion, the unending chatter as to whether the question calls for a conclusion, the meaningless formulation of and assault upon interminable hypothetical questions.

The law of evidence is not an end in itself and we should cease making it our objective. It is purely adjective law, simply a method by which to ascertain facts. A great accomplishment of the English procedural reform was to emphasize that rules of evidence are merely a method and not an end of litigation. . . .

[3] Joseph M. Proskauer, A new professional psychology essential for law reform, *American Bar Association Journal*, March, 1928. Author is Justice of Appellate Division of Supreme Court of New York.

[In the United States] the meaningless mumble of the objection as incompetent, irrelevant and immaterial sounds through our court rooms like the drone of destroying locusts.

I have found it well nigh impossible by individual effort to make the slightest impress on this habit. By contrast I recall the trial of an accident case I heard in England. A witness was asked to describe the accident and then was asked: "To what do you attribute the accident?" The answer was succintly given that the chauffeur had not been looking where he was going. I should like to parallel that incident in an American court. The witness would be asked what he saw; he would probably endeavor to say that he saw the chauffeur was not looking where he was going. A motion to strike this out as a conclusion would be promptly made and promptly granted. The question would be repeated. The bewildered witness would again approximate to a statement of what he really thought he saw, namely, that the chauffeur had not been looking; a new motion to strike out made and granted would be followed by an admonition of the trial court to the witness to be careful not to give his conclusion, but only what he saw, and the situation would end with the collapse of a witness, now no longer bewildered, but utterly stupefied by the obscurity of a system of law which would not permit him to tell the story of the accident exactly as he would relate it to any human being in the world.

I ask, therefore, that the profession realize that most of the objections urged upon trial are futile and meaningless and that we should reform ourselves in this respect by just ceasing to make them. We should also cease requiring our adversaries to formulate hypothetical questions, when the same result can be more simply achieved by a mere request for the opinion of an expert, and that the unspeakable practice of making our adversary prove a fact, even if you know it is provable, be eradicated among all decent members of the profession.

There can be no doubt that the existence of this mass of complex rules constitues one of the major defects in our judicial system. No other country has a system comparable to it in its refinements and limitations. More than anything else, it is responsible for making the trial of causes an intricate game in which there is a contest of wits as between counsel for the parties and between counsel and the judge, leading to a multiplicity of appeals and retrials.

It is manifestly beyond the scope of the present work to subject these rules to intensive examination with a view to determining their justification. All that can be done is to consider their general

character, the reasons that have led to their establishment, and the lines along which steps for their improvement can best be taken.

In seeking to determine whether the complexity that characterizes the whole system of evidence is necessary and whether there cannot be substituted for it one which is simpler and more direct, it is necessary to examine the underlying principles to determine whether they are ones which should be adopted; in a word, the problem is not so much one of details as of the fundamental principles that should govern in making provision for this branch of judicial administration.

Admissibility of Testimony of Interested Parties. Examining the question from this fundamental standpoint it will be found that the whole system of rules of evidence rests upon certain assumptions the validity of which, to say the least, is open to question. Among these assumptions, the one holding the most prominent place is that a jury cannot be trusted to exercise a proper judgment in weighing evidence that is not of the most direct character or that emanates from parties having a certain interest in the contest. Many of the rules thus have for their purpose the exclusion of evidence. A principle was early developed by the English courts that persons having a direct interest in the case were not competent to be heard as witnesses. In accordance with this principle, the parties themselves in a civil action, their wives or children, and indeed almost any one having an interest in the matter, were not permitted to appear as witnesses and give testimony. In like manner the defendant in a criminal action could not testify in his own behalf and the wife or husband could not testify for or against each other. The theory upon which this principle rested was that an interested party could not be relied upon to tell the truth, and that if they were permitted to testify, the jury was incompetent to determine the extent to which their testimony was veracious.

It is hardly necessary to point out that the existence of this rule at one stroke excluded the evidence of all those most familiar with the facts, and, therefore, the most competent in instruct the court in respect to such facts.

One of the great judicial reforms in England in the nineteenth century was the abolition of this rule. A beginning was made in 1846, when interested parties were permitted to testify in county

courts. In 1851 this right was extended to the superior courts, with some limitations as, for example, in breach of promise of marriage suits. It was not until 1869, however, that such testimony was permitted in all civil actions, and not until 1898 that the defendant in a criminal action was permitted to give testimony in his own behalf. This action of England in removing the barrier to the testimony of parties to the action and other interested parties has been followed by many of the states in the United States.

Until comparatively recent times the defendant in criminal actions was not allowed to testify in his own behalf. Not until the last half of the nineteenth century was this prohibition removed in the United States. Maine took the lead in 1864. Massachusetts and New York followed in 1866 and 1867, respectively, and gradually the reform became general, the Congress passing an act of this character in 1878.

Though this most serious defect in the rules governing the production of evidence has now been corrected, it has been mentioned as illustrating the principles that have governed in the building up of the system of rules of evidence now in force which still exert a strong influence.

Hearsay Evidence. Another rule early developed by the courts in England and accepted by the United States, was that it was not competent for a witness to testify to statements that he had heard other people make. The reasons for the exclusion of such evidence were: that it involved two factors of reliability; one, whether the statement testified to was really made; and the other, that opportunity for cross examination in respect to the subject matter of the statement was lacking.

That there is some force to these reasons there can be no question. On the other hand the rigid enforcement of this rule often excludes evidence of great value and at times the only evidence available for establishing a material fact. The way it can and often does work is illustrated by the following statement of the situation by Judge Simeon E. Baldwin:[4]

Much that in other countries is helpful in reaching a just conclusion is in this manner shut out in American courts. A man of the highest character, for instance, may say before twenty listeners

[4] Baldwin, The American judiciary, 205.

that he saw a certain person shoot and kill another and state how the whole thing happened. The person thus accused is sued for damages under a statute permitting such a remedy for the representatives of the man shot. Before the trial the witness of the act dies. He was the sole witness. There is no other testimony to be had. Under our system of practice those to whom the statement was made cannot be allowed to testify to it. Such testimony would be "hearsay." It would put before the jury two questions, first whether such a statement was really made, and then whether, if made, it was true. The law of evidence says that they ought not to be perplexed by questions upon questions.

It is evident that this rule is one which at times is beneficial and at others detrimental to the administration of justice. The issue presented, therefore, is whether, viewed as a whole, its maintenance is or is not desirable, or rather whether discretion should not be permitted in respect to its admission. The solution, it is believed, lies in the latter alternative. The perferable form of the rule, in other words, is that hearsay evidence should be excluded except where the judge, in the exercise of his discretion, believes that its admission will assist in determining the truth of the facts in dispute. Certainly this rule should obtain in all cases tried without a jury, and, if care is taken by the judge to indicate the character and limitation of such evidence, there would seem to be no reason why it should not exist even where use is made of a jury. After all, the matter is one to be handled in a common-sense manner. In private efforts to determine the facts regarding matters in dispute, one does not hesitate to accept such evidence and give to it such weight as the circumstances warrant. The same is true in respect to inquiries made by non-judicial public bodies. There would seem to be no reason why the same possibilities should not exist in respect to procedure in a judicial tribunal. In support of this position it may be pointed out that in other countries the rule excluding hearsay evidence either does not exist at all or is applied with far less rigidity than in the United States.

Non-Compulsion of Accused to Testify. Still another rule having for its effect to exclude testimony of the most direct and informative character is that which provides that the defendant in a criminal action cannot be compelled to testify, and that his refusal voluntarily to do so cannot be commented upon by the judge in charging

or by counsel in arguing the case before the jury.[5] It is difficult to defend this principle on any logical ground. As Chief Justice William H. Taft has stated:[6]

When examined as an original proposition, the prohibition that the defendant in a criminal case shall not be compelled to testify seems in some aspects to be of doubtful utility. If the administration of criminal law is for the purpose of convicting those who are guilty of crime, then it seems natural to follow in such a process the methods that obtain in ordinary life. If anything has happened and it is important to discover who is the author of it, the first impulse of the human mind is to inquire of the person suspected, whether he did it and to cross-examine him as to the circumstances. Certainly this is the domestic rule by which your wife or your mother proceeds to find out who it is that broke the window, who it is that stole the jam from the pantry, or why it is that the sweeping has not been done by the person charged with that duty. She goes to the suspected culprit and asks the questions natural under such circumstances, to see whether her suspicion of guilt is well founded. Now the proposition that it is unjust to call upon the person suspected of a crime to tell of his connection with it is at first sight untenable. Why is it unjust? If he is not guilty, will he not have the strongest motive for saying so, and if he is guilty and seeks to escape liability will he not use every effort to make his conduct consistent with his innocence? Why then does it expose the defendant to improper treatment if an officer of the law at once begins to interrogate him concerning his guilt? But the answer is, he has the right to consult counsel. He should not be hurried into statements which he may subsequently desire to retract. In other words, he should be given an opportunity after he has committed the crime, to frame in his mind some method by which he can escape conviction and punishment. I am inclined to think that the expression: "No person shall be compelled to testify against himself" if traced back to its original source, had reference to a system of torture which did prevail in the time of the early English kings, and which was intended to denounce not the mere calling of a defendant to testify and inviting him by questions so to do, but the actual compulsion of evidence by physical means.

Speaking to the same point Judge Baldwin said:[7]

He (the defendant) cannot be interrogated in any court or before any magistrate without his consent. This is a weakness in

[5] In only two states, New Jersey and Ohio, can the defendant's failure to testify be commented upon by the prosecution or judge. American Law Institute, Report to Council on a Survey and Statement of the Defects of Criminal Justice, 1925.

[6] Address on criminal law, Yale University, 1905.

[7] *Op. cit.*, 231.

the American system of criminal procedure. . . . If our constitutions could be so modified or so construed as to allow them to ask the accused the questions that the sheriff who makes the arrest, or the reporter who hurries after him to the jail is sure to ask, there are many reasons for believing that it would oftener prove a safeguard to innocence than an occasion for extorted and perhaps inconsiderate or misunderstood admissions. And be that as it may, it would certainly lead up to important clues and frequently bring out admissions that were unquestionably true and necessary to establish guilt.

The fifth amendment to the Constitution of the United States and similar provisions in the various state constitutions preclude, so long as they stand, any radical reform in this direction. They speak for a policy that was necessary under the political conditions preceding the American Revolution but which is out of harmony with those now existing in the United States. The interests of society are greater than those of any individual and yet it is with us the State that is deprived in public prosecutions of an equal chance with the accused. While burdened with the necessity of proving his guilt beyond a reasonable doubt, it cannot, according to the prevailing judicial opinion in this country, so much as ask him at any stage of the prosecution where he was at the time when the crime charged was committed.

The terms of our constitutions are not such as necessarily to demand the construction which has been generally given them by the courts. They have been commonly interpreted with a view to making them as helpful as possible to the accused. Provisions against compelling him to testify have been treated as if they forbode requesting him to testify.

James Bronson Reynolds, President of the American Institute of Criminal Law and Criminology, says:[8]

An instance relevant to my proposition of a modern abuse continued because due to an ancient evil and a false theory is the silence of the defendant. As we know, that right came to be because the crown, that is the state, was wont to torture defendants to secure confession. At first the defendant was forbidden to testify but later he was allowed to do so, but if he chose to be silent the state could not comment thereon. Yet once the truth is sought without fear or favor—and let us remember that it is in behalf of the people that the inquiry is made—we must evidently be free to call all likely to be able to give information. And who is more likely to do so or at least to give a highly important version of the facts than the very person charged by the prosecuting attorney with having committed the offense? Yet in spite of the evi-

[8] Proceedings, Academy of Political Science, July, 1923.

dent desirability of securing the testimony of the defendant, Ohio is the only one of the United States which at present allows the people, that is the Public Prosecutor who represents the people, to comment on the silence of the defendant. A judge of the Supreme Court of Ohio recently stated to the writer that unquestionably more convictions had been secured since the passage of the constitutional amendment giving the power of comment to the Public Prosecutor. He added that he knew no instance of injustice. In a recent discussion of the subject at the annual meeting of the American Institute of Criminal Law and Criminology the view of the Justice of the Supreme Court of Ohio was sustained by the Attorney General of that State and by one of the County Prosecuting Attorneys. No instance of abuse or injustice was established by any speaker from the floor. It may therefore reasonably be inferred that the existence of the ancient provision has only operated to enable guilty defendants to escape from the just consequences of their acts and that the abolition of that provision has operated to secure the conviction of criminal defendants who otherwise might have been acquitted.

While good can be accomplished by removing specific restrictions such as have been enumerated, substantial improvement can only come by a thorough overhauling of the whole system with a view to the elimination of technicalities and to putting the whole matter upon a simpler and more common sense basis. It may almost be said that the question as to what evidence should be deemed competent should be a matter not of definite rule, but of discretion on the part of the judge, to be exercised in accordance with the circumstances of each case. This is the principle that is universally followed by sensible men in the resolving of disputed facts arising in their private business, and is the practice almost invariably followed by administrative bodies in the handling of disputed matters coming before them for action. "Why," writes Professor Sunderland, "should any evidence be absolutely excluded in a court of justice which reasonable men in their own important affairs consider useful?" It is, moreover, significant, as he points out, that in practically every case where governments have created special tribunals of an administrative or quasi-judical character for the purpose of determining facts, care has been taken to provide that, in performing their duties, such tribunals shall not be governed by the legal rules of evidence. Indeed, one of the prime objects sought in setting up such tribunals has been to permit of action untrammelled by such rules.

It will not escape notice that this whole question of the admissability of evidence and the manner in which it shall be given, has an intimate relation to three other matters elsewhere considered: the controlling force of procedural rules; the rôle of the judge in the conduct of the trial; and the continuance of the petty jury in its present form. With the principle once established that the purpose of rules of procedure is merely to ensure that proceedings are carried on in an orderly manner and that departures from them, where no substantial damage is done to the rights of any party, shall not give grounds for a reversal of the decision or a new trial, much of the evil resulting from the present technical and complicated character of the rules governing the production of evidence will be obviated. With the correlative principle put into force that it is the affirmative duty of the judge to direct and control proceedings in court and to exercise broad discretionary powers in so doing, the existing rules, even though unmodified, can be made to serve the ends of justice much more effectively than they do at the present time. With the discontinuance of the use of the jury in civil cases and its greatly restricted use in criminal cases, the *raison d'être* for many of the arbitrary provisions of the rules is destroyed and the basis laid for the adoption of the simpler and more common sense rules that obtain in administrative tribunals.

Status of Witnesses. In the foregoing the assumption has been made that no fundamental change is made in the general character of judicial proceedings as now provided for. As has been repeatedly pointed out, our present system of adjudication is based upon the principle that actions in court partake of the nature of a judicial duel, the court having no responsibility other than to referee and to decide the contest. It follows as a necessary consequence that the whole burden of developing the facts is thrown upon the contesting parties, the judge himself having no responsibility for the securing of the evidence that will enable him to reach a correct decision and in only slight degree for securing a full disclosure of facts from the witnesses who are produced by the contestants. Though use is made of the powers of the court to compel the attendance of witnesses and the giving of testimony, the witnesses are witnesses not for the court but for the respective parties. It may be seriously questioned whether this system is the correct one; whether the preferable one would not be one where the

witness has a neutral status; that is, one called by the court with the duty of giving an unbiased statement of the facts within his knowledge, regardless of the effect upon the interests of the parties.

It may be claimed that in view of the fact that witnesses are sworn to tell the truth, the whole truth, and nothing but the truth, this change in the status would amount to little. This, however, is not so. Regardless of the fact that in theory the witness is called upon to tell the whole truth, in practice he does not feel called upon to volunteer information detrimental to the party calling him, and the opposing attorney, not knowing that he has certain information, may fail to elicit it in his cross examination. Much also depends upon the manner in which the witness gives his testimony. All lawyers are familiar with the difficulties presented by a reluctant witness. It is probably true that witnesses, under the system where they are witnesses for the court instead of for one or the other of the parties, will continue to have their preferences and be guided somewhat thereby. The objection to the present system is that it emphasizes and in a way justifies this position, while under the other system it is minimized. Other objections are that it leads to refinements of rules governing the questioning of the witness which serve no useful purpose and tend to complicate the rules of evidence. Examples are the prohibition on the part of parties of attacking the veracity or impugning the character of witnesses called by them, and the distinction that is made between questions which are proper upon direct and upon cross examination.

There would seem to be strong arguments in favor of doing away with this whole system and substituting in its place one under which the witnesses are not only summoned by the court (though their summoning will of course be suggested by the parties), but, when summoned, have the status of witnesses for the court rather than for the parties. And, consonant with this, the judge should have the right, and freely exercise it, himself to question the witnesses with the purpose of securing a full and proper presentation of the facts within their knowledge, and, when the parties have failed to produce a material witness, or to put into evidence a material document, to cause such witness to be summoned or document produced. This would be but adopting the practice of administrative tribunals.

Expert Testimony. Especially is this principle one that should be followed in respect to what is known as expert testimony. In general, evidence admitted in the trial of a cause must relate specifically to the matters in dispute. Not infrequently, however, issues are presented involving features of such a technical character that it is difficult if not impossible to resolve them without the aid of evidence to inform the court regarding the nature and bearing of such features upon the matters in dispute. Important examples of such cases are those involving the determination of the causes of death of the decedent in trials for murder or manslaughter; the sanity or insanity of the accused where insanity is set up as a defense; the genuineness of handwriting where the authorship of a document is questioned; and the scientific or technical features that are presented in patent cases. In such cases the rules of evidence permit the calling of witnesses, who, while having no direct knowledge regarding the commission or non-commission of the acts in issue, are yet able, as the result of examination subsequently made by them or as the result of their special knowledge, to give testimony that will aid the court in determining the significance of particular issues at stake.

Logically and as a matter of practical expediency, it would seem that it would be of the essence of such testimony that it should represent an absolutely unbiased and independent judgment of the person giving it. As it is, under the existing system these witnesses are selected solely with reference to their giving testimony that will support the side of the party responsible for calling them. It may be and probably is true, in the great majority of cases, that these witnesses are not called upon and do not testify contrary to their convictions. It is, nevertheless, an unavoidable fact that such witnesses are under the incentive to make their testimony conform as nearly as may be to the wishes of the party calling them. At best they seek to present the facts favorable to the contentions of such party while making no effort in respect to the facts that are unfavorable. They receive their compensation, which often is a liberal one, from the parties selecting them, and in return they deem it their duty to support their contentions so far as they are able without being guilty of positive misstatements or distortions of the truth. Even did these conditions not obtain, the fact would still remain that only those persons are called as expert witnesses

who, by previous inquiry by the parties, are found to be willing, as a matter of scientific conviction or otherwise, to give the testimony desired. The result of this system is that in most cases requiring evidence of this character, there is presented to the court evidence which is not unbiased and which is conflicting, thus leaving to the court or to the jury the burden of passing upon such conflicting claims.

If one keeps firmly in mind the special character of this evidence and its special purpose, there would seem to be no justification for such a system. All of the arguments are in favor of the establishment of the rule that expert witnesses in all cases should be selected by and summoned at the instance of the court itself. When so summoned they will be selected by a wholly disinterested agency, and they will have no incentive other than to enlighten the court to the best of their abilities. In making a selection of such experts the court will be influenced wholly by the desire to secure the best information available and not at all by the direction that the testimony may take. It is only reasonable to suppose, therefore, that as a general rule experts of greater competency will be secured as witnesses than are secured under the existing system. That this system has not been adopted is due almost wholly to the indefensible extent to which litigation in the courts is regarded as a judicial duel between the parties over which the judge presides in the capacity of an umpire.

The question of reform in the method of determining the issue of insanity in criminal trials has received especial attention in the draft outline of a code of criminal procedure prepared by a committee of the National Crime Commission. Its proposals so completely cover the subject as to warrant their reproduction in full They read:

A. Whenever a person under indictment desires to offer a plea of insanity he shall present such plea ten days before trial or such time thereafter as the court may direct.

B. If a Defendant when brought to trial for a criminal offense appears to the court to be or is claimed by his counsel to be insane so that he cannot understand the proceedings against him or assist in his defense the question of his sanity shall first be determined and if he is found to be insane he shall not be tried, but shall be confined in a proper institution. If later he is found to be sane, he shall then be brought before the court on the original charge and the prosecution shall not be prejudiced by such lapse of time.

C. Whenever in the trial of a criminal case the defense of insanity at the time of the commission of the criminal act is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial and if the judge does so, he shall notify counsel for both the prosecution and defense of the witnesses so called, giving their names and addresses. On the trial of the case, the witnesses so called by the court may be examined by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as, in the discretion of the judge, may seem just and reasonable, having regard to the service performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

D. Whenever in any indictment or information a person is charged with a criminal offense arising out of some act or omission, and it is given in evidence on the trial of such person for the offense that he was insane at the time when the alleged act of omission occurred, then if the jury before whom such person is tried concludes that he did the act or made the omission, but by reason of his insanity was not guilty according to law for the crime charged, then the jury shall return a special verdict that the accused did the act or made the omission but was not guilty of the crime charged by reason of his insanity.

E. When the special verdict provided for in Section D is found, the court shall immediately order an inquisition to determine whether the prisoner is at the time insane, so as to be a menace to the public safety. If it is found that the prisoner is not insane as aforesaid, then he shall be immediately discharged from custody. If he is found to be insane as aforesaid, then the judge shall order that he be committed to the state hospital for the insane to be confined there until he has so far regained his sanity that he is no longer a menace to the public safety.

In conclusion, it is desired again to emphasize that the admitted evils of the present system of rules governing the production of evidence are not to be met merely by the process of subjecting these rules to a technical revision. What is needed is a reëxamination of the fundamental principles upon which these rules rest. Generally speaking, many of these principles should be abandoned and there should be adopted in their place the principles now underlying the procedure employed by administrative agencies and private individuals in the settlement of their personal controversies.

CHAPTER XXXVI

THE PETTY JURY

The use of a jury of twelve men, not constituting part of the permanent personnel of the court but selected *ad hoc* from among the general body of citizens for the determination of the facts and the rendering of a verdict or decision in actions at law, constitutes one of the dominant features of the American judicial system. Though, to a limited extent, the jury is known in other countries, in none does it play anything like so prominent a rôle as in the United States. This is true even of England where the jury had its origin. The influence of this institution goes far beyond that of its mere existence as a part of the judicial machinery. In a way it determines the whole character of judicial proceedings. Any consideration of the problem of improving existing conditions in respect to the administration of justice in this country must center, therefore, around the questions as to whether this institution is one which in its essential character has merits sufficient to justify its employment, and if so, the conditions under which it should be employed and the rules that should control its operation.

Historical Origin of the Petty Jury. These important questions cannot be properly considered without keeping constantly in mind the circumstances under which this institution had its rise and development, and the reasons that have led to its incorporation in the American judicial system. Though the history of the jury has been written in detail and is readily available in other works, it is desirable that its outline at least should here be given as a basis for subsequent critical examination. This is essential, since an institution that has had so long and prominent a history is not to be discarded or even essentially modified unless the clearest reasons therefor can be shown. All the presumptions are in its favor. Any destructive criticism that does not recognize its historical claims is open to suspicion on the ground of superficiality and failure to give due weight to one of its strongest claims.

As is all countries, justice in early England was exceedingly primitive. In its essence it involved the invocation of the Deity to make known the right. The ordeals of fire and water, as also the trial by battle, were but means of securing a divine decision, the belief being that the Supreme Being would see that the right would prevail. The jury system arose as a substitute for this system. That it represented a vast improvement over it no one can question. As a writer has put it:[1]

Some centuries later when a sort of jury had come into vogue, there was good cause to love it. It provided an alternative to the other modes of trial then existing, modes which were even more haphazard than the verdict of a jury, and which incidentally were less comfortable to an accused man. Compurgation was still used. On this plan, if five witnesses swore a man guilty of theft, he might escape by the oaths of six who had not seen him steal. But this resulted in frequent inaction, and, as the medieval idea of justice required that someone should be hanged, the other modes of settling a doubt were resorted to. Trial by Battle and Trial by Ordeal were both methods of decision which should commend themselves to all but an accused person on account of their fine, bluff, open-handed, Anglo-Saxon characteristics. Trial by Battle, beginning as it did with invocation, combined the attraction of a prize fight with those of a religious ceremony. Trial by Ordeal was more popular among prosecutors because it eliminated the unpleasant chances of battle. The accused person, being bound hand and foot was thrown into a pond. If he "swam," as it was expressed, he was taken out and dealt with as guilty. If he sank and drowned, his innocence was manifest and he was buried with all decency and respect. But the horns of this dilemma were somewhat close-set. A not unreasonable dissatisfaction was felt among the criminal classes, which at that time constituted the bulk of the population. Even the red-hot harrows which were introduced as a reformed method of Trial by Ordeal were felt to be but one step in the right direction. Accordingly medieval genius turned with relief to the jury.

The procedure out of which the jury arose was originally employed by the King as a part of his machinery of government.

The Domesday Book was compiled out of verdicts returned by the men of the various hundreds and townships of England in answer to a string of questions put to them by royal commissioners. . . . Thenceforward the inquest was a part of the machinery of government; it could be employed for many different

[1] Hector Burn Murdoch, Jury justice, *Juridical Review*, April, 1908.

purposes whenever the King desired information. He could use it in his own litigation, he could place it at the service of other litigants who were fortunate enough to obtain this favor from him. But throughout the reign of our Norman kings it keeps its prerogatival character.[2]

This procedure Henry II put at the disposal of all his subjects, as a feature of making his justice supreme throughout his kingdom. This he did by a series of "assizes," of which the Grand Assize was one.

It [the Grand Assize] is described by Glanvill as a Royal boon conferred on the people, with the counsel and consent of the *proceres,* to relieve free-holders from the hardship of defending the title to their lands by the doubtful issue of trial by battle. By the Grand Assize the defendant was allowed his choice between wager of battle and the recognition (*i. e.,* knowledge) of a jury of twelve sworn knights of the vincinage summoned for that purpose by the sheriff. . . . In both cases [those involving either the ownership or the possession of land] the recognitors were sworn to found their verdict upon their own knowledge, gained either by eye-witness or by words of their fathers, or by such words as they were bound to have as much confidence in as if they were their own. The proceeding by assize was in fact merely the sworn testimony of a certain number of persons summoned to give evidence upon matters within their own knowledge. They were themselves the only witnesses. If all were ignorant of the facts, a fresh jury had to be summoned; if some of them only were ignorant, or if they could not agree, others were to be added—a process subsequently called *afforcing* the jury—until a verdict could be obtained from twelve unanimous witnesses.[3]

* * * *

Before the twelfth century was at an end, the inquest in one form or another—sometimes it was called an assize, sometimes a jury—had become part of the normal procedure in almost every kind of civil action. Still there long remained many cases in which a defendant could, if he chose, reject the new-fangled mode of trial and claim the ancient right of purging himself with oath-helpers, or of picking up the glove that the plaintiff had thrown down as a gage of battle. . . . However, before the Middle Ages were over, trial by jury had become the only form of trial for civil actions that had any vitality.[4]

[2] F. W. Maitland and Francis C. Montague, Sketch of English legal history, 52.

[3] Taswell-Langmead, English constitutional history, 137-38. Quoted by Maitland and Montague.

[4] Maitland and Montague, 54-55. Not until 1833, however, was the old trial by battle formally abolished by statute.

The evolution of the jury from a witness-body to one composed of persons not themselves having knowledge but having the duty of determining facts through the testimony of other persons, was a slow one, the history of which cannot be accurately traced.

In course of time, and by slow degrees—degrees so slow that we can hardly detect them—the jury put off its old and acquired a new character. Sometimes, when the jurors knew nothing of the facts, witnesses who did know the facts would be called in to supply the requisite information. As human affairs grew more complex, the neighbors whom the sheriff summoned became less and less able to perform their original duty, more and more dependent upon the evidence given in their presence by those witnesses who were summoned by the parties. In the fifteenth century the change had taken place.[5]

In the criminal field, the use of an "inquest," that is, the procedure where officers of the King called upon selected representatives in each neighborhood to declare whether they suspected anyone of crime had been employed, by the Frankish Kings, and, according to Maitland and Montague, may have made its way into England as early as a half century before the Norman conquest. It was, however, little heard of before Henry II made it the regular procedure for detecting crime. At the outset, affirmative action by the persons questioned constituted an accusation or "indictment" and the person so accused was sent to the ordeal of fire or water. This method of trial, however, disappeared in 1215 when the Fourth Lateran Council forbade the clergy to take part in it as being a superstitious rite.[6] If the accused was willing "to put himself upon his country," that is, to accept the verdict of his neighbors, those who indicted him could ask him whether he was guilty or not. If he declared himself guilty, no further trial need take place. If he affirmed his innocence, he was sent before a second set of men for trial. This was the origin of the petty jury in criminal cases.

No one, could be tried by this new procedure without his consent. Such consent, however, could be forced by what was known as the *peine forte et dure,* that is stretching him out naked on the floor and heaping weights upon his chest until he said that he would abide by the verdict of his fellow neighbors. This procedure was not

[5] *Ibid.*, 57.
[6] *Ibid.*, 59.

always successful, since if a man consented to be tried and was found guilty, he was hanged as a felon, his property was confiscated, and his wife and children left penniless. If he persisted in his innocence and refused to be tried, his guilt was not deemed to be established and, though himself suffering death, the other consequence to his wife and children did not follow. Not until 1772[7] was this barbarous practice formally abolished.

This new method of jury trial did not at once supplant the old method of "appeal" under which the aggrieved party, the person whose goods were stolen or the kinsmen of the murdered man, might still offer to prove his accusation in personal combat or the accused to make his defense in this way. "By slow degrees in the thirteenth century the accused acquired the right of refusing his accuser's challenge and of putting himself upon a jury"; and more and more the judges began to favor this method, but for some centuries later occasional physical combats took place. Not until 1819 was this old method formally abolished.[8]

The two prime characteristics of the petty jury, that it should be composed of twelve men and that unanimity was required for a verdict developed gradually. As Taswell-Langmead puts it:

> The number of the recognitors was at first undefined, but when Glanvill wrote, under Henry II, twelve appears to have been the usual, though not the invariable, number mentioned in the King's writs. We have seen that it was necessary that twelve jurymen should concur in their verdict, and this result, in civil cases at least, was procured by "afforcing" the jury, that is, adding other recognitors from the vincinage who were acquainted with the matter. But the difficulty of procuring a verdict of twelve caused for a time the verdict of a majority to be received. In the reign of Edward III., however, the necessity for a unanimous verdict of twelve was reëstablished.

It will be seen from the foregoing that the petty jury was firmly established by the end of the Middle Ages as the prevailing if not the exclusive method of trying both civil and criminal causes, and had assumed its modern character of being a body having to pass upon facts established by evidence laid before it, instead of being itself composed of persons having prior knowledge of such facts; of being composed of twelve men; and of requiring

[7] 12 Geo. III, c. 20.
[8] 59 Geo. III, c. 46.

unanimity in order to render a verdict. That it represented a great advance over the older primitive methods is evident. The system, moreover, was to render at least two other services of inestimable value.

Down until modern times the English criminal law was inhuman in the extreme. Over two hundred offenses were punishable by death. If guilt was established in these cases, the judge was compelled to impose the death penalty. The jury performed its duty in such a way as to humanize this system to a certain extent. This it did by refusing to convict when it deemed the penalty excessive. Secondly, the jury became the means by which the people were protected in their rights against a tyrannical King. As Hector Burn Murdoch has put it:[9]

Throughout all our constitutional history juries stand out prominently as bulwarks of liberty. At a time when judges were minions of the kings and cabals, juries more than held their own in popular favor. It was small wonder if the amateur band of verdict-givers was loved for its greater honesty. The trial of the Seven Bishops is a sufficient illustration of this. London went half-mad with joy over the jury which disagreed. Some of the jurymen, it was said, had been bribed by the Crown, but the obduracy of others resulted in acquittal. This was put down to the credit of the system. In the course of the next, the eighteenth century, juries did undoubted service to the cause of mercy by refusing to bring in verdicts of guilty when judges, as was their wont, strained the law to the breaking point of severity, notably in the cases of treason and libel. But the law of that time, both Scots and English, was full of cruelty which, strictly enforced, would disgust a Nero. Then when a jury swore a five pound note to be of the value of thirty-nine shillings and elevenpence, in order to save a poor wretch from stangulation, Blackstone himself calls it a "pious perjury." Pious or not, one can readily understand the popular approval which the jury system gained in these times, an approval which has lingered illogically, and which cannot now be reasonably supported by its ancient merits.

Adoption of the Jury System in the United States. The jury system as thus developed in England was taken over in its entirety by the United States. It was but natural that this should be so. At the time of the break with England no doubts had arisen regarding its efficiency as an instrument for securing justices. Black-

[9] *Op. cit.*, 62.

stone, of whose "Commentaries" more copies are said to have been sold in the American colonies than in England itself, gave it high praise as an institution. For years the colonists had struggled against what they believed to be the arbitrary and despotic acts of the King, and in this struggle the jury was one of their mainstays.

We thus find the first Continental Congress, in the Declaration of Rights, adopted October 14, 1774, unanimously resolving that "the respective Colonies are entitled to the common law of England and more especially to the great and inestimable privilege of being tried by their peers of the vincinage, according to the course of the common law."[10] Later, provision was made in the ordinance of 1787 for the government of the Northwest Territory that that territory should always be entitled to the right of trial by jury according to the course of common law.[11] And, finally, among the amendments to the Constitution, the adoption of which was demanded by the states as a condition of ratification, were the Sixth and the Seventh, which provide that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed," and that "in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law."

These provisions of the Constitution apply only to proceedings in the federal courts. Similar provisions were, however, incorporated in nearly all the constitutions of the states, with the result that the jury system was firmly embedded in the constitutional system of the United States.[12]

Adaptation of the Petty Jury System to Modern Conditions. It is one thing to recognize the merits of a political institution as representing an advance over those which have preceded it and as meeting the conditions that prevailed at the time of its rise and development, and quite another to justify its continued mainte-

[10] Journals of the Continental Congress, I, 28.

[11] Poore Charters and constitutions (Federal and state constitutions), I, 431.

[12] The only exceptions are Louisiana and Utah.

nance after those conditions have passed away and new ones quite dissimilar have taken their place. The maintenance of the jury system at the present time must be justified, therefore, not on historical grounds, but upon its positive merits as an institution adapted to present conditions.

In considering this question from this purely utilitarian or practical standpoint, certain distinctions should be made. These may be stated in the form of questions: Is the system as viewed in its fundamental aspects one that should be retained in its substantial integrity, or should it be entirely abolished? Or, second, if retained, should substantial modifications be made in it; and if so, what form should these modifications take? In considering both of these questions the further distinction should be made between the retention, abolition, or modification of the system as employed in the administration of civil justice and the administration of criminal justice. It may well be that the system can continue to prove an efficient instrument in the one case and not in the other, or that the modifications found desirable will apply in one and not the other. The order in which these questions will be considered is that of their statement. An evaluation of the system as a whole should first be sought before an attempt is made to consider the features in respect to which it may with advantage be modified.

Retention or Abolition of the Petty Jury in Civil Cases. As an historical institution which has rendered valuable services, the burden of proof rests upon those advocating the abolition of the jury system. Viewed from the standpoint of its technical character, it is fair to say that the reverse is the case. If a people were starting anew, uninfluenced by historical attachments and sentimental considerations, free to devise that system for the administration of justice which it believed would give the best results in practice, it is hardly conceivable that it would deliberately create such an institution. Stated baldly, the use of the petty jury means that matters requiring adjudication, instead of being submitted to professional experts, trained in the performance of their duties and acting under a continuing responsibility, are handed over to a body of laymen, selected almost at random, regarding whose ability to perform the delicate function of weighing evidence free from sentimental and emotional influences nothing is known, and

who perform their duties under no sense of continuing responsibility. It is, furthermore, a system which complicates and renders more difficult the process of adjudication, entails great expense to the government, and imposes a heavy burden upon the citizen body. A system which represents such a radical departure from normal or accepted methods of handling public business and presents such disadvantages, is surely one the use of which should be supported by affirmative proof of merits that more than offset its failings. It is believed that it is difficult to produce such proof.

A cold analysis of the problem of the administration of justice reveals certain essential considerations that must be met if the system for securing it is to be satisfactory.

The first is that the proper adjudication of controversies requires the exercise of a very special faculty, usually described as the judicial temperament. By this is meant the ability to disentangle the essential from the unessential, to discover the real issue that is presented, to weigh the evidence presented in a detached way, to eliminate matters of sentiment, to be impervious to mere emotional appeals, and to make decisions conforming to the law and the facts as developed and their bearing on the controversy ascertained. It does not need the studies of psychologists to establish the fact that this faculty is not a common possession, that it is one that is acquired only as the result of experience and by persistent self-drill in making action conform to such requirements. The decision of controversies is thus a task requiring specially selected and specially trained experts.

Secondly, persons entrusted with such responsibility as that of determining individual rights should be required to perform their duties under a system of continuing responsibility, where their standing in the community and in their profession, if not their continuance in office, is dependent upon the honesty and ability with which they discharge their duties.

A third consideration is that the work of adjudication should be performed with dispatch, involve the minimum of technicalities, and entail as little burden of expense upon the government, the litigants, and the general public as is consistent with certainty and justice to all parties concerned.

No one of these requirements is met, even in measurable degree, by the jury system. The defects of the ordinary jury from the

standpoint of intellectual attainments, ability to disentangle complicated issues, capacity to weigh evidence of varying degrees of credibility, and power to resist appeals to their emotions are appreciated by all, and find express recognition in the numerous technical rules determining the competency of witnesses and evidence that may be produced. Only in the most general and temporary way is the factor of responsibility present. And it would be difficult to devise a system that would be more productive of trouble, expense, and delay.

Technically considered, therefore, the jury system is defective, and all the arguments from this standpoint are in favor of the alternative system where complete responsibility for the determination of matters both of fact and the law and the rendering of the decision is vested in a permanent trained bench. As Mr. Charles A. Boston puts it, in his excellent article on "Some Practical Remedies for Existing Defects in the Administration of Justice":[13]

> We train recruits to bear arms, we license lawyers, physicians, dentists, midwives, veterinarians, horseshoers and chauffeurs, but so long as a man speaks any sort of English, can hear, is on the jury list and has not formed an opinion, he is deemed a competent man to decide disputes in a court of justice. He would not be accepted to run a street car, nor to perform any number of ordinary duties for a private employer, but he is legally a fit juryman if he has these qualifications.
>
> The true, but not the legal essentials of a competent juryman considering his actual functions, are the ability to listen attentively, to remember testimony, to weigh evidence, to understand instructions upon the law, to argue and give heed to argument, and to unite in pronouncing a reasoned verdict, applying law as instructed to facts as ascertained. In any other vocation, this would be deemed to call for training and experience; these demands require for their efficient exercise, a high degree of mental development, involving attention, memory, observation, reflection, apprehension, understanding, judgment, and reason; but we find no such requirement upon any statute book or in any decision. . . . In short, we recognize in every imaginable way that the jury is the weakest element in our judicial system and yet we pander to it as a sacred institution. It causes more miscarriages of justice and is the occasion of more appeals, reversals and delays than any other element in our system. . . .

[13] *University of Pennsylvania Law Review*, November, 1912.

One of the prime elements of an efficient judicial tribunal is impartiality and freedom from prejudices and yet it is proverbially admitted that before an average jury in a negligence case a corporation stands less chance of judgment on the merits than an individual, an employer than an employee, a religious opponent than a co-religionist, a member of a different race from a member of the same race. . . .

We hear much of the technicalities of the law defeating justice; the most of these technicalities have grown up and exist in a vain endeavor to prevent juries from defeating justice.

In the foregoing no attempt has been made to set forth and employ as arguments against the jury system the many evils which characterize this system in its practical operation. These relate to the extent to which there is what amounts to a process of adverse selection in the selection of men for jury service, with the result that the ordinary jury is composed of men relatively low in order of intelligence and with meagre capacity to exercise a discriminating judgment; the extent to which juries are deliberately "packed" in the interest of one of the parties; the extent to which use is made of "professional" jurors the extent to which juries are "tampered" with; the extent to which jurors are not only unconsciously influenced by race, religion, class, and other prejudices, but deliberately allow such factors to influence their verdicts; the intolerable delay that often occurs in the selection of juries, etc. All of these evils are not inherent in the system and conceivably may be abated, if not entirely removed, by appropriate provisions to govern the jury system in operation. All that will be sought in the paragraphs that follow will be to determine whether the jury system, even if operating with maximum efficiency, is one that represents a desirable feature of a system of judicial administration under political and social conditions now obtaining.

It should not escape notice that those in favor of the retention of the jury system must hold as a part of their argument that the system of trial by the judge alone is one that will not give satisfactory results from the standpoint of the protection of the individual in his rights and the promotion of the public welfare. This it is difficult to do in light of the fact that this non-jury system is in successful operation as regards many classes of litigation in this country, and is being employed to an increasing extent in those

countries, such as England and her Dominions, which have had experience with both systems. As Chief Justice William H. Taft has said in his commencement address on "Criminal Law," at Yale University, in 1905:

In suits in equity the judge hears and decides the issues of fact. The issues may be, and often are, very similar to those arising in suits at common law, the genuineness of a signature, the existence of fraudulent motive, the identity of an individual, damages to business by violation of patents, trade marks or contract rights, and all the variety of issues presented in civil litigation. Now the federal constitution requires that such issues arising at common law shall be tried by a jury, but if an equity suit the court may try them. Since the abolition of the distinction between law and equity in civil actions in our codes of procedure, it requires a lawyer to tell whether a suit brought is in equity or law. Certainly a constitutional mandate that requires a jury in less than half the civil issues, and only in those when in a certain form of action, distinguishable only by a lawyer, can hardly be said to rest on any very broad and sound principles. Of course, in suits for personal injury against corporations, the plaintiff relies on the supposed sympathy of twelve laymen with the poor plaintiff against the rich corporation both to find the facts in favor of the plaintiff and also to swell the damages to a large sum. But this hardly constitutes a reason for maintaining the jury in a system which is supposed to dispense justice to all whether rich or poor—impartially. The abolition of the jury in civil cases would relieve the public of a great burden of expense, would facilitate the hearing of all civil suits and would not, I think, with proper appeal deprive any litigant of all he is entitled to, an impartial hearing.

In England, the home of the petty jury, its use has greatly declined in recent years; and all parties, the bench, the bar, and the public are in accord that in nowise have the safeguards of individual rights been weakened or the due administration of the law suffered.

In Ontario, where the judicial system is modelled on that of England, large discretionary powers are exercised by the judge in determining whether a civil action shall be tried with a jury. Justice W. R. Riddell of the Supreme Court of Ontario gives the following interesting account of the conditions governing the use of a jury in that province.[14]

[14] *Journal of the American Judicature Society*, April 1922.

A party who wishes his case tried by a jury files a jury notice—the other side may move to strike it out. It will be struck out in chambers if the judge sitting in chambers thinks it is a case that ought not to be tried by a jury upon the face of it. Usually, however, a different course is pursued and the matter is left to the trial judge: I go on circuit, say, as I have done many times and hope to do again. The records containing the pleadings are laid before me; I go through the records one by one and determine which, if any of the cases for which a jury is asked should really be tried with a jury. Counsel may be heard; and as a rule, in a very few minutes we have determined in which cases a jury is proper. In all the other cases the jury notices are struck out and they are placed at the end of the list with the cases to be tried without a jury (This applies only to civil cases).

* * * *

The percentage of cases tried by a jury is constantly diminishing—the last time I had occasion to look into the matter at all closely, I found that about twenty per cent were so tried in the Supreme Court, about fifteen per cent in the County Court, and not one-fifth of one per cent in the Division Court.

While technically there is an appeal from the action of a trial judge in striking out the jury, I have, in more than thirty years experience known of only two appeals being actually taken on this ground, both of them unsuccessful—I know of one case, however, in which an appeal taken on other grounds succeeded and the Appellate Court directed the jury notice to be restored.

In an address before the Illinois Bar Association May 28, 1914 I used the following language in reference to our practice.

The saving of time—and wind—is enormous, the opening and closing of speeches of counsel to the jury and the charge of the judge are done away with; in argument there are very few judges who care to be addressed like a public meeting and quite a few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks upon witnesses or parties, appeal to the lower part of our nature, are all at a discount; and in most cases justice is better attained, rights according to law are better ensured. Moreover, during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimized before a judge.

The position is taken by some students that the advisability of the use of the jury in civil cases varies according to the nature of the case. Another writer thus points out that a distinction from

this point of view should be made between cases of tort and of contract. He says: [15]

The success of jury trials in tort actions in the past fifty years in England justifies the belief that there is a class of cases, particularly defamation, breach of promise and the like, in which the jury, rightly employed, is fully justified by results. But in this country where in most states the jury was deprived of the assistance from the judge, the results in personal injury cases were so unsatisfactory as to form a strong argument for workmen's compensation acts, which have greatly reduced this class of cases.

When we come to the use of the jury in contract cases we find the United States divergent from all the rest of the world. In Ontario, for instance, juries are rarely asked for in contract cases. . . .

Much is to be said of the jury as an agency inherently unsuited to comprehending involved commercial causes. Most jurors in such cases have to be educated *ad hoc* at a great waste of energy and time. Education obtained through expert witnesses limited to rules of evidence is a costly and uncertain thing at best.

This position is ably supported by Justice Proskauer of the Supreme Court of New York. In his paper on "A New Professional Psychology Essential for Law Reform" he says: [16]

I should like to apply these generalities to some specific phases of our problem. I maintain that the system of jury trial in civil contract cases has been transformed from a useful process into a wasteful, ineffective and outworn fetish. . . . In this country of today our people have come to regard jury trial in all types of cases with a baseless reverence and awe that finds its parallel in the jurisprudence neither of any other civilized country in this world nor in the historic origin of trial by jury.

The first reason is that the method is wasteful of time and inefficient in result when applied to the typical contract case. . . . Almost every active trial lawyer or judge will concur in this opinion. We observe daily the spectacle of twelve perfectly honest jurors, untrained in the analysis of evidence, ignorant of the subject matter of the litigation, inexpert in that art peculiar to the lawyer by which he quickly absorbs and assimilates as his own that which is primarily the business of others; we see these twelve men sitting through a long complicated trial, with scores of documents and letters and accounts in the evidence, vainly endeavoring

[15] Where jury trials fail, *Journal of the American Judicature Society*, October, 1925.

[16] *American Bar Association Journal*, March, 1928.

to interpret that which they can barely understand. We know the waste of time consumed in reading to a jury hour after hour and day after day written evidence which can be handed up to a trial judge and absorbed by him in a few minutes; and we know the frittering away of time in openings and summations. This is a spectacle that must strike dismay into the heart of every lover of justice. There is no more practical reason today for persistence in jury trial in this type of case than there would be for the continuance of trial by battle.

I can testify to my own experience sitting as a trial judge in the non-jury part provided in this county for the trial of actions at law. It was there possible fairly to dispose of three times as many contract cases in a given time without a jury as with one and with infinitely greater satisfaction to every party concerned. . . .

The second reason is that we may fairly assure the public and the profession that the instinctive distrust of magistrates, which I think is a basis for this reluctance to waive jury trial is no longer warranted. This distrust was born of the suspicion of English magistrates which the founders of our nation had at the time of the Revolutionary War. . . . It is a survival of an organism which has ceased to be useful, a kind of political vermiform appendix. Tyrants are not our most threatening danger today, and certainly, with a formulated body of substantive law and copious right of appeal, we fairly give assurance that the widespread growth of the custom of waiver of jury trial in civil cases need not be distrusted. It has come about in England almost as a matter of course. The trial before a jury of a complicated contract cause is there practically unknown; it simply is not done.

The third reason is that the popular sanctification of a jury trial in civil causes is based upon a complete popular misconception of its historical origin.

After calling attention to the fact that originally the jury was made to consist of persons who knew about the litigants and the subject matter of the litigation, he continues:

I think it must be evident that we have not maintained a system whereby men familiar with the litigants and the litigation in comparatively small communities, where modes of life were simple, were called upon to act as triers of the fact. We have kept the shell alone. We now call twelve men into the jury box, not because they know the litigants or the controversy, but because they do not know them. The questions they are to decide are no longer the simple issues of the earlier centuries. The sentimental devotion to the notion of jury trial in contract causes is an outworn creed.

A calm weighing of the advantages of the jury system in civil cases, supported by the experience of other countries, must lead to the conclusion that the use of a jury in this class of cases, if not entirely done away with, should at least be narrowly restricted to the relatively few classes of cases where it can be advantageously employed.

In point of fact, little attempt is made at the present time to justify the use of the jury system in civil cases upon its intrinsic merits as a piece of judicial machinery. Its defenders do little more than hark back to the services that it has rendered in the past as a protector of the liberties of the people against arbitrary rulers and as a humanizer of a barbarously severe penal code, ignoring the fact that, with the rise of popular government, the establishment of constitutional guarantees, the securing of an independent judiciary, and the humanization of the penal law, the need for a special institution to render these services has completely passed away. Typical of the arguments brought forward in support of the jury system is that of Joseph H. Choate, in his address before the American Bar Association in 1898, which was devoted almost wholly to the defense of that system. In this address he said:[17]

> The truth is, however, that the jury system is so fixed as an essential part of our political institutions; it has proved itself to be such an invaluable security for the enjoyment of life, liberty and property for so many centuries; it is so justly appreciated as the best and perhaps the only known means of admitting the people to a share, and maintaining their wholesome interest in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a school and training in the law to the profession itself; and is so embedded in our constitutions which, as I have said, declare that it shall remain forever inviolate, requiring a convention or an amendment to alter it—that there can be no substantial ground for fear that any of us will live to see the people consent to give it up.

The foregoing argument is one that should be carefully examined by anyone who believes that the time has come to abandon the petty jury, or at least so to modify it as to make it into a radically different institution.

In the first place, it should be noted that this statement evidently emanates from one who carries his appreciation of our political

[17] Report, American Bar Association, 1898, p. 290.

institutions, not only as a whole, but as regards specific details, to the point of veneration. It represents the position of one who apparently believes that American political institutions, taken as a whole and in respect to details, are superior to those of any other country and that the action of our political predecessors, though taken it may be hundreds of years ago, when conditions and problems to be met were radically different, cannot be improved upon. If the same line of argument were advanced in respect to all proposals to change our political institutions and practices, it would mean that it is possible to devise political institutions and practices that are good for all time, regardless of change in conditions and ideals; that there is no such thing as political progress; and that our constitutions and fundamental laws are straight jackets that should yield to no efforts for improvement.

It would hardly seem to be necessary to point out the error of this position. Politics is a science dealing with dynamic, not static conditions. An institution or custom may well have been admirably devised to meet conditions existing at the time of its establishment and yet wholly fail to correspond to changed conditions. Though admitting that age or long established use is a strong *a priori* argument, and that the burden of proof rests upon the one who is advocating change, it by no means follows that the making of change is not often advisable. At all times and in respect to all political institutions, the maintenance of things as they are should be justified by their actual results under existing conditions. If this position is taken, it can be shown how little is the validity of the several arguments incorporated in the statement just quoted.

The first is that the jury system is "so fixed as an essential part of our political institutions" that no change should be made in it. This argument is merely of *a priori* validity. It can be rebutted by showing, as can be shown, that the institution in its present form, no matter what its original merits, no longer gives satisfactory results in practice; and that other countries secure the same ends without its use and through institutions and practices presenting none of the evils admitted to characterize the use of the jury in the United States. Probably the strongest evidence against the retention of the jury simply because it is an old institution is to be found in the fact that in its home, England, its use has been greatly curtailed and, when employed, is operated under rules quite different from those now obtaining in the United States.

The evidence is overwhelming that this change in England in respect to the use of the jury has represented an improvement in the administration of justice in that country. The bench, the bar, and the general public are united in sustaining this position.

The second claim by the author of the quotation was that "it has proved itself to be such in invaluable security for the enjoyment of life, liberty and property for so many centuries" that its abolition should not for a moment be entertained. No one can question this statement as it relates to past times. Since then, the whole problem of securing individual liberties has undergone a revolution. The English-speaking peoples now live under a government of their own and supreme power is in their own hands. The government from a position of supremacy has been reduced to that of an agent, and means have been provided whereby this agent may be rigidly controlled. Especially is this so in the United States where the most severe limitations have been placed by constitutional provisions upon the power of the government, whether acting through the executive or through the legislative branch to do violence to the life, liberty, and property of the individual. The need for the jury as an institution from this standpoint has passed away. Other and more effective means have been devised which renders its continuance on this ground no longer necessary.

The third statement is that the jury should be retained, since it is "so justly appreciated as the best and perhaps the only known means of admitting the people to a share and maintaining their wholesome interest in the administration of justice." This argument is almost wholly a sentimental one. It represents the principle of democracy as opposed to that of representative government. If it has validity here, it calls for the support of all proposals for the direct participation of citizens in governments; the initiative, the referendum, and the recall. The same argument has been advanced in favor of the election by the people of almost all officers of the government, even the more petty officers, and even in favor of the spoils system, since under that system so many persons have a direct interest in securing the victory of the party to which they belong. The interest of the people in the administration of justice is precisely that of the administration of all other branches of the government; having a proper conduct of affairs. It is no more

necessary that this interest should be stimulated by direct participation in the work to be done than it is in the case of other fields of governmental operations. In point of fact, this participation is had only by a small proportion of the population; it is resented rather than sought, and the nature of participation is for the most part not of a character greatly to increase respect for the manner in which justice is administered.

Fourthly, the statement is made that the jury system is "an indispensable factor in educating them [the people] in their personal and civil rights." It may be that the jurors do receive a certain amount of education through service on a jury. The jury system, however, can scarcely be defended from this standpoint. The interest at stake is not that of the jurors but of the parties to the litigation. It hardly seems reasonable to retain an institution that admittedly has evils and often results in miscarriages of justice on the ground that it is a means of education to the persons operating the institution.

Finally, the claim is made that the jury is a desirable institution, since it affords "such a school and training in the law to the profession itself." Here again, the interests of those participating in the operation of the institution is considered rather than those of the parties for whose benefit it is supposed to exist. It is admitted that the use of the jury greatly complicates the process of administering justice; that it is responsible for many of the technicalities of procedure; that to it is due the highly technical rules of evidence; and that it is a fertile source of appeals. With Blackstone, Mr. Choate apparently saw in these technicalities and refinements of judicial procedure a merit rather than a defect; that it is advantageous to have them, as they make more subtle the practice of the law and thus make the game more of an intellectual feat on the part of counsel. The extent to which Mr. Choate emphasized this factor as a supermerit of the jury system would be ludicrous were the issue not so important. In other parts of his address he said:

Let me say what I understand by a jury trial; that picturesque, dramatic and very human transaction, that arena on which has been fought the great battle of liberty against tyranny, of right against wrong, of suitor against suitor, that school which has always been open for the instruction and entertainment of the common people of England and America, that nursery, that common school of lawyers and judges, which has had five times more pupils than

all the law schools and Inns of Court combined—for there are ninety thousand lawyers in America of whom four-fifths probably never saw the inside of a law school.

It alone atones for and mitigates all the drudgery and painful labor of the rest of our professional work. Here alone we feel the real joy of the contest, that *gaudium certaminis* which is the true inspiration of advocacy. Here alone arise those sudden and unexpected conflicts of reason, of wit, of nerve, with our adversaries, with the judge, with the witnesses; those constant surprises equal to the most startling in comedy or tragedy. Here alone is our one entertainment in the confinement for life to hard labor to which our choice of profession has sentenced us, and here alone do the people enter into our labors and lend their countenance to our struggles and triumphs. Sorry indeed for our profession will be the day when this best and brightest and most delightful function, which calls into play the highest qualities of heart, of intellect, of will and of courage, shall cease to excite and to feed our ambition our sympathy and our loyalty.

Not a word here of the interests of the parties to litigation. The jury is to be commended because it offers the setting of a great contest between counsel to be played before a gallery. It is as if hospitals were to be commended because of the opportunities they afford to practitioners and not because of the patients who are to be cared for.

Space has been devoted to this statement of Mr. Choate because it represents to so great an extent the character of the arguments generally brought forward against the abolition of the jury or even its modification in any essential respect. Nowhere has the author been able to find any really able argument in favor of the jury system in its present form based squarely upon the practical results in operation. It is, as has been stated, admitted that the burden of proof falls upon those advocating the abolition or modification of this system. This burden, it is submitted, has been met by the marshalling of a great body of facts showing the extent to which the system complicates and renders expensive the administration of justice, entails delay and trouble to all concerned, and too often results in positive miscarriages of justice. This done, it is incumbent upon the defenders of the system to meet these facts with other than a mere appeal to the veneration that attaches to a long established institution and to the educational value that it may have from the standpoint of the participating jurors and counsel.

Retention or Abolition of the Petty Jury in Criminal Cases. Though many of the objections that can be urged against the use of the jury system in civil suits apply to its use in criminal cases, the argument against its abolition in the latter class of cases is much stronger. The power to deprive a man of life or liberty is such a serious matter that its exercise cannot be too carefully safeguarded. If the vesting of this power in the hands of a single judge, even with the right of appeal, presents an element of danger, and the requirement that guilt shall be established in the minds of twelve men is believed to be not an excess of caution, then the retention of the jury may be justified. The problem of its abolition is one, not of doing away with it entirely, but of determining whether its use should not be restricted.

At the present time petty cases below the grade of felony are in great part tried without a jury. It is believed that this practice can be greatly extended with safety, with the result that the right to a trial by jury will exist only in certain specified cases where the punishment is that of death or imprisonment for a specified term of years. Certainly provision should be made whereby the accused, if he desires, may waive the right to a jury trial and elects to be tried by the judge alone. It is a common thing in municipal and police magistrate courts to try cases without a jury unless a jury trial is demanded by the accused. In criminal cases, the use of a jury is required by practically all of the states in felony cases. Maryland and Connecticut are probably the only states where the accused is permitted to waive the use of a jury in this class of cases. In both of these states this right of waiver is largely availed of, and the results have apparently been wholly satisfactory. In 1924 90 per cent of all cases tried in the criminal courts of Baltimore were tried before a judge. In Connecticut the system was established in 1921. Four years later a questionnaire was sent to judges, prosecutors, public defenders, and a considerable number of attorneys to elicit their opinions regarding its workings. The response was an almost unanimous endorsement of the system.[18]

The Missouri Crime Survey, the Michigan Commission of Enquiry into Criminal Procedure, the California Commission for

[18] For an excellent account of the operation of the system in Connecticut, see article by William M. Maltbie, Criminal trials without a jury in Connecticut, Judicial Council of Massachusetts, Annual Report, 1927, Appendix.

Reform of Criminal Procedure, the Massachusetts Judicial Council, and the Committee of the National Crime Commission all recommended that the waiver of the use of a jury be permitted either in all but capital cases, or in all cases.

Modification of the Petty Jury System. Though many of the most eminent students of our judicial system believe that the time has come when the use of the petty jury should be abolished in civil suits and greatly curtailed in criminal cases, it must be recognized that such action in the immediate future is not to be anticipated. This, for two reasons: In the first place, so deeply is this system embedded in our judicial system, so general is the belief that in it alone is to be found adequate safeguards to a due administration of justice, and so conservative are the American people in respect of the making of changes in fundamental political institutions, that a change of this importance can only be secured after a long campaign of education. Second, is the fact that the existence of this system is for the most part a matter of constitutional guarantee; and experience has proven the extreme difficulty in securing amendments to either our federal or state constitutions that have for their purpose the effecting of fundamental changes. In view of this fact, it is desirable that, starting with the assumption that the petty jury system will be retained for an indefinite time at least, a critical examination should be made of it for the purpose of determining whether it can be modified in such a way as to remove, or lessen, some of its acknowledged evils, and thus be made a more efficient instrument in the administration of justice. This examination will be restricted to those modifications only which relate to its more characteristic features: its size, the requirement of unanimity for the rendering of a verdict, and the method employed in its selection.

Size of the Petty Jury. Twelve, as the number of persons to constitute a petty jury, is evidently purely a matter of historical accident. This being so, the question is presented whether, assuming the petty jury to be retained, its makeup cannot be improved by changing its size. So far as the writer knows, no proposal has ever been made to increase the size of the petty jury as now constituted. The question is really as to whether increased efficiency and economy may not be secured by reducing its size. This question has a different aspect as it relates to the use of the jury in criminal

and in civil cases. It may be that public opinion demands that a person shall not be deprived of life or sentenced for a long term in prison without the affirmative action of at least twelve of his fellow citizens. No such consideration is present in the case of civil suits. Here it would seem that the requirement that the matters at issue should be considered and passed upon by so large a number of persons as twelve is excessive. Especially is this so if taken in connection with the requirement of unanimity in order to render a verdict. Five, or at the most, seven, would seem to be an ample number. It must not be forgotten that any reduction in number proportionally reduces expense, both to the state and to the litigants, and reduces the burden of meeting jury service that rests upon the community, and that it also tends to improve the composition of the jury due to the greater ease in securing a smaller number of competent men for the service.

As a matter of fact, many of the states have acted in this direction and made provision for juries of less than twelve. Conditions as regards this matter are described by W. F. Dodd to be as follows: [19]

The constitution of Utah provides that in civil cases the jury shall consist of eight persons in courts of general jurisdiction. Seven states expressly permit their legislatures to provide for a jury of less than twelve in civil cases in courts of record (Colorado, Florida, Michigan, New Jersey, South Dakota, Virginia and Wyoming). In Florida the constitution provides that in civil cases the number of jurors may be fixed by law, but at not less than six; and it is provided by law that the jury of six shall be sufficient. The Virginia constitution provides that legislation may limit the number of jurors in lesser civil cases to not less than five, and in more important cases to not less than seven. The laws of Virginia provide that the jury shall consist of five persons in cases within the jurisdiction of justices of the peace and of seven in cases not within that jurisdiction. In Virginia the laws also provide that the jury may be waived by consent and that each party may select one person who is eligible as a juror and that the two so chosen may choose another with like qualifications, the three so selected to constitute a jury. In New Jersey, Illinois and a number of other states a jury of less than twelve is expressly permitted by constitutional provision in minor cases.[20]

[19] State government, 307.

[20] The following more detailed data regarding the use of juries of a smaller number than twelve are given by Mr. John Burton Phillips in his article "Modifications of the Jury System," University of Colorado Studies, June, 1905:

Unanimity Requirement. If it is difficult to defend the requirement that a jury shall be composed of so large a number of members as twelve, it is still more difficult to justify the requirement that these members shall reach a unanimity of opinion in order to render a verdict. This point is thus stated by Professor James W. Garner:[21]

The weakest point in our jury system is the rule requiring unanimous verdicts to convict. Although time-honored, there have always been some to see the absurdity of the rule. Hallam in his "Middle Ages" called it a "preposterous relic of barbarism"; Jeremy Bentham and Francis Lieber inveighed against it and Judge Cooley in his edition of Blackstone declared that the rule was "repugnant to all experience of human conduct, passions and understandings" and asserted that "it could hardly in any age have been introduced into practice by a deliberate act of the legislature." Justices Miller

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Arkansas: In less than felony cases, by consent of parties (Stat. 1894, Sec. 2121).

California: In civil actions and misdemeanors, by consent of parties (C. C. P. 97, Sec. 194).

Colorado: Six to twelve, in civil cases on demand and payment of fees (1891, p. 83).

Connecticut: Nine or more, in civil cases, by written consent of parties (G. S. 1888, Sec. 1103).

Florida: Twelve, in capital cases, six in others (R. S. 1892, Sec. 2854).

Georgia: Not less than five in all except city and superior courts (Const., Art. 6, Sec. 18), Code 1895, Vol. 2, Sec. 4143).

Idaho: Less than twelve in civil cases, by consent of parties (R. S. 1887, Sec. 3939).

Illinois: Twelve or six, by agreement, in trials of right to property in county courts (R. S. 1899, p. 1274).

Indiana: Three to twelve, by agreement in civil cases (Ann. S. 1897, Sec. 521).

Kentucky: Less than twelve by agreement in all cases except felony (Stat. 1894, Sec. 2252).

Louisiana: When punishment may be hard labor, five; when must be hard labor, twelve (Const. Sec. 116).

Montana: Less than twelve, by consent, in civil cases and in criminal cases below felony grade (Const., Art. 3, Sec. 23).

Nevada: Not less than four by consent in civil cases (C. S., Sec. 3256).

Oregon: Less than twelve by consent in civil cases (Ann. S. 1887, Sec. 180).

Utah: Eight jurors in all but capital cases (Const., Art. 1, Sec. 10).

Washington: Not less than three by consent in civil cases (Bulanger's S., Sec. 4978).

[21] Crime and judicial inefficiency, *Annals of the American Academy of Political and Social Science*, May, 1907.

and Brown of the United States Supreme Court and Ex-Judge William H. Taft are all on record as favoring a modification of the rule. Justice Ingraham of the New York Supreme Court has suggested the possibility of adopting a rule making a verdict by three-fourths of the jury sufficient to convict, subject to the approval of the presiding judge.

Nowhere on the Continent of Europe does the unanimity requirement prevail. In Germany, Austria and Portugal a verdict may be returned by two-thirds of the jury; in France and Italy by a bare majority, and in the Netherlands, where crime is almost nonexistant, trial by jury does not prevail at all. In Scotland curiously enough a unanimous verdict is required to convict in civil cases while a two-thirds verdict suffices in criminal cases. In England, the unanimity rule still prevails but juries are never empowered, except in libel cases, to pass on questions of law, and in determining questions of fact they are so much under the control of the court that many of the abuses which result from jury trials in the United States are avoided.

The theory upon which the unanimity rule rests is that twelve men may be found who will take the same view of a disputed fact, that the balance of each juror's mind can be struck in the same direction, that all are able to feel the same cogency of proof and that no one can be drawn to a conclusion different from that to which his fellows have arrived. It is needless to say that such conditions are rarely present in the minds of twelve men picked up at random from the community. The result is that in many cases a unanimity is apparent and not real. Everyone is familiar with cases in which a single juror has set at naught the opinions of eleven—has by sheer obstinacy and power of physical endurance compelled his associates to return verdicts which did not represent their real convictions or driven them to disagreements, in either case defeating justice.

The unanimity rule gives too much power to one man. It virtually places the protection of the community in the hands of a single individual who is often selected without regard to mental or moral qualification.

Whatever may be the feeling in regard to the requirement of unanimity in capital cases, there would seem to be no justification for it in criminal cases of lesser importance and in civil cases, whatever their character or importance, with the possible exception of libel and slander cases. As Professor Garner has said, it puts too much power in the hands of a single irresponsible person. Worse still, it is a direct incentive to tampering with the jury by the evil-disposed, since the danger involved in an attempt improperly to influence a single juror is so much less than when a number

must be so influenced, if success is to be secured. In civil cases the issue is between two individuals and there should be no presumption as to which is in the right. It is true that the burden of proof may be deemed to rest upon the plaintiff, but, on the other hand, the fact that he is willing to go to the trouble and expense of an action at law renders it certain that in practically all cases he believes that he has a just cause, while no such presumption exists in the case of the defense. Yet, under the unanimity requirement, the plaintiff must convince all the members of the jury in order to secure a favorable verdict, while the defendant must secure only one man in order to defeat action. Under this requirement, the balance of the scales of justice is not equally held.

More and more the objections to the unanimity requirement are being appreciated in the United States. According to Professor Dodd, eighteen states by their constitutions expressly provide for, or permit, a less than unanimous verdict in civil cases.[22] The constitution of Montana provides that two-thirds of the jury may render a verdict. The Minnesota constitution provides that the legislature may permit five-sixths of a jury to return a verdict after the jury has deliberated not less than six hours; and the laws of Minnesota permit a five-sixth's verdict after not less than twelve hours deliberation.

The situation in respect to the unanimity requirement in criminal cases is set forth by Professor Dodd as follows:[23]

> A unanimous verdict of a jury of twelve is required by all states in capital cases. In felonies—that is, in the more serious criminal cases—a unanimous verdict is required in all states except Louisiana. The Louisiana constitution provides that cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; and that cases in which the punishment is necessarily at hard labor shall be tried by a jury of twelve, nine of whom concurring may render a verdict. In capital cases the unanimous verdict of a jury of twelve is required. In Utah capital cases are tried by a jury of twelve men, but eight constitute a jury in all other cases; and in Virginia a jury of less than twelve is permitted where punishment is not by

[22] *Op. cit.*, 307, *et seq.* These states are: Arizona, California, Colorado, Idaho, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, and Washington.

[23] *Michigan Law Review*, May, 1907.

death or confinement in the penitentiary. Several states permit a jury of less than twelve in inferior courts. The constitutions of Oklahoma and Texas provide that three-fourths of the jury may render a verdict in criminal cases below the grade of felony; and the constitution of Montana provides that in similar cases two-thirds of the jury may render a verdict. The constitution of Idaho permits the legislature to provide for a two-thirds verdict in misdemeanors.

Most, if not all, of the recent enquiries into criminal justice in the United States take the position that the unanimity requirement should be abolished in all but capital cases. The Missouri Crime Survey recommended that five-sixths of a jury of six members be permitted to give a verdict in misdemeanor cases and that five-sixths of a jury of twelve be permitted to give a verdict in all felony, except capital, cases, The Michigan Commission of Inquiry into Judicial Procedure recommended that the constitution of the state be amended so as to permit of verdicts by less than unanimity of the jury.[24] And the revised Code of Criminal Procedure drafted by the committee of the National Crime Commission provides that in all misdemeanor cases and in all felony cases except where death may be the penalty inflicted, a five-sixths' verdict may be rendered. The section of the draft code covering this point reads:

In all felony cases a five-sixths verdict of a jury shall be sufficient to convict, except in cases where death may be the penalty imposed, and in which cases the verdict of the jury must be unanimous. In misdemeanor cases triable before a jury the jury shall consist of six, and a five-sixths verdict shall be sufficient to convict. The defendant, in any case except where the death penalty may be imposed, may waive a trial by jury and have the case tried by the court. In all jury trials, only the question of guilt shall be decided by the jury, and the trial judge shall fix such punishment as may be authorized by law. Before sentence the judge shall be advised of the defendant's criminal record so far as obtainable, and may seek information as to his mental condition.

In 1879 California amended its constitution so as to permit juries to render verdicts in civil cases by a vote of three-fourths of their number. The manner in which this system has operated

[24] In Scotland, juries have long been permitted to render verdicts by less than unanimity and the evidence is that the system gives satisfaction to all parties.

and the question of its possible extension to criminal actions has recently been surveyed by former Secretary of the Navy Curtis D. Wilbur, who has long been personally familiar with it.[25] Regarding the manner in which the system is appreciated he says:

> After nearly one-half a century's experience under this provision of the state constitution, the results have been so satisfactory that I doubt if a single practicing attorney could be found who would advocate a return to the unanimous verdict.

On the question of the extension of the system to criminal cases, he says:

> I believe that a majority of the bar would be in favor of such a change in all felony cases except capital ones.

Method of Selection of Jury. The entrusting of so important a function as that of determining issues involving life, liberty, and property to a body of twelve laymen is such a serious matter that it would seem to carry with it the taking of every possible precaution to secure men believed to have special qualifications in the way of character, attainments, and experience. Unfortunately, this requirement is only imperfectly met. In the first place important classes of the community are by law relieved from the duty of jury service, chiefly on the ground that their occupations or positions are of such a character, that to require them to leave their work would do injury to the public good or impose undue hardship upon them personally. Secondly, the officer having the duty of selecting the veniremen from among whom the men to serve on juries are selected, actuated by the same motives underlying the jury-exemption laws tend to restrict their choice to those classes to whom jury service will not be a great hardship. Finally, the judges, who have power to relieve men drawn for jury service, for the same reason display great liberality in excusing persons who are able to show that service will seriously interfere with their business and work great pecuniary or other loss to them. The result is that only in exceptional cases are juries composed of men in respect to whom any claim can be made that they possess special qualifications for the work. This statement is not made as a criticism either of the law regulating jury service or of the men entrusted with its

[25] Address, Pennsylvania Bar Association, June 27, 1928. Reprinted in *U. S. Daily*, June 28, 1928.

administration. One of the objections to the jury system is that it involves the throwing of a great burden upon the community. The conditions described represent merely a recognition of this fact and an attempt to meet it. The fact that juries are generally of an inferior character is a criticism of the jury system itself rather than of its administration.

There is another feature of the problem of selecting juries, however, that is open to still greater criticism and for which no such justification can be made. This is the great expense and delay that is often involved in securing a jury. The extent to which this can go is illustrated by the case of the trial of a labor union slugger, where the selection of a jury consumed nine and a half weeks, involved the summoning of ten thousand veniremen, the examination of nearly five thousand talesmen, and entailed a cost to the state of forty or fifty thousand dollars before a jury was finally selected. This, of course, is an extreme case, but cases where days if not weeks are consumed in securing a jury, and hundreds of veniremen are summoned and talesmen examined, are rather the rule than the exception where there is great public interest in the case to be tried.

That such occurrences, which are universally recognized as an evil, can take place is due not so much to faulty administration as to the fundamental principle adopted by American courts in handling this feature of the jury system. This principle, whether openly avowed or not, is that the selection of the jury from among the veniremen summoned rests primarily upon the legal representatives of the parties, or that such representatives will at least have a large negative influence upon the selection. The result is that the selection of the jury constitutes one feature of the judicial duel between such representatives. Another governing principle is that the effort should be made to exclude from the jury all those who, as the result of reading the newspapers or otherwise, may have formed an opinion, no matter how slight, regarding the case to be tried. As Professor Garner has written:[26]

In America it is assumed that one who may have casually or otherwise formed and expressed an opinion upon the merits of the case from hearsay evidence is incapable of rendering a verdict according to the legal evidence when it points to a different con-

[26] James W. Garner, Criminal procedure in the United States, *North American Review*, January, 1910.

clusion from that at which he may have already arrived. Such a rule renders it exceedingly difficult in important cases to find twelve men who are legally qualified to try the case.

Still another defect in the system of selecting a jury as it obtains in the United States is the excessive extent to which counsel for the defendant may challenge peremptorily prospective jurors. Commenting on this feature of our system, Chief Justice William H. Taft has written: [27]

Another cause of the inefficiency in the administration of the criminal law is the difficulty of securing jurors sensible of the duty which they are summoned to perform. In the extreme tenderness which the state legislatures exhibit towards persons accused as criminals, and especially as murderers, they allow peremptory challenges to the defendant far in excess of those allowed to the prosecution. In my own state of Ohio, for a long time, in capital cases, the law allowed the prosecution two peremptory challenges and the defendant twenty-three. This very great discrimination between the two sides of the case enabled the defendant's counsel to eliminate from the panel every man of form and character. and to assemble a collection in the jury box of nondescripts of no character who were amenable to every breeze of emotion however maudlin or irrelevant to the issue.

In marked contrast with this is the system of England. The principle there is that the selection of a jury is primarily the function of court. To quote from the report of the New York Commission on the Laws' Delay: [28]

Under the English practice but two inquiries are permitted to be asked the juror in a criminal case; (1) Whether he is in any way related to the accused or his victims; and (2) whether he knows of any reason why he cannot render a verdict in accordance with the evidence presented to the court. The protracted and rambling interrogatories which have become to be a regular feature of nearly every important trial in this country are not permitted. Anything beyond the two inquiries indicated, to an Englishman seems superfluous and a waste of time. . . . Mr. R. Newton Crane, formerly a member of the American Bar but for sometime past a prominent barrister of London, says "The examination of jurors on their *voir dire* is absolutely unknown in England while many lawyers

[27] Delays and defects in the enforcement of law in this country. Address Civic Forum New York City, April 28, 1908; Reproduced in Reinsch, Readings on American state government.

[28] P. 19.

who have been in practice for twenty years or more have never known a juror to be objected to or excused for cause. It not infrequently happens that the same twelve jurymen will hear three causes without leaving the box.

A great improvement in the manner in which the jury system operates in the United States can thus be secured by adopting the principles governing the selection of juries in England. Among them the most important is that of throwing the entire responsibility for the selection of the jury upon the court. This change is one of the reforms most urgently advocated by the California Commission for the Reform of Criminal Procedure in its exceedingly able report, which recommends the enactment by a statute to read as follows:[20]

It shall be the duty of the trial court to examine the prospective jurors and to select a fair and impartial jury. He may, in his discretion, permit reasonable examination of prospective jurors by counsel for the people and for the defendant.

Commenting upon this recommendation, the report says:

The purpose of this selection is twofold. First, to cut down the great amount of time now consumed in the selection of jurors; second, to increase the probability that a fair and impartial jury will be selected. . . . At the present time the selection of the jury is to a large extent a game between counsel. It is only natural that each side should endeavor to secure jurors who will be favorable to that side. The ideal should be to select a fair and impartial jury. . . . This statute is designed to make it primarily the duty of the trial court to bring about the selection of such a jury. There are undoubtedly cases in which reasonable examination by counsel should be permitted. The proposed statute permits this. It makes it the right and duty of the court always to control such examinations to the end that justice shall be done and no undue delay occur.

Incidentally, the report recommended that the right of peremptory challenge of prospective jurors be equalized as between the state and the defense. Both of these recommendations were enacted into law by the 1927 legislature.

[20] Report, 1927, 19.

CHAPTER XXXVII

THE QUESTION OF APPEALS

Need for Review. In all modern systems of judicial procedure provision is made for the review of the decisions of trial courts by courts of superior jurisdiction. The need for such a review is found in two facts: the necessity for a unified interpretation of the law and the belief that means should be provided by which errors committed by the trial courts may be corrected. The trial of cases in the first instance is necessarily entrusted to a large number of courts, each exercising jurisdiction in but a particular district. Unless provision is made by which their determinations of law may be passed upon by a single tribunal whose determinations have a general force, there may be as many interpretations of the law as there are trial courts. As regards the second point, trial courts are, after all, but human agencies, and, like all human agencies, are liable to err. If practical means can be found to detect and correct their errors no one will question the desirability of making use of them.

Existing Unsatisfactory Conditions in the United States. Though the principles involved are thus clear, great difficulties have been encountered in putting them into execution without introducing evils as great, if not greater, than those they are intended to correct. It has long been recognized that a prime cause of the excessive delay and expense characterizing the administration of justice in the United States is due to the possibility that exists for the same case to be repeatedly appealed. What can take place under the American system is shown by the following cases cited by Judge Simeon E. Baldwin:[1]

In 1882 a brakeman was injured on a New York railroad. He brought suit against the company and in 1884 recovered $4000 damages. The judgment in 1886 was reversed on appeal. On a new trial he got a verdict for $4900. This was appealed to two courts successively. The first affirmed and the second reversed the

[1] Baldwin, The American judiciary, 366-67.

judgment. In 1889 there was a third trial at which the company won. Two appeals by the brakeman followed. On the first the intermediate appellate court in 1894 decided against him. On the second, in 1897 the court of last resort decided for him. For the fourth time the case came on in the trial court and a verdict for $4500 was recovered. The company appealed and with success. A fifth trial gave him a verdict for $4900. This too was set aside on appeal. A sixth trial followed with exactly the same results. In 1902 the seventh and final trial took place. The verdict this time was for $4500. The company appealed again but was defeated.

As Judge Baldwin remarks, "A lawsuit that embraces seven appeals and lasts for twenty years is, of course, a rarity but the system of administration of justice under which such things are possible is faulty in the extreme."

The right to appeal from the decision of a trial court is undoubtedly of value to the defeated party. It is, however, a corresponding disadvantage to the successful party. At best, that is, when exercised in good faith in the belief that the trial court has erred, it means delay and added expense in securing a final judgment. Unfortunately, the right to appeal is one that can be, and only too often is, exercised by the defeated party merely as one of a number of devices employed by a litigant who has no real defense, to postpone meeting an obligation and if possible to tire out his antagonist, exhaust his financial resources, and force him either to abandon the action or accept an inequitable compromise. What at first sight may appear to be only a reasonable provision for the correction of error may, in fact, seriously interfere with the prompt and economical administration of justice.

This possibility is all the more serious on account of the inequality of financial strength that often exists between the parties to litigation. A broad right of appeal works to the advantage of the strong and to the disadvantage of the weak. To such an extent is this true that more than almost any other feature of our judicial system, it is responsible for the feeling that exists that it is difficult for the poor to obtain justice against a wealthy opponent. Whatever may be alleged from the standpoint of theory in favor of a liberal appeal system, practical experience under such a system

would indicate that its effect on the whole is often bad. Thus Chief Justice William H. Taft, speaking from his large experience says:[2]

It may be asserted as a general proposition, to which many legislatures seem to be oblivious, that everything which tends to prolong or delay litigation between individuals, or between individuals and corporations, is a great advantage for that litigant who has the longer purse. The man whose all is involved in the decision of a lawsuit is much prejudiced in a fight through the courts, if his opponent is able, by reason of his means, to prolong the litigation and keep him for years out of what really belongs to him. The wealthy defendant can almost always secure a compromise or yielding of lawful rights because of the necessities of the poor plaintiff. Many people who give the subject hasty consideration regard the system of appeals, by which a suit can be brought in a justice of the peace court and carried through the other courts to the Supreme Court, as the acme of human wisdom. The question is asked: Shall the poor man be denied the opportunity to have his case re-examined in the highest tribunal in the land? Generally the argument has been successful. In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must be given to the other and wealthier party, of carrying the litigation to the court of last resort, which generally means two, three, and four years of litigation. Could any greater opportunity be put in the hands of powerful corporations to fight off just claims, to defeat, injure or modify the legal rights of poor litigants, than to hold these litigants off from what is their just due by a lawsuit for such a period, with all that limits the right of appeal works for the benefit in the end of the poor litigant and puts him more on an equality with a wealthy opponent. It is probably true that the disposition of the litigation in the end is more likely to be just when three tribunals have passed upon it that when only one or two have settled it; but the injustice which meantime has been done by the delay to the party originally entitled to the judgment generally exceeds the advantage that he has had in ultimately winning the case.

It will be seen from the foregoing that the problem of securing a unified interpretation of the law and a correction of error on the part of trial courts is not to be solved by any general grant of power on the part of defeated litigants to carry their cases to a

[2] Some delays and defects in the enforcement of law in this country. Address, Civic Forum, New York City, April 28, 1908; reprinted in Reinsch, Readings in American state government, 173 *et seq.*

superior tribunal. The situation, in a word, is one where some discrimination must be made in respect to circumstances under which this right may be exercised. It is proposed in the pages that follow to indicate the form that this discrimination should take.

Subject Matter of Appeal. It has been pointed out in the analysis of the functions of a court that, in deciding a case, a court does a number of distinct things. Referring to this analysis it will be found that the errors that may be committed by a trial court are of three kinds, according as they relate to: (1) The determination of the facts; (2) the determination and application of the adjective law, or the rules of practice and procedure governing the conduct of the case; and (3) the interpretation and application of the substantive law. If, now, we examine the question of the desirability of permitting appeals from the standpoint of the nature of the action of the trial court, it will be found that quite different provisions should be made in respect to each of these three classes of possible errors.

Appeal on Matters of Fact. Considering first the question of the right of appeal from the decision of the trial court as regards the facts, the statement can unhesitatingly be made that this right should be restricted within very narrow limits. There is no reason to suppose that the trial court is not as competent as any other tribunal to determine accurately the facts. If there is any presumption in favor of the competency of one or the other tribunal it is in favor of the one which has had the witnesses before it and gives full opportunity to the parties to bring forward evidence in support of their several contentions. Furthermore, so long as the petty jury is retained as the agency to determine the facts, its conclusions should be given controlling weight. Apart from these considerations and as a matter of practical expediency, more harm is done in permitting a retrial of facts, through the delay and added expense thus entailed, than good is accomplished through the occasional correction of an error of judgment on the part of the judge or jury. In this connection it should be noted that the trial judge may himself set aside the verdict of the jury when it is manifestly contrary to the weight of the evidence. One must thus agree with the conclusions of the Massachusetts Judicature Commission when it says:[3]

[3] Report, 1921, p. 37.

The commission is satisfied that the present system of appeal from the district courts to the Superior Court, providing as it does for two trials of fact in the smaller civil cases, with the resulting delay to the parties and cost to the Commonwealth, is a great waste of judicial time and power which ought not to continue. Trying small cases twice, maintaining courts for the conduct of ineffective trials is merely consuming the time and money of parties and witnesses many of whom can ill afford the loss and delay involved in two trials. . . . As the system of double trials on the facts has been gradually abandoned, first in the Supreme Judicial Court, then in the Court of Common Pleas (which preceded the Superior Court), then in the Land Court in 1910, then in the Municipal Court of the City of Boston in 1912, and lastly in the Probate Court by chapter 274, General Acts of 1919, the Commission believes that the time has come to take the next step and abandon the system in the district courts generally. In our opinion the sooner this is done the better.

If there is distrust of the trial courts in respect to their competency to determine facts, the remedy lies in the improvement of these courts and not in the provision that their determination of facts may be reviewed and set aside by another tribunal. The reform elsewhere urged in the way of abolishing the unsatisfactory justice of the peace courts and setting up of strong tribunals to hear cases in the first instance, if accomplished, will greatly strengthen the argument in favor of making the determinations of fact by trial courts conclusive, except as actual fraud or misconduct equivalent to fraud is alleged or found to exist. Until the trial courts have been greatly improved, it is possible that public opinion will not sanction the cutting off of the right to an appeal from determinations of fact by trial courts in all cases. Where this is so, a distinction may be made between cases according to the gravity of the criminal offense or the amount involved in the case of civil causes, appeal being permitted in the more serious or important cases and denied in those of lesser gravity or importance. At any rate, the existing right of appeal from determinations of fact should be greatly curtailed and hedged in with safeguards against abuse. If this is done, a great step will be taken toward lessening the existing evils of excessive appeals.

Appeal on Matters of Procedure. The question of the extent to which the right shall be granted to demand a review of the action

of trial courts in respect to the interpretation and application of the adjective law, or the rules of procedure governing the trial, is a somewhat more difficult one. Here, certain distinctions have to be made that are not required in the case where the issue is one regarding the determination of the facts. The first distinction is that between those errors in procedure which materially affect the rights of the parties, that is, those which are of such a character that they have had a real influence upon the judgment rendered, and those which are of a minor or purely technical character, which, even though admitted to be errors, furnish no reasonable grounds for believing that they have prevented the aggrieved party from fully presenting his case or influenced the judge and jury in reaching their decisions. Manifestly, the argument in favor of permitting a review of the decision of the trial court in case of errors of the first class are much stronger than in the case of those of the second.

To permit of appeals in all cases where it is alleged that the trial court has erred in respect to the application of the rules, whether such alleged errors are of a character than can be reasonably supposed to have materially affected the judgment or not, is certain to be productive of evils out of all proportion to the good that may be done in a relatively few cases. It throws open the door to the use of the right of appeal purely for purposes of delay, and increases the expenses of litigation, all of which, works to the disadvantage of the weak litigant.

Further than this, the existence of any such broad right affects profoundly the whole character of the conduct of the case in the trial court. The proceeding tends to become one known as trying a case for error; that is, one where the defendant's attorney devotes his attention not merely to an attempt to combat the material allegations of the plaintiff, but to the attempt to entrap the plaintiff's counsel or the presiding judge into the commission of some technical error in applying the rules, on which he can base an appeal to a superior court. To such an extent is this carried, where this system prevails, that the proceeding is sometimes described as one where the trial judge is on trial rather than the defendant.

It is a matter of regret that this is the system which has generally prevailed and, though there has been some tendencies within recent years to get away from it, still largely prevails in the United States. It constitutes one of the greatest defects in our system of judicial

administration. Its establishment in our system is wholly due to the attitude taken by the court, in respect to this phase of our judicial system. Not only have the courts, as a general proposition, drawn no distinction between errors in the interpretation and application of substantive and adjective law as a ground for review, but they have ignored the distinction between errors of procedure having a material bearing upon the issue and those which are of a petty, technical character, which only by the greatest stretch of the imagination could be conceived as ones that could unduly influence the judge or jury. The principle followed, in a word, has been that of the presumption that any error, no matter how slight, incidental, and immaterial, is to be deemed prejudicial and to give ground for a review by a superior court and in any cases to a new trial. The result has been to multiply appeals and to have these appeals relate to matters of procedure rather than substantive law. In 1910 the American Bar Association caused an examination to be made by Mr. Frank C. Smith of the general digests of court decisions in all the states and in the federal courts during a period of three months for the purpose of determining the extent to which the decisions of the courts turned upon matters merely of procedure. This investigation showed that more than one-half of all the points ruled upon during that period related to matters of procedure. To quote from a congressional report, in which use was made of the results of this investigation to support a bill to confer upon the Supreme Court of the United States power to prescribe rules of procedure for the federal courts when sitting as common-law courts: [1]

Taking all of the reports, State and Federal, together it will be seen that the total points which were ruled upon during this period number 22,986 with 10,727 relating to matter of substantive law and 12,259 to matters of practice. In other words, that a little or 53 per cent were practice points and less than 47 per cent were upon substantive law. In the federal courts 49.8 per cent, or substantially one-half of the points ruled upon, related to procedure. Kentucky makes the best showing with 43.7 per cent and Delaware the worst with 64.4 per cent (or nearly two-thirds) of the rulings relating to the purely adjective law.

A system under which matters of mere procedure play so important a part and the action of trial courts can be reviewed and set

[1] 64 Cong., S. rep. 892.

aside upon the grounds that, in the opinion of the reviewing tribunal, the rules have not been rigidly complied with, even as regards petty technicalities in no way affecting the real rights of the litigants, is radically wrong. Attempts to apply a remedy have taken several forms. One of these, as has been pointed out in the chapter "Legal Basis and Controlling Force of Rules," has taken the form of the enactment by the national government and by certain states of statutes declaring that, in terms of the federal act, "the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not affect the substantive rights of the parties."[5] Though the passage of such acts is to be fully commended and in cases has been productive of much good, they have not fully met the requirements of the situation. In the first place, they do not limit the right of appeal on the ground that errors in procedure have been committed, but merely seek to prevent the appellate court from setting aside the verdict of the trial court when the error in procedure is of an immaterial character. Notwithstanding such acts, litigants can prolong a judicial contest and bring about delay and added expense by appealing, even though the basis of their appeal is the commission of errors of procedure of an immaterial character. In the second place, the courts have in many cases nullified this act by holding that any error in procedure is presumed to be material.

The real remedy, apart from a change in the attitude of the courts toward this question, lies in two other directions: first, the abandonment of the practice of determining rules of procedure by legislative enactment and the adoption in its place of the principle of conferring the rule-making power upon the courts themselves; and, second, the adoption of the principle that the power to prosecute an appeal in matters involving procedure shall not be a right but a privilege, to be granted by the court to which an appeal

[5] In respect to this matter, the draft outline of criminal procedure of the National Crime Commission provides that:

"On the hearing of an appeal a judgment of conviction shall not be reversed on the ground of misdirection of the jury or rejection of evidence, or for error as to any matter of pleading or procedure unless, in the opinion of the appellate court, after an examination of the record before the court it shall appear that the error complained of has resulted in a miscarriage of justice."

is desired to be taken only when in its judgment the circumstances are such as to make it desirable that a review of the action of the trial court should be had. The first of these methods of action has already been considered; the second will receive attention in another place in this chapter. It is sufficient to say here that if this principle were adopted it would be possible practically to eliminate the thousands of appeals that are now taken without any real justification upon matters merely of procedure in the trial courts.

Appeal on Matters of Substantive Law. There remains for consideration the question of the extent to which there should be a review of the action of trial courts where the issue raised is that of the interpretation and application of the substantive law. Here we have to do with a consideration that is not present in the two classes of cases that have been under examination: that of the necessity for a uniform construction of the substantive law. In all cases in which the point at issue is the interpretation or construction of substantive law there should be the possibility of carrying the issue to the court of last resort. This does not mean that in all cases in which this issue is raised an appeal may be prosecuted as a matter of right, but that the court to which it is desired to carry such appeal may have the right to take jurisdiction and review the decision if in its opinion it is desirable that such review by it should be had.

Review as a Right or a Privilege to be Granted. In the consideration of the subject matter of appeals we have necessarily touched upon one of the most important questions that is presented in respect to the whole subject of the circumstances under which a review of the action of a trial court shall be permitted. This is whether the litigant shall have the power to demand a review by a superior tribunal as a matter of right or shall enjoy such privilege only when he can present a convincing plea for a review.

In the United States the power to secure a review of the decision of the trial court by a superior court has largely been given the character of a right to be exercised by the litigant as he sees fit. It is submitted that this, as a general principle, is wrong. Though there may be cases where the authority to prosecute an appeal

should constitute a right, such cases should be by way of exception and the general rule should be that an appeal shall lie only when the right to prosecute it has been granted by the superior court. Especially is this principle one which should obtain in respect to the prosecution of a second appeal; that is, an appeal from the decision of an intermediate appellate court to the court of last resort. This for two reasons: one, that after there has been a careful consideration of a case by two tribunals, it is unnecessary to have a third consideration except in the relatively few cases where a final determination of substantive law is desirable; and, two, that the grant of the power to prosecute the second appeal throws upon the court of last resort a burden of work which it is difficult if not impossible for it to meet.

The desirability of the establishment of this principle as regards the prosecution of appeals from an intermediate appellate tribunal to the court of last resort is one that has recently been thoroughly threshed out in the successful movement for its establishment as a fundamental feature of the federal judicial system. After years of effort on the part of the American Bar Association and the direct urging of the Supreme Court itself, Congress passed an act in 1925 putting this principle into effect.[6] This act, the bill for which was drafted by members of the Supreme Court, provides for two important reforms: it codifies and clarifies the law defining and determining the jurisdiction of the circuit courts of appeal, and it declares that, with a single exception to be noted hereafter, appeal from these courts to the Supreme Court shall be taken only by way of *certiorari*. It is with the latter provision only that we are here interested. The section relative to this reads:

SEC. 240. (a) In any case, civil or criminal, in a cricuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or

[6] An Act to amend the judicial code and to further define the jurisdiction of the Circuit Courts of Appeal and the Supreme Court and for other purposes, approved February 13, 1925, 43 Stat. L., 936.

For an analysis of the bill and arguments in its support, see Hearings before a Sub-committee of the Committee on Judiciary of the Senate on S. 2060, February 2, 1924. Included in the hearings is an analysis of the bill and a statement of reasons for its enactment prepared by a committee of the members of the Supreme Court.

other litigant, to require by *certiorari,* either before or after a judgment or decree by such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a Circuit Court of Appeals where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on *certiorari* shall not be allowed at the instance of such party and the review on such writ of error or appeal shall be restricted to an examination and decision of the federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

It will thus be seen that, with the single exception stated in paragraph (b), the whole question as to whether the action of a circuit court of appeals may be reviewed by the Supreme Court rests with that court, to be determined by it, in its judgment, according to whether the issues involved or the circumstances of the case are such as to make it desirable to take jurisdiction.

In its argument in support of the bill, submitted at the hearings on the bill, the committee of the Supreme Court representing that body said:

This is primarily a bill to relieve the Supreme Court of the increasingly heavy burden of hearing cases which do not involve questions of sufficient importance to take its time and which prevent its prompt disposition of serious cases. . . . The great object of this bill is to reduce the number of cases in which there is an appeal on writ of error or of right and increase those in which only a *certiorari* or a certificate can bring the case before the Supreme Court. . . . If this bill becomes a law every case now reviewable in the Supreme Court will still be subject to review there, if the court finds that it presents any question which should in the public interest, engage its attention. The change of many cases from the obligatory jurisdiction of the court to the *certiorari* class will enable the court by a denial of the writ to give immediate notice to the parties of the disposition of the cases. It will greatly reduce the number of those who have to wait until their cases

are reached on the docket, and relieve them of needless suspense and delay attending the practice under present statutes. Moreover, the opportunity of taking cases to the Supreme Court merely for delay will be almost entirely removed.

All the arguments in favor of this action as regards the federal judiciary are of equal force in respect to the judicial systems of the states. It is a matter of congratulation, therefore, that a beginning in the direction of accomplishing this reform has been made by the states. According to a statement of Chief Justice William H. Taft to Senator Copeland in support of the bill, the system of providing that appeals to the court of last resort may be prosecuted only by way of *certiorari* has been adopted and has worked "most successfully" in New York, Ohio, Georgia, Illinois, California, Indiana, and in other states.[7] The Michigan Commission of Inquiry into Criminal Procedure in its recent report strongly supports this principle. Its report reads:[8]

The procedure known as Exceptions before Sentence is archaic and productive of delays. There is not and never has been a constitutional right to an appeal. In our judgment an appeal should be entirely discretionary with the Supreme Court, at the same time giving the appellant the full right of presenting his case to this court for its consideration. This may be done by provisions similar to the practice in certain civil cases. The person desiring an appeal can promptly and concisely state his ground for appeal and the errors relied upon without the necessity of getting out, in some instances, a long and cumbersome record for examination by an already overburdened court. . . . If, in the discretion of the Supreme Court, there is any question as to the respondent not having had his full rights and privileges protected an appeal can be granted and the entire record examined by the court.

Evils of the Double Appeal. At the outset, when the volume of judicial business is not large, judicial systems usually provide for but a single court of appellate jurisdiction, the supreme court of the state, to which appeals lie directly from the trial courts. With increasing business and especially when the principle obtains that litigants may prosecute appeals as a matter of right, the time soon arrives when the number of appeals taken to the court of last

[7] Letter to Senator Copeland. Cong. Record, Daily edition, February 3, 1925.
[8] P. 16.

resort is so great that it finds it impossible to keep up with its docket, with the result that an increasing length of time elapses between when a case is entered upon the docket and when it is reached for a hearing. In many cases this delay amounts to two, three, or more years. What makes the situation a serious one is that this condition is not a temporary one but tends to become constantly more aggravated.

To meet this situation, many if not most of the states have resorted to the device of creating what are known as intermediate courts of appeal. These generally consist of a number of courts to which all or the great bulk of the appeals from the trial courts must first be taken and from which a further appeal, with varying restrictions, may be taken to the court of last resort. Laudable as has been the motive that has dictated the creation of these courts—to expedite business and relieve the burden of the supreme court—the results have not been wholly good. While they have expedited the hearing of appeals and the final determination of many cases, they have, if anything, increased the delay in the final decision of those cases which are carried to the court of last resort, and in all of such cases they have increased by one the number of times that a cause must be argued and have added to the expenses of litigation. This situation is now quite generally recognized as unsatisfactory. The feeling is that there is little or no justification for the existence of what is known as the double appeal. Thus Justice Harlan F. Stone, in his exceedingly interesting volume, "Law and Its Administration," writes:[8]

A matter to which serious attention should be directed is the double appeal. In a large number of cases in this and a number of other states, two appeals may be had as a matter of right. The absurdity as well as the inconvenience of such a procedure is obvious. Assuming that an appellate bench is competent to bear the responsibilities placed upon it, there is no sound reason why in the ordinary case suitors should suffer the inconvenience, expense and delay of having their cases twice argued on appeal on the same record. The present system inevitably results in every case of importance being twice appealed when that right exists and the first appeal is more than likely to be dealt with in a perfunctory manner by a court which knows that its own decision will not be final Either there should be one appellate court with a sufficient number of judges to hear and formally dispose of all appeals taken to it

[8] P. 126.

direct from the trial court, or the intermediate appellate court, corresponding to our own Appellate Division of the Supreme Court, should be the final court of appeal except in those cases where, because of public interest, or to settle doubtful points of law, an appeal is allowed either by the intermediate court or by the court of last resort.

Two methods are available for correcting this evil: to provide that the decision of the intermediate court of appeals shall be final, except in those relatively few cases where, upon adequate reasons being shown, the supreme court by *certiorari,* will, assume jurisdiction and review the decision of the intermediate court; or to abolish the intermediate appellate courts and increase the number of judges of the court of last resort, granting to that tribunal the power to sit in divisions. The first of these methods is probably the better one in the case of the federal judiciary, where the territory to be covered is extensive and the volume of business is large. In advocating this system for the federal judiciary Chief Justice Taft said:[10]

The community at large is not interested in his [the litigant] having more than one (appeal). The function of the court of last resort should not primarily be for the purpose of securing a second review or appeal to the particular litigants whose case is carried to that court. It is true that the court can only act in concrete cases between particular litigants, and so incidentally it does furnish another review to the litigants, in that case; but the real reason for granting the review should be to enable the Supreme Court to lay down general principles of law for the benefit and guidance of the community at large. Therefore, the appellate jurisdiction of the court of last resort should be limited to those cases which are typical and which give to it in its judgment an opportunity to cover the whole field of the law. This may be done by limiting the cases within its cognizance to those involving a construction of the Constitution of the United States or the States, or a large sum of money, or to the construction of statutes. The great body of the litigation which it is important to dispose of, to end the particular controversies, should be confined to the courts of first instance and the intermediate appellate courts. It is better that the cases be all decided promptly, even if a few are wrongly decided.

Regarding the second method, Judge Simeon E. Baldwin has pointed out its feasibility as indicated by its actual employment in a number of states:[11]

[10] Some delays and defects in the enforcement of law in this country. *Op. cit.*
[11] Baldwin, The American judiciary, 278.

In Ohio, for instance, the Supreme Court consists of six judges and commonly sits in two divisions of three each having equal authority. The whole court sits to hear any cause involving a point of constitutional law. It also decides those which have been heard in one of its divisions and in which the divisional court is in favor of revising the judgment appealed from. An affirmance by the divisional court is final but if it inclines to a reversal the judges communicate their opinions to the full court which also reads the printed briefs submitted on the original argument and then, without any further oral hearing pronounces the final judgment. Four judges, therefore, at least must concur to pronounce a reversal. Should the full court in any case be equally divided the judgment appealed from stands.

Under the constitution of California (Art. VI, Sec. 2) the supreme court, which consists of seven judges, ordinarily sits in two departments. Three judges can render a decision, but the judgment does not go into full effect for thirty days, unless three, including the chief justice, have given it their approval. The chief justice also with the concurrence of two of his associates, or four of these without his concurrence, can direct that any cause be heard before the full court within thirty days after judgment by a department court. He can also order the removal into the full court of any cause before judgment.

In Michigan, only five out of the eight judges sit to hear a case and if one of them files an opinion dissenting from that of his associates, the losing party can demand a rehearing before the full court.

The only objections that can be urged against the supreme court sitting in divisions are that, under this system, the judgment of the entire court is not obtained, and that there may be diverse constructions of the law by the several divisions. These objections, it will be noted, have been given consideration in the system described by Judge Baldwin and adequate safeguards provided.

Right of Subordinate Courts to Secure Instruction on Points of Law from a Superior Court. Another means of lessening appeals is that of obviating their necessity by granting to a trial court, or a court of intermediate appellate jurisdiction, the right, while a case is under consideration by it, of securing from a higher court a ruling on points of law that may be presented and in respect to which there may be some question. Such a provision exists in the case of the federal judiciary in virtue of Section 239 of the act of February 13, 1925, defining more carefully the juris-

diction of the circuit courts of appeal and the Supreme Court. This section reads:

> In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal.

This procedure, it will be remarked, is analogous to that of the exercise by a court of the power of giving advisory opinions, elsewhere considered, the only difference being that the opinion is given to a lower court instead of to the legislature or executive.

Appeal to Lie Only After Trial of All Issues Involved. Conditions are serious enough when repeated appeals can be made from the judgments of a trial court having for their purpose the final disposition of the case. They become worse when appeal can be made against the decisions of the trial judge in respect to particular features of the case, such as upon demurrer, the joinder of parties, or interlocutory orders. Though it may be conceded that this right of appeal from special decisions of the trial judge has certain advantages in particular cases where it is resorted to in good faith, there can be little doubt that the general results of its existence are bad. It necessarily entails delay in the settlement of litigation and directly invites resort to it purely for that purpose and as part of the effort on the part of a defendant to tire out his adversary and force him to an abandonment of his action or the acceptance of an inequitable compromise. The mere fact of its existence and the knowledge that it can be resorted to, acts as a deterrent upon parties resorting to the court for a redress of their grievances and to that extent works a denial of justice.

It has already been pointed out that the rules of procedure should require the parties to incorporate in the complaint and answer all of the points, whether of law or fact, upon which they rely for the

support of their contentions; and that, in order to avoid a multiplicity of actions and secure a complete settlement of all claims arising out of a transaction, all parties in any way interested should be made parties to the action. Collateral to this, and in order that the principle involved may find its proper application, the further provision should exist that the trial court should at one and the same time consider all of the issues so raised and so frame its judgment as to cover all such issues and provide for a complete settlement of the controversy. Not until this stage has been reached should the right lie to invoke the powers of review on the part of an appellate court, which appeal when made will embrace all points upon which the appellant may desire to rely in seeking to have reversed or modified the judgment as rendered in the trial court.

Nature of the Action on Appeals. There remains for final consideration the nature of the appeal proceeding where the right of appeal is provided for by statute or is granted as the result of a petition to the court to which it is desired to appeal. It has already been pointed out that provision should be made for but a single appeal, which should lie only after the trial of the cause on its merits and should embrace all points which the appellant desires to raise in respect to the action of the trial court. On such appeal the question is presented as to whether it is the function of the appellate court to review the entire proceedings in the trial court, and, on the basis of such review, to render " final judgment," or merely to determine whether errors were committed by the trial court which were of sufficient gravity to vitiate its decision and therefore to require that the whole case be retried by the trial court.

In the United States, an appeal for the most part partakes of a hearing merely for the purpose of determining whether errors were committed in the trial of the cause and, if such is found to be the case, of setting aside the verdict of that tribunal and ordering the case to be again tried. Under this system it is possible to have an indefinite number of trials and appeals. Under any circumstances, unless the party defeated in the appellate court abandons his case, it means a repetition of all the work involved in reassembling the witnesses and in retrying the case. In many cases this means a denial of justice due to death or departure from the

jurisdiction of the trial court of material witnesses, or the inability of the defeated party to meet the expense involved. The evils of this system are graphically pointed out by Harlan F. Stone in the volume from which we have several times quoted: [13]

A very general cause of prolonged litigation with consequent delay in reaching the final determination (he writes) is the statutory limitation on the powers of appellate courts to correct errors by a modification or reversal of the judgment from which an appeal is taken instead of sending the case back for a new trial. It often happens that some error upon the trial requires modification or reversal of the judgment and that upon the record of the case an appellate court can see that such is the proper disposition of it. But if the court is powerless to do anything but order a new trial, or if it has power and is unwilling to exercise it, it sends the parties back on their weary way to travel again the road of the new trial, the double appeal, perhaps only to be again sent back to repeat the performance.

This was formerly necessary in New York where, however, by statute the power of both the Appellate Division and the Court of Appeals has been increased so as to authorize the court on appeal to modify or reverse the judgment of the court below and enter judgment accordingly without a new trial. As however the court of appeals in many cases has no authority to review questions of fact, in all such cases the court is practically unable to exercise the power conferred upon it. A proposal now made endorsed very generally by lawyers for consideration by the pending constitutional convention in New York is that a constitutional provision be adopted authorizing the Court of Appeals to review questions of fact in all cases appealed to it and conferring on both the Court of Appeals and the Appellate Division power to award final judgment without new trial in all cases if the court is satisfied that the record on appeal warrants such disposition. Such a provision would eliminate the necessity which now exists in a very large number of cases of sending a case back for a new trial instead of the court's directing judgment in accordance with its view of the law or of the facts as shown by the record.

It is in respect to this matter that one of the greatest differences exists between the judicial system of Great Britain and the United States. One of the important reforms accomplished by the judiciary act in the former country was the doing away of the evil of retrials. Not only was the right of appeal carefully safeguarded, but the principle was established that the hearing of the appeal, when

[13] Law and its administration, p. 207.

permitted, should itself partake of the nature of a retrial, and that it was the function of the appellate court, after a review of all points in dispute, to render a final decision. To this end the appellate court was granted full power to receive new evidence coming to light after the trial in the trial court, and to do anything else necessary to enable it finally to dispose of the case on its merits. The principle of a single trial with a single appeal is thus firmly established in the English judicial system.[13] The adoption of the same

[13] The simplicity and effectiveness of the English system is brought out by the following description of this system, given by Professor Sunderland in his Appraisal of English Procedure:

"In the final stage of litigation, the appellate review, the English rules are clearly founded upon the simple proposition that an appeal, in its formal aspects, should involve no technical difficulties whatever. The judgment record already exists. If the papers which make it up are filed in the appellate court office, and the appellee is notified of such filing, nothing more would be essential to a perfected appeal. An appellate process reduced as nearly as possible to this degree of simplicity would be an unmixed economic advantage, for the only purpose served is the mechanical one of effecting the transfer with notice to the appellee, and every added restriction, requirement or condition merely presents an obstacle and imposes a risk. Unnecessary friction always impairs a mechanical device.

"The English practice in taking an appeal so successfully meets its theoretical aim that there is almost no way of making a mistake. Nothing is required but the ability to read and to operate a typewriter. Bills of exceptions became obsolete in English so long ago that some of the oldest men now in the law court offices never heard of them. Assignments of error have also gone the way of the cross appeal, the writ of error, and the other extinct monsters of the cave-dwelling period of English law. To perfect an appeal the English barrister serves a notice upon the respondents that he will move the Court of Appeal in fourteen days to reverse the judgment. He then files with the clerk of the Court of Appeal three typewritten copies of the notice of appeal and of the pleadings, evidence and opinion below. There are no abstracts, or condensations, or reductions to narrative form, to be worked out, wrangled over, and settled. The appellate record is merely a copy of existing documents. There are no exceptions. If the appeal is too late, the court can extend the time for good cause shown; if the parties change by death or otherwise, the court may order substitution; if additional parties should be joined, the court may at any time order that they be notified; if additional evidence is needed in the Court of Appeal it may be ordered brought in, either by oral testimony or affidavit or deposition; if new points not raised below ought to be considered, the court may order or allow that this be done.

"The appeal is by way of rehearing, which was defined by Sir George Jessel, Master of the Rolls, as meaning that the appeal was not to be confined to the points mentioned in the notice of appeal. Indeed, the rules do not require any grounds of appeal to be mentioned in the notice and, according to the current practice, about half the notices specify grounds and

principle is one of the reforms most urgently needed in the system of judicial administration in the United States.

Appeal in a Unitary Court. It would be improper to leave this subject without calling attention to the extent to which the whole problem of appeals is simplified under a unitary court system. Under that system, the proceeding does not have the character of an appeal from one court to another, where a record of the proceedings in the trial court has to be made up for use in the appellate court and other action taken, due to the fact that the matter is to be reviewed by a separate tribunal. The case continues in the same court, and the records of the trial court are available to the judges hearing the petition for the appeal or the appeal itself. The advantages of this system are shown by the following description of the system of appeals under the English unitary court system given by Mr. Frederick W. Lehman: [14]

The procedure on appeal (under the British system)—he writes—is simple. There is no transfer of the case from one court to another for the trial division and the appellate division are constituent parts of one and the same tribunal. All appeals are in the nature of rehearings, and are brought by notice of motion in a summary way, and no petition, case or formal proceeding other than the notice of motion is necessary. This notice may be amended at any time as the Court of Appeals may see fit. So much of the record is used as the questions involved in the appeal may require. The evidence, if questions of fact are to be reviewed, may be adduced by copy, or if the expense of this is heavy, the original is resorted to. The appellate division may allow amendments and may receive further evidence upon questions of fact. It may order a new trial, or it may give any judgment or make any order which should have been made, and it may make such further or other order as the case may require. In brief, an appeal is a rehearing without intricacy of method, is freed from all our formal labor and a great deal of our expense and is disposed of in a substantial way and upon substantial grounds.

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the other half do not. The case is therefore not reviewed for errors, but reviewed at large upon the merits, and to insure the broadest usefulness, the Court of Appeal is given all the powers of the trial court, and may draw inferences of fact and make any judgment or order that ought to have been made or make any further order that justice may require. The avowed aim is to enable the appellate court to completely dispose of the case so that when the appeal has been decided the litigation is at an end.

[14] Conservatism in legal procedure, *Green Bag*, March, 1909.

CHAPTER XXXVIII

THE SENTENCE

It is no part of the purpose of the present work to present a study of the problem of prison administration. The determination of the sentence that should be imposed upon those found guilty of infraction of the criminal law, however, is so essential a part of the work of the courts in the administration of the criminal law that its consideration cannot be omitted.

Various theories have been, and still are, held regarding the fundamental purpose of the prosecution of crime. Few, it is believed, now hold to the theory that the essential end is that the offender should be made to suffer for his offense. Such suffering or punishment, it is now held, is but a means to an end—that end being the protection of the community against crime through the deterring of would-be or potential criminals. If one keeps in mind this fundamental purpose it is evident that the nature of the penalty that is imposed upon convicted criminals determines in large measure the effectiveness of the system.

The term "penalty" is here employed as covering not merely the character of the sentence that is imposed by the court, but the whole subsequent treatment of the offender. There are few more difficult questions in the whole problem of the administration of criminal justice than this matter of the manner in which convicted criminals should be handled. The difficulty arises from the fact that, though the crime itself may be a very definite thing, the criminal himself presents as many variations as there are differences in human character. He may be a man fully competent to distinguish between right and wrong and responsible in every way for his conduct. Or, he may be one of impaired or defective mentality, of abnormally low emotional development, rendering him more or less irresponsible for his acts, or a child who has not reached the age of full discretion and responsibility. He may be a hardened offender or one who for the first time has committed a criminal act, and, if properly treated, may be led to see the error

of his ways and be restored to the community as a law-abiding citizen. If the administration of the criminal law is not to cause undue suffering and to defeat its purpose, efforts must be made, in fixing the penalty in individual cases and in subsequently supervising its payment, to adjust this penalty and treatment to the requirements of the several cases.

The problem here presented has given rise to a distinct branch of study known as the science of penology. Though constituting an important and essential part of the general problem of the administration of criminal justice it is impracticable to give it detailed consideration. All that it is feasible to do here is to note its existence and briefly to indicate the various forms that the penalty, as fixed by the court, may take, and some of the considerations to which these variations give rise.

Character of Sentence. Though, as will appear, the sentence imposed upon the convicted criminal may present an almost infinite variation in respect to its severity, the penalty imposed falls under one of the following four heads:

1. Death: capital punishment
2. Corporal punishment
3. Imprisonment
4. Fine

Capital Punishment. In former times the infliction of the death penalty, known as capital punishment, was far more widely employed than at the present time. In England, until comparatively recent times, it was the penalty provided by law for over two hundred offenses running from murder to petty larceny. Partly due to the increasing humanitarian spirit and partly to a realization that the severity of the punishment defeated its purpose, since juries would refuse to convict even in cases of clear guilt when they knew that conviction would be followed by the sentence of death, this penalty has been more and more restricted until at the present time, in most countries, it may be imposed only for such grave crimes as treason and murder. In many countries and in not a few of the American states, it has been abandoned, and in practically all countries which still retain it, there is continual agitation for its abandonment.

This is not the place to attempt any detailed consideration of this proposal. It may be stated, however, that the chief arguments in its favor are: (1) That it is wrong in principle, since the deliberate taking of human life can never to be justified; (2) that it is inexpedient from a practical standpoint, since it makes conviction more difficult; and (3) that it makes it impossible to correct the error when an innocent man has been improperly convicted. In reply, those in favor of retaining capital punishment as the penalty for murder and other equally serious offenses, deny that it violates any moral or religious principle and maintain that its abolition would greatly weaken the deterrence to crime which, as it is, is none too strong. Efforts have been made to determine by a comparison of statistics of convictions under the two systems the relative strength of the arguments from the standpoint of the practical enforcement of the criminal law, but they have been largely inconclusive. The question is one for which a universal answer cannot be given. In those places where the infliction of this penalty does violence to the moral feelings of a great part of the community, it should probably be abandoned for that reason, if for no other. On the other hand, there are probably other communities in which conditions are such that the retention of this penalty is necessary in order to secure a due observance of laws against violence. It is quite possible that its abolition in primitive or wild communities might be followed by disastrous results.

In considering this problem, one collateral factor should be borne in mind. That is the existence of the power to pardon and to parole. Imprisonment for life, if rigidly enforced, might have an equal deterrent force to that of capital punishment. With the existence of the power to pardon and parole it is likely, however, that many life sentences will not in fact be completely served. With the lapse of time, the feeling regarding the crime will become weakened, if, indeed, the circumstances of the crime are not entirely forgotten, and sooner or later a chief executive will be found who will feel that the prisoner has sufficiently atoned for his crime and order his release. The existence of this contingency thus greatly weakens the deterrent force of the life sentence and correspondingly strengthens the argument in favor of the retention of the death penalty.

Corporal Punishment. Corporal punishment has long been recognized as a penalty for the commission of crime. As in the case of capital punishment, it has, however, tended to fall into disuse, until at the present time, it is entirely abandoned in most countries and in most of the American states. Where retained, it is inflicted only for a certain limited number of offenses. The reason for its abandonment is chiefly the feeling that it is inhumane and tends to brutalize both the prisoner receiving and the officer inflicting it. As such, it stands in the way of the accomplishment of one of the main objects sought in handling prisoners—that of their reformation. In certain states the claim is still made, however, that this form of punishment is necessary as a deterrent to the commission of crime; that with prisoners of a certain class imprisonment for short terms has little terror. It is quite possible that this is true in certain cases, but generally speaking, this form of punishment is viewed with disfavor and its abolition is probably wise.

Imprisonment. With the rejection, or holding within narrow limits, of capital and corporal punishment, imprisonment has become the prevailing form of punishment, either as the sole penalty or as a penalty to be incurred in default of the payment of a fine. There is universal agreement that this form of punishment is the one that should be imposed in all cases of serious offenses not calling for the infliction of the death penalty. It has the great advantage of accomplishing the two purposes of serving as a deterrent and providing for the segregation of the criminals where they can no longer prey upon the community. It also makes possible efforts looking toward their reformation.

In the enforcement of this penalty opportunity is afforded for a wide range of treatment according to the character of the institution in which the prisoner shall be confined, the manner of his employment while in confinement, the regulations to which he shall be subjected, the extent to which he shall be deprived of privileges, etc. Into this question we cannot here enter. It may be stated, however, that there is general agreement that efforts should be made to reform the prisoners, and to this end that when practicable, there should be a segregation of prisoners according to their character.

Fines. Many violations of the criminal law are of a character for which imprisonment is too heavy a penalty. In such cases the penalty takes the form of the imposition of a fine. There is a certain element of injustice in the use of this form of punishment, since its severity is inversely proportionate to the ability of the person fined to make the payment; and there are many cases where inability to make payment results in imprisonment. This feature can be met in fixing the amount of the fine, by the judge taking into account, the financial ability of the person upon whom it is imposed. A by no means negligible advantage of this form of punishment is that it produces a revenue to the government that may be viewed as an offset to the expense incurred by it in enforcing the criminal law.

Sterilization. A form of sentence that has been advocated in recent years for certain classes of crimes involving sex delinquency is that of sterilization. This sentence is proposed, not so much as a form of punishment as a means of protecting the community from an eugenical standpoint. Sterilization acts, applying to mental defectives rather than criminals, have been passed in a number of states, and in some cases their constitutionality has been denied. Acts providing for sterilization as a punishment for rape have been upheld by the courts.[1]

Habitual Offender Sentence. Records show that to a great extent serious crimes are committed by persons who have apparently adopted crime as a profession, or at any rate do not hesitate to break the law as circumstances present themselves. If one of the purposes of criminal administration is to protect the public against the lawless, provision should be made for placing them where they cannot exercise their vocation. That second offenders should receive a more severe punishment than first offenders has long been recognized. In the recent movement for combating crime, this principle has received a great extension through the adoption by a number of states of the principle that those persons who are convicted of a felony three or more times shall be deemed to be habitual offenders, and on their third or other conviction, shall be given a life sentence; and that persons so sentenced shall not

[1] For an interesting consideration of this question, see Burke Shartel, Sterilization of mental defectives, *Michigan Law Review*, November, 1925.

be eligible for release on parole. Laws of this kind are known as "habitual offender acts." Among the states which have enacted legislation of this character are: New York, Minnesota, and California. The New York act is one of the so-called "Baumes laws," enacted in pursuance of the recommendations of the Crime Commission of New York State, of which Caleb H. Baumes was chairman. It provides that a person having previously been convicted three times of a felony upon a fourth conviction, shall, be deemed to be an habitual criminal and receive a life sentence with no privilege of possible parole.

The Minnesota act was passed as the result of a recommendation of the Minnesota Crime Commission and is still more rigid than the New York act, since it treats a person convicted a third time of a felony as an habitual offender and provides for a life sentence.

The California act, which was passed on the recommendation of the California Commission for the Reform of Criminal Procedure, provides that a person twice convicted of any of certain enumerated felonies which embrace all felonies of a more serious character, shall receive a life sentence upon a third conviction, and not be eligible for parole until he has served a minimum of twelve years; and that one previously convicted three times shall receive a life sentence without eligibility for parole at any time.

The Michigan Commission of Inquiry into Judicial Procedure recommends the adoption of an habitual criminal act which will provide for a life sentence upon a fourth conviction for a felony.[2]

Discretion of Judges in Determining Character of the Sentence. A reform that is being urged in the fixing of the sentence is that of giving to the judge the authority, when the circumstances warrant, to impose a sentence for a lesser crime than that for which the prisoner was tried. The California Commission on the Reform of Criminal Procedure thus recommends:[3]

It is recommended that subdivision six of this section be amended so as to provide that where a defendant has been convicted of a

[2] According to the report of the Minnesota Crime Commission, England and Australia have long had an habitual criminal act similar to the ones above described, and the National Conference on Reduction of Crime states in its report that North Dakota, Kansas, Oregon, California, and New Jersey have passed habitual offender acts that are nearly if not quite as drastic as the New York act.

[3] Report, 1927, p. 25.

crime and the evidence is found insufficient to justify the conviction for that crime, but does justify the conviction of a lesser degree of the crime, or of some lesser and included crime, either the trial court or the appellate court, as the case may be, need not set aside the verdict entirely, but may modify the judgment of conviction to the lesser crime.

Mitigation of Sentence. In some jurisdictions, the judge, after sentence is passed, has the authority to reduce the sentence or possibly to waive its enforcement altogether. This is true in Cleveland. The Cleveland Survey held this system to be thoroughly bad. In its report it said:[4]

This motion apparently peculiar to the police court, makes a farce of judicial business, more than any other single factor. After a defendant has been adjudged or has pleaded guilty, the court imposes the sentence. To the uninitiated the case is over but this is not so. A " motion in mitigation " is then made which is sometimes granted the same day, after trial, and sometimes ruled upon weeks and even months later, after many continuances. Thus the court satisfies the complaining witness in open court and has the opportunity later to placate the defendant's lawyer. . . . It is said that the " motion in mitigation " serves the purpose of allowing the defendant time to pay his fine and after the fine is paid the motion is overruled as a matter of form. Undoubtedly the motion is used for this purpose and also to allow the court time to investigate the defendant to ascertain whether the fine is a just one. The vice of the motion is that the court apparently disposes of the case and at a later date when no witnesses are present makes a change. This vice is intensified by a system of record keeping, discussed later, which makes it difficult to find out what actually happened in a particular case. The court should make its investigation before sentence, not afterward, and the sentence once imposed should stand. This could be accomplished by continuing a case for sentence to a certain day after the issue of guilt is determined in case the court wishes further advice as to the condition of the defendant. This method would be more apt to impress the defendant with the seriousness of the court than the game of thimble, played with motions in mitigation.

Suspended Sentence. Analogous to the power of judges to release convicted criminals upon probation, is the power possessed by them in certain cases to suspend the execution of the sentence after it is

[4] Criminal justice in Cleveland, 285-86.

imposed. There are undoubtedly many cases of offenses of a minor character where the ends of justice are adequately served by the arrest, trial, and conviction of the offender, and where harm rather than good would result from compelling the person convicted to serve a term of imprisonment. This is particularly true in the case of first offenders, of those who have acted under much provocation or temptation, and those who have been weakly led by others into the commission of crime. In many cases, their arrest and conviction has served to bring home to the offenders the gravity of their offense and to act as a deterrent to their repetition. This power of suspending sentence is one possessed by judges under the common law, though it has been expressly authorized in some states by statute and conditions imposed in respect to its exercise.

While it is desirable that judges should have this discretionary power, it must be recognized that the power is one which can be, and unfortunately often is, abused. Thus the Cleveland Survey, in commenting upon this phase of criminal administration in Cleveland, says:[8]

> The high percentage of mitigations and suspensions, particularly in certain classes of cases, indicates an abuse or mistaken practice somewhere. . . . The whole practice regarding suspension of sentences is excessively loose. Much of it is of doubtful validity. The statutes provide for suspension of sentence of imprisonment with a specified period of probation, the final carrying out or discharge of the sentence to be dependent upon the results of the probation period. Statutes furthermore provide for suspension of a sentence of a fine for a specified period during which the defendant is given opportunity to pay the fine. In practice these limitations are by no means observed. Sentences of imprisonment are suspended without probation for a definite period and sentences of fines are suspended without a condition concerning the payment of a fine. . . . The suspension of a sentence is often justified as a sword hanging over the defendant. The old sentence is made a hostage for future good conduct. There is obvious merit in this. The trouble is that the theory is not carried out. With rare exceptions the suspended sentence is promptly forgotten by everybody, and if the defendant comes back into the court upon a new or even the same charge, seldom if ever is the old sentence remembered.

Indeterminate Sentence. The ordinary sentence of imprisonment is for a fixed term or period. Objection is made to this form of

[8] *Ibid.*, 150-51.

sentence on the ground that it fails to take account of the manner in which the prisoner may conduct himself during confinement and does not readily adjust itself to the principle of individualizing punishment; that is, of making the punishment fit the criminal rather than the crime. If reformation is one of the ends sought in the imprisonment of criminals, it is desirable that the prisoner should have an incentive to respond to efforts in this way. The strongest possible incentive is release from confinement. In response to this feeling, there has arisen a demand for "indeterminate sentences" instead of fixed determinate sentences. The first state to adopt this system was New York, by a law enacted April 24, 1877. It has been adopted by a number of other states.

The merits of this system, from the standpoint of principle, can be readily appreciated. Its weakness is that the deterrent force of the sentence is probably weakened, and the difficulties of operating the system are considerable. Its successful operation implies a high degree of integrity and efficiency on the part of those charged with its administration. If loosely administered, it makes possible the discharge of prisoners in response to political and other solicitation before they have paid an adequate penalty for their crimes. It is unfortunate that the grant of discretionary powers which may be desirable, in theory, necessarily carries with it the possibility that those powers will be abused. The one is inherent in the other. It may thus be said of this form of sentence, what is more fully pointed out in the consideration of the parole system, that the desirability of its adoption is largely dependent upon the character of the system of penal administration possessed by the state contemplating its adoption. When that system can be relied upon to administer the indeterminate sentence system in a proper manner, its adoption is probably desirable; when such reliance cannot be had, only disastrous results may be anticipated.

Probation System. Undoubtedly the greatest innovation that has been made in recent years in the character of the sentence that may be imposed upon a person convicted of a criminal offense is that of the power of the judge, after imposing sentence, to suspend the sentence for so long as the prisoner conducts himself in a satisfactory manner after his release. A prisoner so released is said to be released on probation. This system necessitates the establishment by

the court of means by which it can keep track of the conduct of the prisoners so released, and, if such conduct is not satisfactory, order his rearrest and the service of his sentence. This requires the appointment by the court of what are known as "probation officers," whose duty it is to keep in touch with the prisoners placed on probation and to report to the court from time to time regarding them. As the system has developed, more and more emphasis has been placed upon the duty of the probation officer to act not merely as an inspector, but as a friend of his charges, in the way of advising them, aiding them to secure employment, cautioning them if they appear to be getting into bad company, and, generally, aiding them in their efforts to lead a proper life.[6]

The origin and development of this system, as described by a writer on the system, were as follows:[7]

The probation system originated in the practice of the judges of many Massachusetts courts, notably those of the inferior courts in and about Boston, of continuing cases from time to time, after a determination of guilt and upon satisfactory proof of good behavior of dismissing the case. . . . In 1878 the Mayor of Boston was authorized to appoint a probation officer for Suffolk County to be under the charge of the chief of police and whose duty it should be to recommend to the courts of Suffolk County "the placing on probation of such persons as may reasonably be expected to be reformed without punishment." In 1880 this method was made state-wide. In 1891 the law took substantially its present shape, by which probation officers are judicially appointed throughout the state, and become to all intents and purposes agents of the courts. It is significant that all these laws provide only that courts might appoint probation officers and might place offenders "upon probation." What that term meant in criminal law, what consequences it entailed were still left for judicial evolution. And such has been the general course of later legislation in other states.

[6] Probation should be carefully distinguished from parole, with which it is often confused. Probation is the act of the judge in fixing the sentence. Parole takes place after a prisoner has been sentenced to imprisonment and has begun the service of his sentence and is the act of the prison authorities or a special body known as a Parole Board. The motives for paroling a prisoner are, however, similar to those actuating the judge in placing a sentenced prisoner upon probation. Use may be made of the probation officers in supervising the conduct of prisoners released on parole.

[7] Wilfred Balster, adult probation. *Annals of the American Academy of Political and Social Science,* March, 1914. Author is Chief Justice of the Municipal Court of the City of Boston.

In truth, probation is but one aspect of the evolution and growth of the system of individualized punishment.

From Massachusetts the system spread rapidly until it is now found in every state of the Union. In all except twelve states the system applies to adults as well as juveniles. On March 3, 1925, Congress passed an act providing for this system in the federal courts. Prior to that time without express authorization of law, these courts had been operating a system of suspension of sentences which was in effect a probation system. In the so-called Killits case[8] decided in 1916, the United States Supreme Court held that the federal judges had no authority to suspend sentence. At that time, over two thousand persons, convicted in the federal courts, were at liberty under suspended sentences. To avoid the necessity of having all of them returned to court for sentence, many of whom had become law-abiding citizens, President Wilson, in 1917, issued a blanket pardon for them all.

In view of the fact that this system is now one of the established features of our system of criminal administration, it is important to determine the principles that should govern its establishment and operation. As will shortly appear, it is one which can accomplish a great good if it is properly conducted, and on the other hand, can be a serious evil if not so run.

The first and most important requirement is that the judges shall use with great discretion their power to place persons convicted of crime upon probation. In no case should such action be taken until the judge has made a careful investigation, not merely of the circumstances of the offense bringing the accused into court, but of his previous criminal record, if any, his general character, etc. Generally speaking, it should be used only in the case of first offenders.[9]

[8] 242 U. S. 52.

[9] The recommendations of the California Commission for the Reform of Criminal Procedure on these points are as follows:

"First, that no person who has been previously convicted of a felony, either in this state or elsewhere, shall be eligible for probation; second, that no person who, at the time of the commission of the offense, or at the time of his arrest, was armed with a deadly weapon shall be eligible for probation; third, that the present provision which prevents public officials guilty of bribery, embezzlement or extortion from receiving probation, be retained."—Report, p. 21.

A second requirement is the selection of a thoroughly competent and trustworthy force of probation officers, who will discharge their duties in a conscientious manner and use their utmost efforts to aid those placed in their charge to lead a proper life. Finally, the system must provide for a continuous supervision by those officers of the persons placed on probation and periodical reports to the courts regarding the manner in which their charges are conducting themselves. To quote again from the valuable paper of Judge Balster:

In adequate supervision of persons on probation lies the very heart of the system, yet it is the part which is all too apt to be crowded into the background by the more insistent claims of preliminary investigation, court attendance and office duties. . . . Constant contact with the probationer is indispensable. This part of the probation system is so important as to warrant quoting at some length a summary of the directions in which the probation officer should exert himself.

During probation, constant, judicious and helpful supervision, not reaching the stage of undue annoyance, is imperative. This involves a constant study of the probationer and his environment, and the enlisting of all agencies, social, charitable, religious and industrial, which can aid in the work of reform. The officer should help his charge to obtain suitable employment, to live under proper conditions, to associate with desirable companions, and avoid harmful influences. The officer should strive to gain the probationer's confidence and respect and at the same time to impress upon his mind that the relation must be mutual.

He should not be content with aiding him to hold in check his criminal or evil proclivities during the time of his probation—proclivities which if still existent are liable to break out again as soon as he has escaped sentence—but should endeavor to help him to really reform himself. To this end the officer should endeavor

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The proposed Code of Criminal Procedure drafted by a Committee of the National Crime Commission, Herbert S. Hadley, Chairman, contains the following provision:

"No court authorized to place a defendant on probation shall consider and pass upon an application therefor without giving reasonable notice to the prosecuting officer and according him right to be publicly heard thereon.

"No public official authorized to hear or grant pardons or paroles shall consider an application therefor until reasonable notice has been given, if possible, to the prosecuting officer who secured such conviction, the prosecuting officer of the county at the time of said application and the trial judge.

"And the decision by a public official granting a parole or pardon shall state the reasons why the same is granted before such pardon or parole becomes effective."

to stimulate the probationer's dormant energies for a morally healthful and useful life; develop in him ideas of right living, duty and sobriety, and ambitions along desirable and laudable channels; change those impulses, points of view and attitudes toward life and society which are wrong; develop new mental habits in place of old ones; stimulate his confidence in his own capacity to control himself and to succeed in a new and useful life. The re-awakening of will power is an object of importance, inducing the probationer to depend rather upon his own effort and initiative than upon the officer. In sum and substances the officer should endeavor to build up a new character in the offender; to replace the perverted ideas, impulses and habits which he has acquired through his environment with a new stock, *i. e.*, to reëducate him along lines which determine conduct.

Unfortunately, all the evidence obtainable indicates that these fundamental requirements are rarely met. In many courts, so large a proportion of persons convicted are placed upon probation as to indicate that no real care is exercised in determining the persons who shall be so treated, with the result that the system as operated is but little more than one of leniency. Thus, the Baltimore Criminal Justice Commission, which made a careful study of the working of the probation system in Baltimore, found the following conditions in respect to the placing of convicted persons upon probation during 1924:[10]

Crime	Convictions	Probation	Percentage of probation
Assault	170	54	31.7
Burglary	229	53	17.7
Carnal knowledge	19	8	42.1
Embezzlement	48	43	89.5
False pretenses	165	66	40.0
Felonious entry	2	0	....
Forgery	16	8	50.0
Fraud	20	15	75.0
Incest	2	2	100.0
Larceny	718	292	40.0
Manslaughter	4	1	25.0
Murder	18	2	11.1
Mayhem	2	0	....
Perjury	1	1	100.0
Rape	26	9	34.6
Received stolen goods	31	23	74.1
Robbery	41	4	9.7
Total	1582	581	36.7

[10] Annual Report, 1924.

In respect to the administration of the system it made the following findings:

First, that while considerable work was being done in probation both in the juvenile and criminal courts the probation authorities were relying largely on voluntary assistance for its conduct and direction.

Second, that there was no official central agency which controlled the work.

Third, that there was no coördination between the probation activities of the juvenile and criminal courts although frequently members of the same family were in the care of each group.

Fourth, that the probation officers were underpaid and overwhelmed with work.

Fifth, that there was no adequate administrative direction of the various probation officers and no central record system from which the results of the work could be reviewed.

The Chicago Crime Commission reported, in its Bulletin of November 20, 1919, that probation as it operated in Chicago was a farce. In its second annual report, January 31, 1921, it said:

In an investigation of four hundred and eighty-one probations granted by the criminal courts, an enquiry now in the hands of the Committee on Courts and Prosecutions, it was discovered that forty-seven per cent of those granted were against the written law and seventeen per cent were against the spirit of the law. Another bad feature of the lax and promiscuous granting of probations is that the judges fail to require a responsible bond of the defendant covering the probation period, a method which has been employed with remarkably good results in the operation of the Parole Law. A vast number of prisoners other than first offenders are constantly placed on probation, and it is the opinion of your committee that this has made probation an incentive to professional criminals to continue their operations.

The system for maintaining supervision over persons placed on probation is extremely careless and ill-organized, and the chief spirit motivating those in charge of this work seems to be to acquire as many individuals on probation as possible regardless of their criminal offenses or whether they should be in the penitentiary undergoing punishment for their crimes. There appears to be but little attempt on the part of these officials to look up the previous records of the individuals tried for felonies whom they recommend for probation and the tender-hearted thoughtfulness for hardened breakers of the law which seems to permeate much of their work is conducive to anything but checking the operations of organized

crime and the maintenance of law and order. It is conservatively estimated that at least 50 per cent of the persons placed on probation in Cook County later commit criminal offenses and again run afoul of the law. The whole system of probation in Chicago is in need of a most thorough house-cleaning.

The Third Annual Report said:

The administration of the probation law in Cook County is an insult to the intelligence of the community and a travesty on justice.

The Cleveland Survey, in its report,[11] said:

Such probation as there is in Cleveland—if what there is may be dignified by that name—is another proof of the rapid growth of the city and the apathy of its citizens toward the human aspects of government. One would have to travel far to find a great center which is guilty of such gross neglect. . . . Paroling defendants to relatives, detectives, clerks and even stenographers in the prosecutor's office has made a joke of probation, but the Common Pleas Court has no other agency afforded it.

These conditions existing in Baltimore, Chicago, and Cleveland are undoubtedly duplicated in many other places. The fact is that, in the principle of probation, an excellent device has been discovered for individualizing punishment and making the sentence conform to requirements of individual cases, but that there has been a very general failure to do those things which are necessary in order that the principle may be effectively applied. To state it in another way, this system has broken down on its administrative side. It is probably not going too far to say that, in operation, this system has done more harm than good with all its theoretical merits. That the facility with which this treatment is accorded to persons convicted of crime does incalculable injury by lessening the deterrent effect of punishment cannot be questioned. This does not mean that the probation system in America should be abandoned, but merely that those things necessary for its successful operation should be done. These are: (1) Adequate provision for a permanent force of probation officers, carefully selected with reference to qualifications for the work to be done by them; (2) this force to be officers of the court and, as such, to be appointed and be

[11] Criminal justice in Cleveland, 330.

removable by the court, and subject to its general direction and control; (3) this force to be under the administrative direction of a chief probation officer (4) provision for a record system which will reveal the circumstances of each case, the action taken in reference to it, and the reports upon it by the probation officer having it in charge; (5) provision for periodical reports by the chief probation officer upon all probation cases outstanding; (6) the use of the probation force to secure information regarding cases before probation is granted, to the end that the judge will have the information upon which to act intelligently in granting or withholding probation; (7) the correlation, or unification, of the probation forces of each state.

The reasons for all but the last of these requirements has been given in the discussion that precedes. Something further should be said, however, regarding the last. It is evident that a system under which each court has its own independent probation force will have the disadvantages: of inability at times of keeping track of probationers as they change their residences; of employing different methods in performing their duties; and of not making the most effective use of the combined resources of the officers. To meet this situation, a movement has developed of looking to the combining of the several forces into a single state probation force, or, at least, of creating a central state agency to have general direction and supervision over their work. Six states, Massachusetts, New York, Connecticut, Rhode Island, Vermont, and Utah, have created state agencies of this character.

Parole System. Analogous to, though distinct from, the probation system is that of the power of releasing prisoners on what is known as parole. Under this system, prisoners who have entered upon the service of their terms may be given their liberty subject to the right of the authorities to rearrest them and compel them to serve out the balance of their sentences if they abuse their liberty, and, particularly, if they are again found guilty of committing a criminal offense. Though the paroling of prisoners is not effected by the judge and does not constitute a feature of the sentence strictly speaking, it should be considered in connection with the discussion of the nature of the sentence, together with the matter of pardons,

since it has to do with the treatment of persons convicted of crime, and the fact that a prisoner may be paroled is an essential feature of the sentence.

The motives leading to the adoption of the parole system are the same as those underlying the adoption of the system of probation; namely, of refraining from keeping in confinement persons whose treatment in this manner it is believed accomplishes no useful purpose, and the promotion of the reformation of the persons paroled. Practically all of the precautions that should be taken to prevent abuse of the system of probation are needed in the operation of the parole system. Parole should never be granted until a thorough examination has been made of the character of the prisoner and especially his psychological make up, his criminal record, etc., and unless there is reason to believe that he will make good use of his liberty. And adequate provision should exist for maintaining supervision over him while at liberty through probation or parole officers.

As in the case of probation, there is no doubt that the system of parole is capable of accomplishing much good. Unless properly administered, it can also be productive of great harm; and there is much evidence that the system in practice is so loosely administered that it is questionable whether more harm than good has not followed its adoption in the United States. The Missouri Crime Survey in its preface thus says:

> Our study of parole shows an astonishing breakdown of the whole system of punishment for crime in this state. It indicates that the method of release from penal institutions which is commonly thought to be most important, namely, serving the entire sentence, is in reality not important at all, and that parole and commutation of sentence have assumed an importance far beyond even what the ardent supporters of these measures have advocated. Parole has been reduced to a mere method of turning criminals loose without any reference to the fundamental principle upon which parole rests, namely, the determination of a parolee's conduct as a basis for the continuation of such parole.

The remedy for this situation is to be found in improving the administrative features of the system rather than in its abandonment.

Throughout this study we have had occasion to remark on the lamentable lack of information regarding the manner in which our

judicial institutions are working. In few respects is this more marked than in the case of the operation of the probation and parole systems. It would be of immense value if a thorough investigation of this subject were made.[12]

Remission or Modification of Sentences. In the same way that no consideration of the subject of the character of the sentence that may be imposed upon persons convicted of crime is complete without consideration being given to the possibility of sentenced persons being paroled, so attention must be given to the power that exists in practically all countries entirely to remit or to modify a sentence after it has been imposed. Action in this way may take the form of a remission of fines, penalties and forfeitures, a commutation, a reprieve or a pardon.[13]

In England and the United States the power to modify or remit a sentence is usually deemed to be one pertaining to the executive, and is spoken of as the exercise of executive clemency. It is by no means the invariable rule, however, that this power may be exercised by the chief executive alone or, when possessed by him, may be exercised upon his sole discretion. The situation in the states as regards the exercise of the pardoning power, as set forth in a recent consideration of the subject, is as follows:[14]

In thirty-seven states no pardon can be granted to a prisoner without the consent of the governor. This simply means that the governor has the last word in the granting or refusing of a pardon. It does not mean necessarily that upon the governor rests the sole responsibility for extending clemency. In fact, but four states, Arkansas, Tennessee, Virginia, and Kentucky, vest the pardoning

[12] For a valuable consideration of the question both of probation and parole, together with a statement of the states that have adopted such system and a brief description of their systems, see Hearings before the Committee on the Judiciary, House of Representatives, Sixty-sixth Congress, Second Session, March 9, 1920, on bills providing for a federal probation and parole system.

[13] The remission or modification of a sentence should be carefully distinguished from that of granting what is known as "amnesty." Amnesty is the relieving of persons who may have been guilty of certain illegal acts from liability therefor, before they have been arrested and convicted of such offenses. Such action can usually be only taken by the legislature while the modification or remission of sentence can usually only be effected by the executive.

[14] Harold W. Stokes, A review of the pardoning power, *Kentucky Law Journal*, November, 1927.

power in the governor alone. In all other states the machinery of administration varies in complication, although through most of the variations the governor remains the central figure. In only five states can clemency be granted by a board or officer without the consent of the governor. In six more states the governor is made a member of a board, a majority of whom must vote in favor of a petition before a pardon can be granted; but in the thirty-seven remaining states the governor must shoulder the final responsibility.

Twenty-three states create advisory boards to act with the governor to consider application for pardons. It is not mandatory in these states for the governors to accept the advice of these boards, nor is his power to pardon limited to their recommendations. The boards simply serve to lift the load of considering the almost endless petitions for pardons from the shoulders of the chief executives. Outside of these twenty-three states wide differences in administration exist. In Rhode Island the pardon power may be exercised by the governor only with the consent of the Senate. South Dakota divides the power between the governor and a special board. Maine requires the consent of the Executive Council and an advisory board. So the variations continue.[15]

To enter into any detailed consideration of the circumstances under which this power to modify or remit sentences should be exercised, or into the procedure that is or should be followed when need for action arises, would take the author beyond the scope of the present work. All that can be done is to note the existence of this power and to indicate its importance as a feature of the system of criminal administration. That power to act in this way should exist there can be no doubt. It is, however, a power that can be easily abused; and cases are by no means infrequent where it has been abused. One safeguard, though it is by no means one that will always be effective, would be provided by requiring the publication of a complete record of each case acted upon, and especially of the reasons which have led the pardoning or remitting power to exercise clemency.

Fixing of Sentence by an Administrative Board. The determination of the character and severity of the sentence to be imposed upon one found guilty of a criminal act has been deemed to be an essential function of the court within the limits provided by law. With the development of the indeterminate sentence and the power

[15] See also The pardoning power, Massachusetts Constitutional Convention, 1917, Bulletin No. 4.

to release prisoners upon parole and the free use of the pardoning power, the actual determination of the sentence has passed to a considerable extent into the hands of the executive or administrative officers. This has given rise to the question whether the system of having all sentences, or at least those for other than petty offenses, fixed by administrative action does not offer superior advantages. The Minnesota Crime Commission, which devoted considerable attention to this subject, strongly endorses the system obtaining in that state, where the Board of Parole is in effect a board of punishment, and recommends that the board be given the latter designation as better indicating its character. In support of this system where the length of the sentence is, in effect, fixed by the board instead of by the trial judge, the report reads:[16]

First, terms fixed by a Board are more uniform for each type of case. Criminals are tried before many judges all over the state. The judges differ in their attitudes toward crime in general and towards different crimes. Some judges will mete out heavy sentences for one crime, light sentences for another. Other judges reverse the penalties. This statement is not a reflection on the judges. Their sentences are imposed in good conscience, but their consciences differ. The convicts meet in the penal institution and compare their records and their sentences. Those leniently treated feel that they have escaped due punishment. Those who have been severely treated regard their sentences as an injustice, become rebellious in prison and are more likely to take vengeance on society when their time has expired. Both groups lose respect for the law. If all sentencing were done by one judge, many of these difficulties would be obviated; but a board of three is still better, as the number tends to eliminate the effect of prejudices of any one person.

Second, the measure of punishment can be more intelligently fixed after the convicted person has been in the penal institution for a time than at the time of conviction. Under the prevailing theory of punishment, the question in each case is: What punishment of this particular criminal is necessary for the protection of society? The answer to this question calls for a great deal of information that is available after imprisonment but not at the time of conviction.

After setting forth at some length the character of this information dealing with the criminal's character and history, as well as his conduct in the prison, the report continues:

[16] P. 47.

The judges at the trial lack much of this information. They know little of the criminal's character and record. A criminal may act a part during a trial which he cannot sustain through a year or more in prison.

* * * *

Third, it is an advantage that the Board performs its duties at a place removed from the locality where the prisoner has lived. It is there less subject to pressure from relatives and friends of the criminal.

As regards the results of this system the report discloses that: " the transfer of the sentencing power to the Board of Parole has not resulted in lessening the average term of imprisonment. The records show that the average term is longer than it was when the judges gave definite sentences."

The California Commission for the Reform of Criminal Procedure endorses in principle the Minnesota plan, under which the length of sentence to be served is fixed by an administrative board. Its recommendations seek to harmonize the conflicting principles of having the sentence fixed by the court, or by a board, by having the trial court recommend the minimum sentence but leave to the Board of Prison Directors the power to depart from this recommendation if, in its opinion, conditions warrant."

The plan recommended is this: That at the time of, and as part of the sentence, the trial court shall recommend the minimum term for which in his opinion the defendant should be confined before being eligible for release on parole or otherwise. This, it is to be noted, is not the fixing of the sentence, but only a recommendation as to the minimum term of actual confinement. The board of prison directors shall have jurisdiction and power to release the defendant prior to the expiration of such recommended term, but shall not do so unless in its opinion exceptional cause therefor is shown. This leaves power in the prison board to correct any abuses that may arise through excessive recommendations, and to take into consideration facts which may develop subsequent to sentence and which were not known at that time. The plan thus preserves to a large extent the undoubted value of the opinion and recommendation of the trial court without in any substantial degree infringing upon the indeterminate sentence law or the power of the board of prison directors. As a matter of fact, this board has for a long time attempted to get the opinions of trial judges in practically all cases coming before it.

[11] Report, 1927, p. 23.

The latest advocate of this system is former Governor Alfred E. Smith of New York. His proposal as submitted to the New York State Crime Commission is:

That the jury (in felony cases) should determine only the guilt or innocence of the person on trial.

That after a jury has returned a verdict of guilty the power of imposing sentence should be taken from the judge who presided at the trial and given to a special state board to be created by a constitutional amendment.

That the members of this board should include legal experts, psychiatrists and penologists devoting their entire time to the work and paid as high salaries as any others in state employ—$25,000 a year.

That this board should determine whether a convicted felon should go to a state prison or to an insane asylum; and that it should determine the length of punishment and the extent he may be subject to parole.[18]

It is reported that this proposal has received the favorable endorsement of many judges, district attorneys, lawyers and criminologists among whom mention is made of Dr. George W. Kirchwey former warden of Sing Sing prison, Louis E. Lawes, the present warden of that institution and Miss Jane Hoey, member of the Baumes Crime Commission.

This proposal is not such an innovation as might, at first sight, be thought. As is pointed out in a recent study of the indeterminate-sentence and parole system in Illlnois, the Board of Paroles, in effect, acts as a general sentencing board. The reports thus reads:[19]

As the law now exists in Illinois, the Board of Paroles, rather than the trial judge or jury, is the real sentencing body, and it is this board and not the trial judge or jury which is called upon to determine the period of confinement and the actual sentence.

Psychopathic Clinics. Though not developed for that purpose, the force of probation officers, as has been seen, constitutes a valuable administrative service to which judges can resort for aid in determining the character of sentence that should be imposed

[18] *New York Times,* December 18, 1927.

[19] The working of the indeterminate-sentence law and the parole system in Illinois; a report to the Honorable Hinton G. Clabaugh, Chairman, Parole Board of Illinois, 1928, p. 4.

upon those convicted of crime in their courts. Recent years have witnessed the development of another administrative aid that is of equal if not greater importance. This consists of the psychopathic clinic or laboratory to which the judge can resort to secure information regarding the mental characteristics of the persons convicted; and, as a consequence, the degree of their responsibility and the character of treatment that should be accorded them. To quote the director of the Psychopathic Clinic of the Recorder's Court of Detroit:[20]

The psychopathic clinic, then, in a criminal court, is that portion of the court's organization where the intensive study of the individual himself is made. It is for the purpose of supplying the judge, who is to be the administrator of treatment, with the knowledge as to the kind of treatment which will best meet his needs and the needs of society in reference to him. The clinic should furnish the court information on two points: first, the condition of mental health or disease of the accused: and, second, an opinion as to what might be expected of the accused in the future. This latter will practically take the form of course in a recommendation as to treatment.

The modern study of crime has developed the following striking facts: the comparative youth of the great majority of persons coming before the courts for trial for crimes; the large percentage of cases where criminal proclivities are manifested at an early age; the frequency of repeated criminal acts by the same person; the comparatively slight deterrent effect of punishment, no matter how severe; and the comparatively small results secured even in the best reformatory institutions in the way of weaning criminals from their criminal habits. These and other facts seem to indicate that there is in all communities a class of persons who, by their nature, are predisposed to crime and are not amenable to ordinary treatment in respect to making them law-abiding citizens. It has become apparent that if the community is to be protected against this class, a change of method in handling their cases is necessary.

The earliest approach to a study of crime from this standpoint was that made by Professor Cesare Lambroso, which resulted in the rise of what is known as the Italian School of Criminology. It

[20] A. L. Jacoby, The psychopathic clinic in a criminal court; its uses and possibilities, *Journal of the American Judicature Society*, June, 1923.

was believed by this school that there is a distinct criminal class which can be distinguished by certain physical characteristics. Though it is now held that Lambroso and his school were largely mistaken, their work was nevertheless of value in bringing to the front the idea that there is a criminal class in the sense that in every community there are persons who by their make up are predisposed to crime and are not subject to the ordinary restraints in respect to the commission of crime.

Further study has brought out the fact that the factors predisposing this class to crime are mental and emotional rather than physical. Research has revealed that a considerable proportion of the habitual criminals are defective in respect to either their intellectual capacity, their emotional nature, or both. To state this in another way, they belong to the class of feeble minded, or those suffering from dementia præcox. This condition of affairs profoundly affects the problem of the administration of criminal justice. It means that, as regards serious crime at least, proper sentences cannot be imposed by the judge or proper treatment of sentenced persons be had, except as information is secured regarding the mental and emotional character of the persons convicted of such crimes. And this information can only be secured by the establishment of clinics for the psychological examination necessary to develop the facts.

The first clinic of this kind to be created in the United States was that established in Chicago in 1909 on a private foundation furnished by Mr. Wiliam Dummer, with Dr. William Healy as its director. This laboratory was afterwards taken over by Cook County, and is now maintained by it. In 1914 the Municipal Court of Chicago created its psychopathic laboratory to aid it in the handling of cases of juvenile delinquency and certain other special classes. The scope of its work rapidly broadened, and it was reorganized as the Juvenile Psychopathic Institute of Chicago, which is now a part of a state-wide Juvenile Psychopathic Institute of Illinois, under the Department of Public Welfare of the State. Ohio has followed the example of Illinois and likewise has a state-wide psychopathic clinic known as the Ohio Bureau of Juvenile Research, which is under the State Board of Administration. In 1924 the Cleveland Court of Common Pleas established a psychiatric clinic. According to a study made by the United States

Children's Bureau in 1918[21] there were at that time thirteen courts having attached to them psychopathic clinics in charge of trained psychologists or psychiatrists and forty-seven courts in eleven states making use of institutions or public departments for the mental examination of those brought before them accused of crime. The courts possessing clinics of their own were located in Boston, Buffalo, Chicago, Cincinnati, Detroit, Los Angeles, Memphis, Newark, New York, Philadelphia, Pittsburgh, San Francisco, and Seattle.

In 1921 Massachusetts passed an act providing that a psychiatric examination and study should be made of "every person indicted by a grand jury for a capital offense or any person who is known to have been indicted for any other offense more than once, or to have been previously convicted of a felony." The chief purpose of this act was to provide a better method of handling cases where insanity is offered as a defense, but it furnishes the means for securing information regarding the psychological characteristics of persons generally who have been indicted or convicted of a serious offense more than once. This system has apparently given excellent results in practice. In a paper on its operation, the Director of the Division for the Examination of Prisoners of the Department of Mental Disorders, says:[22]

Either side may, of course, call other experts but this is rarely done since the unbiased neutral character of the Department's examiners is well recognized by all parties to the case.

As a result of the neutral and impartial status of the examiners, occasion to employ the services of partisan experts in criminal cases has practically entirely ceased to exist. The clashes of such experts which are all too familiar in some jurisdictions are now virtually unknown in Massachusetts almost entirely on account of this beneficent provision of law.

[21] Evelina Belden, Courts in the United States hearing children's cases; results of a questionnaire covering the year 1918. Children's Bureau Publication No. 65 (1918).

[22] Dr. Winfred Overhalser, The practical operation of the Massachusetts law providing for the psychiatric examination of certain persons accused of crime, National Conference on the Reduction of Crime, National Crime Commission, Washington, D. C., November 2 and 3, 1927. This paper gives an exceedingly valuable consideration of the whole problem of determining insanity in criminal cases and certain valuable references to authorities.

General Summary. If now, the attempt is made to review the consideration that has been given of the character of sentences that may be imposed for criminal acts and the conditions under which such sentences shall be served, certain facts of importance stand out.

First, is the general adoption within recent years of the principle of what is known as individualized punishment. In accordance with this principle, the effort is made by judges in imposing sentence to make the sentence correspond to the needs of the particular individual upon whom it is imposed. The old idea of having a fixed punishment for each offense, varying only within certain limits as regards the maximum and minimum terms of imprisonment, has largely been abandoned. Instead, the sentence should vary according to the character of the prisoner and especially the likelihood that he will respond to efforts for his reformation. Especially, should it vary according to whether the convicted person is an adult or a juvenile, a first offender, or one who has previously been convicted of a similar or other offense, and whether the offense for which he was convicted was committed upon a sudden impulse or under pressure or influence upon the part of others, or was his deliberate and premeditated act. That this principle is more humane, more just, and better calculated to ensure the future good conduct of the persons convicted there can be no doubt. At the same time, it is certain that a sentence system based on this principle does not have the same deterrent force as one where a fixed punishment is inevitable upon conviction for a crime. The serious problem is thus presented of harmonizing this new system with the maintenance of the essential requirement that sentences shall be of such a character as to have a strong deterrent force. This is a matter almost wholly of the manner in which the new system is administered.

A second feature, which necessarily follows from the one just considered, is the great extension of the discretionary powers, both of judges in fixing the sentence and of executive and administrative officers in putting the sentence into execution. After conviction, the judge can, in most jurisdictions, suspend sentence, release the person convicted on probation, or order his incarceration. Furthermore, in the case of juvenile delinquents, he usually has a wide

choice in respect to the character of institutions to which the person convicted shall be sent—a jail or penitentiary, a reform school, a farm or industrial home, etc. After a prisoner has entered upon the service of his sentence, the chief executive, the pardon board, or other administrative agency, can commute the sentence, release the prisoner on parole, or pardon him. The existence of such broad discretionary powers by judges and executive and administrative officers necessarily means that large opportunities exist for its unwise or improper exercise. Both classes of officers may be influenced too largely by purely sentimental considerations. In some cases, they may respond to improper pressure on the part of politicians or friends of the prisoner. That many ineligible persons are placed on probation or paroled has been shown. That the pardoning power is at times grossly abused is a matter of common knowledge. Even if the powers enumerated are exercised in good faith, the cumulative effect of these various ways of avoiding punishment is great. The criminally inclined know that even if their offenses are detected and they are arrested, tried and convicted, there are still many ways open to them to avoid punishment. This cannot fail to weaken the deterrent force of the punishment provided by law.

The fact of the matter is that we have here two considerations, both desirable but in conflict with each other. The problem is to devise some means by which this conflict may be harmonized. This brings us to the third consideration that it is desired to emphasize. This is, that just in proportion as discretionary powers are broadened, precautions must be taken that such powers shall be wisely exercised and that those exercising them may be held to accountability for the way in which they do so. These precautions are of two kinds: first, the requirement that action will not be taken until the information needed in order that the action may be intelligent has been secured and considered; and, second, that a careful record shall be kept and published of all the material facts of each case.

In the case of action by executive and administrative officers, means are usually available by which the needed information may be secured. In the case of action by judges in passing sentence, this too often is not the case. An imperative need, if the probation system and the power of judges to exercise large discretionary powers in fixing sentences are to continue, is that criminal courts

shall be equipped with an administrative staff whose duty it shall be to provide the judge with the information needed by him in determining the character of sentence. This staff should embrace at least two agencies: a force of probation officers and a pyschopathic laboratory. It should be the duty of the first to secure and report to the judge the facts regarding the previous cirminal record of the prisoner, if any, and any facts regarding the offense or the character and habits of the prisoner not brought out in the course of the trial that would tend to determine the character of the sentence that should be imposed. In order that the probation force may do this, proper judicial records should be maintained by the courts, the public prosecutor's office, the police, and the department of penal institutions. The probation force should also have the duty of supervising and reporting upon persons released on probation or parole.

The duty of the psychopathic clinic should be that of examining and reporting upon the mental and emotional character of all convicted persons, or at least all who give the slightest evidence of departure from a normal make-up in this respect. Without the information that such an examination affords, it is impossible, in many cases, for a judge to determine wisely the nature of the sentence that should be imposed.

The foregoing does not mean that each court shall have its individual probation force and psychopathic clinic but that administrative services of this character shall be available to all courts. Motives of economy and efficiency would seem to indicate the desirability of central agencies with general jurisdiction throughout the state.

CHAPTER XXXIX

BAIL

In describing the procedure employed in bringing to trial persons believed to be guilty of criminal acts, no mention was made of the provision whereby persons who have been taken into custody on criminal charges may obtain their freedom pending the calling of their cases for trial through the process of giving what is known as bail. This consists of the accused depositing with the magistrate a fixed sum of money which will be forfeited in case he fails to appear when called upon or securing some other person to enter into an engagement known as a bail bond obligating himself to pay to the government a fixed sum in case of the nonappearance of the accused when his case is called. It is manifest that great injustice and unnecessary hardship would be entailed upon those afterwards found to be innocent unless some provision such as this existed, and even in the case of those found guilty it is illogical to have the punishment begin until guilt is proven.

No one questions the propriety of this provision for the giving of bail. Unfortunately, however, the system, while serving so useful a purpose, is susceptible of abuse, and in fact is administered in such a way in many jurisdictions as almost wholly to distort its purpose and make it one of the many means by which the guilty are able to avoid merited punishment. There is laxity in respect to the enforcement of almost every requisite of the proper working of the system; the bail is fixed at inadequate sums, thus making it to the advantage of the accused to fail to appear and to avoid paying the penalty of his crime by fleeing from the district; bail bonds are accepted from bondsmen against whom the bond, if forfeited, cannot be collected; and no adequate effort is made to enforce the payment of the bonds which are forfeited. In many if not in the majority of jurisdictions there has developed a class of professional bondsmen, who, knowing the slight danger that they run of having to make good on their obligations, make it their business to furnish bonds upon the payment of fees.

Practically every investigation of the administration of criminal justice that has been made in this country has commented upon the faulty administration of this system and the evils that result therefrom. The Chicago Crime Commission reported [1] that during the two years 1919 and 1920 the records showed that of judgments totaling more than $1,000,000 resulting from bond forfeitures, less than $5000 had been collected; and in a later report [2] said that "the law governing bail bonds in Illinois as it stands at present amounts almost to a mantle of protection for the accused felon and his associates." An investigation made by the Director of the Baltimore Criminal Justice Commission into the bail situation in Baltimore showed that bonds were accepted without the making of any real investigation of the financial responsibility of those giving them, and that no adequate effort was made to enforce the collection of bonds that were forfeited.[3] The Cleveland Survey showed that less than 2 per cent of the forfeited bonds were ever collected; while the Cleveland Association for Criminal Justice, an organization created to follow up and secure action upon the recommendations of the Survey, reported that notwithstanding the exposure of the situation that had been made, little or nothing had been done to improve conditions. Its characterization of conditions describes so accurately conditions existing generally in the United States that it is worth while reproducing it at some length. In its Bulletin for September 30, 1925, it says:

In the courts of this county and city this procedure has come to be a farce. Prisoners are turned loose under bond to prey upon the community and fail to appear for trial, presumably continuing the practice of their nefarious pursuits. Their bondsmen rarely pay even the costs of the cases which may be brought upon their forfeited bonds by the state. Procedure upon bonds is unbelievably lax and inefficient. The county loses annually thousands of dollars which might be collected through intelligent and proper procedure in bond cases.

The most glaring faults of the present procedure may be summarized as follows:

First: Bonds are accepted without proper investigation of the financial worth of the proposed sureties;

[1] Annual report, January 31, 1921.
[2] Annual report, January 31, 1923.
[3] Report on bail bonds in criminal cases in Baltimore, 1923.

Second: Inexcusable delays attend the proceedings upon forfeited bonds;

Third: Practically no efforts are made to collect upon judgments which may be secured on forfeited bonds. No executions have been issued to collect judgments in cases of forfeited bonds from April 1, 1924 to July 1, 1925;

Fourth: Flagrant irregularities appear in the proceedings whereby judgments are reduced in amount or vacated or the case dismissed. In many cases the entries of dismissal charge the costs of the case against the state which sued on the forfeited bond.

The net result of this procedure so far as the taxpayer is concerned is apparent in losses of thousands of dollars to Cuyahoga County every year. In the period from January 1, 1921, to June 30, 1925, there were forfeited bonds recorded in the records of the County Auditor in the total amount of over $950,000.00 and of this amount only $17,726.00 was collected in judgments, *i. e.*, less than 2 per cent of the total value of bonds forfeited. . . .

There seems to be no system in the acceptance of bonds whereby the clerks of the Municipal Court determine the worth of the proposed sureties. Bonds are accepted from sureties who already have bonds outstanding in large amounts, from sureties who have cases pending against them on forfeited bonds, and even from sureties who have unpaid judgments upon forfeited bonds standing against them. . . . The result of the above procedure is a generally careless and perfunctory action in the acceptance of bonds.

The Bulletin then goes on to point out that there is inexcusable delay in taking proceedings for the forfeiture of bonds, the average time in the county prosecutor's office before action is brought after receipt of the papers being fifty-three days, though the procedure involved is an exceedingly simple one, and, even then, such proceedings are not vigorously pushed. It thus says:

The cases are not followed up diligently. When the summons for the defendant surety in a forfeited bond case is returned by the county sheriff reading "defendant not found" an alias summons is practically never issued and so far as the record shows no further effort is made to find the defendant surety. Even in cases where cash or property bail has been provided no effort is made to secure a judgment against the defendant surety by attachment and service by publication. . . . In 75 per cent or more of the cases on forfeited bonds no answers are ever filed. When answers are filed they are generally filed months in arrears and are frequently dilatory in their nature or frivolous. In general judgments by default are frequently taken and shortly thereafter reduced or vacated. . . . In all of these proceedings the most inexcusable methods are used in the collection of judgments. In the few

cases where judgments are obtained, practically no efforts are made to collect the amount of the judgment. . . . The ordinary proceedings of lawyers to collect money for their clients are never resorted to. Proceedings in the aid of execution are never carried out. Efforts to uncover property which may be owned by the surety are never made. Even in the cases where judgments are obtained and collections have not been made by proper proceedings, the authorities have seemed to feel that the defendant surety should not be embarrassed by the standing of judgments against his name. In case after case, journal entries appear on the dockets of the court which recite "on representation . . . this case is dismissed," or "judgment vacated," or "modified" as the case may be. No reasons appear for such action. In these cases many times even the costs of the case are assessed against the plaintiff instead of against the defendant surety. . . . This farcical procedure costs the taxpayers of Cuyahoga County thousands of dollars annually in maintaining prosecuting machinery, etc., to secure these negligible results. But the most serious feature of this bond situation is not the loss of money to Cuyahoga County, regrettable as that is, but rather in the resulting increase in crime. Seasoned criminals well know that they may secure release from jail by securing bonds, especially in petty offenses, knowing that it is a simple matter to jump their bond without danger of serious financial detriment to their sureties. The surety is seldom held for any damage in the present procedure and the fear of apprehension for crime is reduced to the minimum when the criminal knows he can walk out of jail by giving a bond which will entail no damage to his surety.

The New York State Joint Legislative Committee on the Coordination of Civil and Criminal Practice Acts, comments on conditions in that state as follows:[4]

So flagrant have become these abuses that it is claimed almost unreservedly that a professional criminal has little to fear in being arrested on almost any charge, for he feels secure in the thought that it will be only a matter of a very short time when he will be admitted to bail and thus permitted to pursue his nefarious practices. Numerous instances have been cited to us when men charged with serious crimes, while out on bail have committed further serious crimes and when apprehended have been again bailed, neither of the offenses having been tried.

Responsibility for this condition of affairs rests partly upon the the courts but primarily upon the office of prosecuting attorney. It furnishes but another illustration of the lax business methods which prevail so generally in these offices. The enforcement of a proper

[4] Report, 1926, pp. 8-9.

record and reporting system under which full information would be currently available regarding the manner in which these officers perform their duties could not fail to secure the handling of this work in a much more efficient manner.

In considering this problem at least two important distinctions should be made: that between the release of prisoners on bail as a matter of absolute right on the part of the prisoners and their release in this way as a matter lying within the discretion of the court; and the release of prisoners on bail before and after trial and conviction in the trial court. In the United States the feeling is that release on bail should be an absolute right of the prisoner pending his trial in all cases except those of such serious character as murder or manslaughter. Such right is guaranteed, in fact, by constitutional provision in most if not all of the states.[5] Such a system lessens the injustice of the arrest and trial of innocent persons and is consonant with the principle of the presumption of innocence until guilt is proven. After conviction in the trial court, and pending further proceedings to have such conviction set aside, a radically different condition obtains. Not only is the presumption then one of guilt rather than innocence, but the incentive on the part of the prisoner to violate his bail is greatly increased. The release of prisoners on bail under these circumstances is subject to grave danger that advantage of it will be taken by the prisoners to abscond. The granting of bail in such cases, moreover, results in a discrimination between those having financial means or facilities and those not so situated.

Due to these considerations there is a growing feeling that increased safeguards should be thrown around the bail system in respect to the release of prisoners on bail after conviction in the trial court. Proposals in this direction have taken the form of providing that release on bail of convicted prisoners shall not be a matter of right but shall be discretionary with the court. The revised draft code of criminal procedure drafted by a committee of the National Crime Commission, of which Mr. Herbert S. Hadley was chairman, thus provides that:

A defendant appealing from a judgment of conviction shall remain in custody unless the trial court shall on granting the appeal

[5] In England the release of prisoners on bail is discretionary with the court to a far greater extent than in this country.

certify (provided the charge is one which is bailable) that there is in its opinion reasonable ground for the prosecution of said appeal. The appellate court shall on application also have the power to issue such certificate. In case of such certificate the defendant shall be released on bond fixed by the trial or appellate court.

Regarding this proposed provision Mr. Hadley said:[6]

The system described exists in the Federal Courts and in the courts of many states. It should be extended to the courts of all states so as to remove a striking inequality to the advantage of criminals with money and to the disadvantage of criminals without money and at the same time remove a real danger to society.

Substantially the same recommendation is contained in the report of the New Jersey Commission to Investigate the Subject of Crime. This report further points out that the enactment of this provision will result in the additional advantage of reducing materially the number of appeals and consequently the number of cases coming before the appellate courts, since, when bail is freely granted, appeals will be taken even though there is little or no hope of a reversal of the verdict.

The manner in which this question of bail should be handled as provided in the outline of a code of criminal procedure of the National Crime Commission is as follows:

In every case where one charged with crime is entitled to bail, the amount of the bond shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant, and the probability or improbability of his appearing at the trial of the case. Each bondsman shall be examined under oath and shall be required to make full disclosure of his financial condition and submit a decription of his property and amount of his obligations, and also who, if any one, has indemnified him and what, if any, collateral he has received and from whom. All statements made by him in such examination shall be deemed to be material allegations and if false statements are made he shall be deemed guilty of perjury. The bond shall be conditioned that in case the defendant does not appear, the bond shall thereupon be declared forfeited, which forfeiture shall become a final judgment against the defendant and his sureties and execution issued for the amount thereof unless within ten days the bondsman shall produce the defendant and satisfy the court that the defendant's absence was not with their connivance. Cash bail may be accepted in lieu of a surety bond.

[6] *American Bar Association Journal,* October, 1926.

PART VI

LEGAL AID

CHAPTER XL

PROVISION FOR MEETING COURT COSTS

It is one of the glories of Anglo-Saxon jurisprudence that it recognizes no distinction between the rich and the poor in respect to their substantive rights or, in principle, in respect to their rights to appeal to the courts for the adjudication and enforcement of such rights. Unfortunately, this equality before the law, which is a real one in so far as substantive rights are concerned, is largely lacking as regards the real powers possessed by the poorer classes to take the steps necessary to secure the enforcement of such rights. As justice is generally administered in the United States, the assistance of the courts for the enforcement of rights or protection against wrongs can only be secured under conditions which, while easily met by the wealthy, either are wholly beyond the resources of the poor, or subject those resources to a burden so disproportionate to the possible relief that may be obtained as, in effect, to deny to them such aid. As one of our most distinguished students of jurisprudence has expressed it:[1]

> Taking the country as a whole, it is so obvious that we have almost ceased to remark it, that in petty cases; that is, with respect to the everyday rights and wrongs of the great majority of the urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed. Indeed, in a measure, this is so in all cases. But what is merely exasperating in large causes is downright prohibitive in small causes. While, in theory, we have a perfect equality, in result, unless one can afford extensive and time-consuming litigation, he must constantly forego undoubted rights, to which in form the rules of law give full security but for which, except when large sums are involved, the actual conduct of litigation affords no practicable remedy.

This condition of affairs is not one to be viewed with equanimity. Probably the most fundamental duty that a government has is to

[1] Roscoe Pound, Administration of justice in the modern city, *Harvard Law Review*, XXVI, 316 (1913).

see that justice is done to all its citizens. This duty our governments are failing to perform. The consequences of this failure go far beyond the direct hardships inflicted upon that portion of the community which is least able to bear it. In some respects the greatest damage done is the encouragement that it gives to the commission of fraud and to the lowering of respect for the government itself, with all the political consequences resulting therefrom. As a writer has put it:[2]

> Denial of justice is not merely negative in its effect; it encourages fraud and dishonesty. . . . Everywhere it abets the unscrupulous, the crafty and the vicious in their ceaseless plans for exploiting their less intelligent and less fortunate fellows. The system not only robs the poor of their only protection but it places in the hands of their oppressors the most powerful and ruthless weapon ever invented. . . . The effects of this denial of justice are far reaching. Nothing rankles more in the human breast than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the government and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them. A persuasion spreads that there is one law for the rich and another for the poor.

The correction of this condition of affairs constitutes one of the important steps to be taken in putting our system of judicial administration upon a satisfactory basis. Though the problem is one that can be simply stated, its solution is one that requires action in a variety of ways. What these ways are, it is the purpose of the present chapter to consider.

General Improvement of Judicial System. At the forefront of action having for its purpose to bring justice within the reach of the poor lies the measures that have been set forth in previous chapters for the improvement of our system of judicial administration generally. Not one of these—the establishment of a system of unified judicial tribunals, the adoption of simplified methods of bringing actions, the rationalizing of proceedings in court, the

[2] Reginald Heber Smith, Justice and the poor, 9.

development of conciliation and arbitration as methods of adjusting disputes, etc.—but contributes to the lessening of the expense of litigation, the securing of expedition, and the simplification generally of the redress of grievances.

Elimination of Court Costs. With the accomplishments of all the reforms that have been enumerated, however, there remain certain conditions which place the poor at a disadvantage in comparison with the wealthy in securing justice through a resort to the courts. Among these first mention should be made of what are known as court costs; that is, the payments that must be made in the form of fees and otherwise by litigants for the right to resort to the courts for the redress of their grievances or the defense of claims made against them. The payment of these costs, though a burden upon all litigants, bears with especial weight upon the poor. In small cases they represent a large proportion of the amount in controversy. It is true that the poor claimant, if successful, may be relieved of the payment of such fees by having them assessed against his unsuccessful opponent. This, however, does not relieve him from the necessity of making provision for their payment in the first instance, either by depositing the amount required in court or by furnishing a bond guaranteeing their payment, and this first provision he often cannot make. From whatever viewpoint regarded, it is difficult to defend the system of court costs as it exists today in the United States. In principle it is wrong. As has been repeatedly stated, governments have no more fundamental duty than that of administering of justice. There is no more reason why it should make the performance of this duty dependent upon the payment of fees than it should charge for its services in other fields of activities. Most work done by government is freely performed without any direct charge upon the citizens. It represents the return for which taxes are paid. In these days when the government freely furnishes school facilities, including free text books, public play grounds, and recreation facilities, and defrays the expense of removing garbage and ashes out of its general funds, it would seem that it should in like manner meet all of the expenses involved in the maintenance and operation of its judicial machinery. Moreover, even under the theory that a charge should be made for judicial services, there has been no attempt to make the system of

charges consistent with the theory. The fees charged are arbitrary in the extreme and bear no accurate relation to the value of the services rendered or to the expense to which the government is put in performing them. Though a burden to the litigant, they represent, in the aggregate, but a small part of the total expense involved in the maintenance and operation of the courts. If it is proper that the government should meet the greater part of the expense of the administration of justice out of its general funds, there is no logical reason why it should not meet all of such expenses. Doing so, moreover, would add but a negligible amount to the present total of governmental expenses. The plea that the government needs this comparatively slight addition to its income can be dismissed without argument.

In point of fact, the existence of this system of court fees is due to no deliberate action on the part of present governments. It exists merely as a survival of old practices that arose at a time when the administration of justice was looked upon as a source of revenue to the Crown. As Mr. Reginald Heber Smith has written:[3]

After the best examination I have been able to make of the statutes, the history and the literature on costs, I am unable to discover any satisfactory *raison d'être* for their existence or any scientific principle in their application. Their variations from state to state and even within a state are endless. They bear no relation to the expense of suit either from the point of view of the disputants or of the state. . . . As costs relate to law it may be unbecoming to call them ridiculous but they may respectfully be termed an anachronism.

And in another place:[4]

It is impossible to find any principle by which costs are determined and regulated. They are too low to deter the rich but high enough to prohibit the poor. They bear little relation to the actual disbursements of the parties. "Term fees" which are taxed in favor of the successful party represent no cash expenditure by anybody. The bill of costs includes one dollar for a writ that can be purchased at any law stationers for five cents. It allows to the prevailing party two or three dollars as an attorney's fee

[3] Denial of justice, *Journal of the American Judicature Society*, December, 1919.

[4] Justice and the poor, 23.

while the actual charge made by the attorney to his client is probably ten times that amount. The fees paid by the litigants bear no closer relation to the state's expense in maintaining the judicial organization. . . . If the existing systems were brought forward *de novo* it would be ridiculed as absurd. Considering it as a part of our traditional method of working out justice it is fairer to call it an anachronism.

As often happens, an existing institution is justified for reasons totally different from those which gave rise to it. The imposition of these costs is now sometimes defended on the grounds that they act as a deterrent of litigation. The assumption here made that it is desirable to deter litigation is more than open to question. If at all effective a deterrent of litigation encourages the violation of rights, and, conversely, facilitation of recourse to the courts discourages such violation. A proper balancing of the results would, it is believed, be in favor of removing all deterring factors. Even granting that there is some need for restraining the litigious instincts of certain individuals, the fact that the system of court costs, as they now exist, operate chiefly against the poor and but relatively little against the wealthy and that the deterrence operates blindly, affecting meritorious cases equally with those of little or no merit, is sufficient to nullify this justification for the requirement of the payment of court costs.

Provision for Meeting Miscellaneous Costs of Litigation. Analogous to court costs strictly speaking, are the expenditures entailed in the payment of witness fees, compensation of stenographers reporting the proceedings in court, the meeting of printing bills, and the like. These payments differ from court fees in that they do not represent payments made to the government or to officers of the government for services rendered. They represent payment to private individuals who are entitled to compensation for their work or loss of time. They cannot be waived by the government, and provision must be made for meeting them. This can be done in various ways. In the first place, the government can easily do much more that it does in the way of assuming certain of these costs. Reference is made particularly to the payment of witness fees and the provision of a court stenographer as a regular part of the court's equipment. If this is done, provision will have to be made by which a certain measure of control may be

exerted by the court with a view to keeping down the expense. Secondly, provision can be made for the creation of a special fund to be constituted by appropriation of public moneys from which these expenses may be met, in the first instance, and which will be reimbursed by the litigants on whose behalf the payments are made in so far as their success in their action produces funds available for the purpose. Action in the second way is the solution of this problem provided for by a model poor litigants' statute drafted by a committee of the American Bar Association, a description of which is hereafter given.

Actions In Forma Pauperis. Some slight provision exists in the United States to meet the situation presented by the inability of poor litigants to pay court costs through proceedings known as *in forma pauperis*. Provision for this action was made in England by the statute of Henry VII, cap 12, enacted in 1495, and its use was carried over into the American colonies. If permitted by the court to avail themselves of this form of action, litigants are relieved from the necessity of giving security for the payment of costs and from personal liability for their payment in case of non-success in their actions. The right to this action is by no means general in the United States. To quote a writer who made an exceptionally careful study of the problem of justice and the poor: [5]

Eighteen of the states with legislation on the subject exempt poor litigants from payment of court fees either permanently or until success in the suit furnishes money to pay. A somewhat larger number of states ease the needy of costs. This is done by absolute exemption, or by waiving the usual requirement of security, or by leaving the matter of costs to the court's discretion. In sixteen states and in the federal courts the litigant is thus benefited as to both fees and costs; in two states as to fees alone, in seven states as to costs alone. It is worth nothing that some slight moves are made towards lifting what I have called miscellaneous expenses of litigation. The federal statute exempts poor appellants from advance payment for printing records. Louisiana provides for free stenography.

In almost no case has this system worked with any degree of satisfaction. Trouble has been encountered in determining the

[5] John MacArthur Maguire, Poverty and civil litigation, *Harvard Law Review*, February, 1923.

degree of poverty that would entitle suitors to the benefit of this action; no adequate provision is made for investigating the claims of litigants that they are unable to pay the costs of litigation; doubt exists as to whether the act applies to proceedings in the way of appeals or is confined only to proceedings in the trial courts, and as to the items of costs that are included. As a result of these uncertainties and a general disinclination to claim the privileges of the acts, the system has largely fallen into disuse if it has not become absolutely obsolete. The fact is, therefore, that this form of action, even when it legally exists, contributes little or nothing toward the solution of the problem of bringing justice within the reach of the poor.[6]

[6] According to Smith and Bradway, Growth of legal aid in the United States, United States Bureau of Labor Statistics, Bulletin No. 398 (1926), the most careful effort that has thus far been made in America to make legal provision for *in forma pauperis* action is represented by a model act drawn by the Committee on Legal Aid of the American Bar Association. For a copy of this draft, see work cited, Appendix A.

CHAPTER XLI

PROVISION FOR COUNSEL: GENERAL

A third category of expense involved in the conduct of litigation is that of the payment for service of counsel. Four methods have been developed for meeting this expense: (1) Elimination, as far as possible, of the need for counsel; (2) assignment by a court of counsel to act without compensation or for such compensation as the litigant may voluntarily offer; (3) provision by the government of counsel to care for the interests of those unable to meet the expense of employing private counsel; and (4) provision of counsel by private organizations specially created to render this service.

Elimination of Need for Counsel. Of these four methods, that of the elimination, as far as possible, of the need for counsel should receive first attention. In considering the extent to which this is feasible a distinction should be made between civil and criminal cases.

In regard to the first, if account is taken of the fact that the great majority of the cases affecting the poor are of a petty character, usually giving rise to no intricate questions of law or procedure, there would seem to be no reason why proceedings could not be made of such a character as to obviate in all but exceptional cases the need for the services of an attorney. If analyzed, these services are of two kinds: the giving of advice, and when legal proceedings are believed to be necessary the preparation of the declaration or bill of complaint setting forth the grievance and relief requested, and the representation of the client in court when the case goes to trial. If one recalls the various reforms in the organization and procedure of the courts that have been advocated in the preceding chapters and have in some degree at least been put into practice with favorable results, it can be appreciated how much can be accomplished in the way of avoiding the need for counsel in petty cases. To cite the more important of them: the establishment of a single form of action; the abolition of all technicalities in respect to the formulation of the bill of complaint and

the provision that it shall consist of a simple statement setting forth the grievance and the remedy desired; the provision of a unified county or municipal court with general jurisdiction, thus eliminating the problem of determining the particular court in which action should be brought; the provision of special divisions of these courts for the handling of small claims in an informal and summary manner; and the use, wherever possible, of the method of conciliation—all these result in putting the proceedings for the enforcement of civil rights upon a simple and easily understood and operated basis that is within the capacities of the ordinary layman.

Combined with these reforms should go one other thing: the extension of the functions and duties of the clerk of court and the judge. It should be made a part of the positive duties of the clerk to give his aid to persons appealing to the court for protection of their rights. The clerk should point out to the applicant those cases where he has no legal ground for appealing to the court and assist him to formulate his complaint where such grounds exist, or use his good offices to secure an adjustment of the controversy through conciliatory methods. The extension of the functions of the judge should be effected so as to enable him to play a more dominant rôle in the trial of cases. This is desirable in all cases. It is particularly so, however, in the trial of the petty cases which affect the poor. If he does this, if he actively intervenes in the way of questioning witnesses and in other ways controls proceedings the judge can do much to minimize the need for counsel by himself seeing that the interests of the parties are properly presented and protected.

When we turn to the field of criminal cases, a different condition of affairs is presented. Here the problem is that of the representation by counsel of the defendant rather than the plaintiff. Under almost all conditions, except where the charge is merely one of the violation of local ordinances, such as traffic regulations and the like, it is desirable that the accused should have the aid of counsel. The problem of supplying him with such aid when he is himself unable to employ counsel has been met in two ways: by the exercise by the court of power to assign counsel to represent the accused, and by establishment of agencies, public and private, having the duty of acting as counsel and supplying counsel to those lacking the

resources to employ counsel. An examination of the relative merits of these two systems, and what can be accomplished under each, follows.

Assignment of Counsel. The right of the accused in criminal actions to representation by counsel is properly regarded as among the most important guarantees of individual liberties. In the United States it exists by virtue of constitutional provisions in the case of the national government and the governments of all of the states with the possible exception of Virginia and Louisiana. The mere possession of this right, however, is of little avail unless adequate means are provided whereby it may be enjoyed. No difficulty is presented in the case of those financially able to employ counsel. Special provision must be made, however, for those not able to do so if this right is to be a general one. The earliest device for making this right effective was that of the court arbitrarily assigning some member of the bar to act as counsel for those prisoners brought before them who had not provided themselves with counsel. The right to assign counsel is probably inherent in the courts and, in England, it was confirmed by statute as early as the reign of Henry VII.

In the United States there is a wide diversity of practice in respect to the provision that has been made for the assignment of counsel, the variations being according to the gravity of the crime with which the accused is charged, and whether provision is or is not made for the compensation of counsel so assigned. In 1924 the Committee on the Public Defender of the National Association of Legal Aid Organizations made a careful investigation of the legal provisions existing in the states in respect to this matter, the results of which were presented in its report at the annual meeting of the Association in 1925.[1] This report showed that all of the states provide by statute for the assignment of counsel when necessary in the case of felonies. In approximately half of the states, definite provision is made for the compensation of counsel so assigned in capital cases, the compensation running from $25 to $500, or being $10 or $15 a day for each day in court, or being rarely merely "reasonable compensation" as determined in the discretion of the

[1] National Association of Legal Aid Organization, Reports of committees, 1924-25, pp. 31-45.

court. In the case of other felonies, provision for the payment of compensation is made in a somewhat smaller number of states and the amount of the compensation is fixed on a reduced scale. In only ten states is provision made for the compensation of counsel assigned in misdemeanor cases.[3]

This matter of whether provision is or is not made for the compensation of assigned counsel is of prime importance, since it is the general opinion that the efficiency of the system is largely if not wholly dependent upon this factor. The committee summarized its conclusions in the following terms:

We have now reached certain definite conclusions which should be set down before we go further—these conclusions relate to the laws.

1. It appears that in a large number of states the assigned counsel system is in force under conditions where no payment is made to counsel. The committee believes that this is an inadequate condition of the law which should be remedied. This conclusion is based on the following grounds:
   a. It is not proper to expect lawyers any more than anyone else to give any appreciable amount of time to unremunerative work.
   b. The experience appears to be that where the plan is tried it does not work because the courts do not appoint really experienced counsel, except in very exceptional cases, and those who are appointed often are perfunctionary in their defense.
   c. The situation is theoretically unfair, because the District Attorney has ample funds and the whole power of the state at his beck and call and wealthy defendants secure able, high-priced counsel.
2. It appears to your committee that the exceptions to the above rule are:
   a. Capital cases.
   b. Communities which are so small that everyone knows everyone else and will feel justified in asking a lawyer for help whether a fee can be afforded or not and in which public sentiment would require a lawyer to work just as hard in such a case. In other cases and places there is need for some other remedy.

[3] In all cases the facts are given for the individual states and citation is made to the statutes making the provision.

3. The committee does not feel qualified at this time to say just where the line should be drawn. That must await further facts. Certainly, cities of one hundred thousand population and over deserve a better system.

The conclusion reached by Mr. Reginald Heber Smith as the result of his elaborate study of the problem of justice and the poor more than confirms this opinion. In his judgment the whole system of specially assigned counsel, whether compensation is paid or not, is defective and inadequate. He thus says:[3]

The truth about the assignment system in criminal cases is that as a whole it has proved a dismal failure and that at times it has been worse than a failure. . . . These men (the assigned counsel) have learned how to make a living out of assigned cases. On days when the grand jury returns its indictments, and the prisoners are brought to the rail to plead, these lawyers may be seen sitting within the bar enclosure expectantly waiting. Sometimes they are easily identified by their "lean and hungry look." They are willing to take assignments because they have succeeded by intimidation, threats, extortion and even worse, in putting the assignment system on a commercial basis. They know how to strip a prisoner and his relatives of every last cent. . . . That this degradation exists in connection with the administration of criminal justice is common knowledge. And back of the professional assigned counsel have grown up runners and straw bondsmen who have worked their way into the jails, corrupted officials and preyed on the prisoners.

The conclusions regarding the efficiency of the assigned counsel system resulting from an elaborate study of the whole question of legal aid made for the United States Bureau of Labor Statistics are set forth as follows:[4]

In general we may say that the plan of assigned counsel works in capital cases. The dramatic situation and the attendant publicity are sufficient to insure the lawyer's best efforts and in capital cases the lawyer receives consideration for his work. As to felony cases the efficiency of the plan is doubtful. In misdemeanor cases it appears that counsel are seldom assigned in actual practice.

The most serious weakness of the assigned council system is that it does not take care of all the needs of the accused. In general,

[3] Justice and the poor, 103-14.
[4] *Monthly Labor Review*, May, 1926.

such counsel is only assigned when the case is called for trial, or at any event the services rendered by such counsel are largely limited to the work of conducting the trial. The accused has thus not had the aid to an adequate extent of counsel in preparing for the trial, the securing of witnesses, their preliminary examination and the like. To quote from the study of the subject made for the Bureau of Labor Statistics: [5]

Nearly every case, if it is to be properly prepared and tried, involves some incidental expenses, but in the great majority of states provision is not made for such expenses. . . . It means that either the attorney must pay the incidental expenses out of his own pocket, which of course he cannot afford to do, and therefore does not do, or the defendant must go to trial and do the best he can in spite of an inadequate preparation of his case.

It will be noted, furthermore, that the effort to provide counsel for those unable to employ counsel for themselves has been made only in the case of criminal cases. No attempt is made in this way to aid the poor litigant in civil cases.

[5] Growth of legal aid work in the United States, United States Bureau of Labor Statistics, Bulletin No. 398, (1926).

CHAPTER XLII

OFFICE OF PUBLIC DEFENDER

Due partially to an appreciation of the inadequacy of the assigned counsel system, but probably still more to the growing feeling that it is the proper function of government to see that all needful things are done to ensure a just enforcement of the criminal law, there has developed in recent years a strong movement for the creation of a public office which shall have charge of the representation of all persons accused of crime who are not able themselves to employ counsel. The first step in this direction was taken by Los Angeles County which, in its charter of 1913, provided for the creation of the office of "Public Defender" with jurisdiction in respect to criminal cases. In 1915 the City of Los Angeles made provision for a public defender in its police court. In the same year, similar provision was made by Portland, Oregon, for its police court, and by Omaha for its superior court. In 1916 Columbus, in its home rule charter, provided for a public defender in the municipal court. In the same year Virginia provided for the appointment of a public defender in Richmond by the presiding justice, but this officer, however, was to receive no salary unless the city saw fit to appropriate therefor. In 1917 Minnesota passed an act providing for a public defender in all counties having a population of three hundred thousand, to be appointed for a term of four years by the judges of the district courts of such counties. There are only three counties in the state having this population, and but one of these, that containing the City of Minneapolis, has acted under the law and appointed such an officer.[1] In 1921 the Committee on Legal Aid Work of the Connecticut State Bar Association secured the passage of a statewide public defender bill. The scope of this act merits its reproduction in full. It is entitled "An Act to Improve the Administration of Justice" and reads as follows:

1. The judges of the Superior Court at their annual meeting shall appoint a legal aid director who shall be an attorney at law

[1] National Association of Legal Aid Organizations, *Proceedings*, 1924 p. 26.

of at least five years practice and such assistants as may be considered by them to be necessary for each of the counties of Hartford, New Haven and Fairfield to hold office during the pleasure of said judges. Said judges shall determine the salary or compensation to be paid to said directors and the assistants and such sums as may be necessary for expenses and shall certify to the comptroller the amounts thereof and to whom payable and when and the comptroller shall draw his orders in accordance with such directions.

2. It shall be the duty of the legal aid directors in cases of a civil nature, and under rules and regulations to be prescribed from time to time by said judges to consult with litigants who are poor and unable to employ counsel and to take all necessary steps to enforce their rights.

3. Each director shall keep a complete record of all applications for assistance and their disposition and make annual report to the Governor. The reports of the several directors may be combined in one volume.

4. The said judges shall also prepare rules under which poor persons may be permitted to prosecute and defend in civil actions in all courts of this state, including courts of justices of the peace, without payment of costs and fees and in which they may have services without expense to them of an attorney at law.

5. All acts and parts of acts inconsistent with any of the provisions of this act are hereby repealed to the extent of such inconsistency.

6. This act shall take effect from its passage.

The study made for the United States Bureau of Labor Statistics in 1925 showed at that time provision for a public defender system in twelve cities; Chicago, Memphis, Norfolk, Bridgeport, New Haven, Omaha, Los Angeles County, Los Angeles City, Minneapolis, New York, San Francisco, and Hartford. The office in Los Angeles City, created in 1915, represents the chief if not the only example of a public defender for petty cases in a police court.

It would be improper to conclude this sketch of the rise of the public defender system in the United States without mention of the work of the Voluntary Defenders' Committee of New York, even though this organization has no legal status and is not supported by public funds. The reasons leading to the creation of this agency, which has been in existence since 1917, are precisely the same as those inducing the creation of public defender's offices, strictly speaking, and it functions in almost precisely the same way as do those offices. The only essential difference is that one is supported by private and the other by public funds. That the New

York organization has been a very useful body and has efficiently performed the task assumed by it, is universally agreed.

The arguments in favor of the public defender over the assigned counsel system may be briefly summarized to be: That it furnishes the services of a trained attorney superior in competency to the class of attorneys usually assigned to the defense of prisoners not provided with counsel; that the public defender, in his office, will have aids and facilities for searching out the facts and securing the evidence in behalf of his clients beyond those of the private attorney casually assigned for a particular case; that the expense of the system will be less than that of assigned counsel, if provision is made for the adequate compensation of such counsel, and without such compensation the assigned counsel system is radically defective; that the conduct of the public defender will not be marked by shifty tactics, attempts improperly to influence the jury, and other practices which too often characterize the manner in which private attorneys conduct the defense; that the judge will have the aid and advice of a responsible officer in fixing the sentence, instead of having to rely so largely, as he now does, on the advice of the officer representing the prosecution; and finally and in some respects most important of all, that this system represents but the assumption by the government of a function that should be assumed if the government is fully to discharge its duties in respect to the administration of the criminal law.

Special students of the problem are in general accord that, for the reasons given, the public defender system is superior to that of assigned counsel. Thus Mr. Reginald Heber Smith, probably the leading authority on legal aid work in this country writes:[2]

> The defender in criminal cases, whether publicly or privately supported, is unquestionably the best immediate method for securing freedom and equality of justice to poor persons accused of serious crimes. It is a complete solution of the difficulties in the existing administration of the criminal law which have placed poor persons at a serious disadvantage and it remedies some of the glaring abuses which have brought the criminal law into disrepute. . . . An examination of this literature reveals the fact that the defender idea, in last analysis, is nothing more revolutionary than a plea for the extension of what is best in the assignment system and for reorganization along modern lines of efficiency. . . . The case for the public defender rests primarily on the fact that such

[2] Justice and the poor, 127, 116, 119.

an office performs an essential function in the administration of justice more efficiently, more economically, and with all rounded better results, than any other plan.

And in another place:[3]

In large communities, the public defender system is preferable to the paid assigned counsel system, not because the former better protects innocent defendants but because it serves them equally well and is also more economical and efficient. This is due to the centralization of all cases of indigent persons in one office and also to the concentration of responsibility in that office. These conditions result in rapid, expert service. Whether a private or public defender organization is preferable in thickly populated centers is a moot question. One of the leading arguments advanced in favor of the public defender is that his position is official and his financial backing made solid. On the other hand the private defender has the advantage of greater freedom from political interference. It seems quite certain, however, that the trend will be toward the establishment of public defender's offices. . . . In the smaller communities where the number of cases is not sufficient to demand the setting up of a public defender's office, the assigned counsel plan can be made to work very well.

Mr. James Bronson Reynolds, President of the American Institute of Criminal Law and Criminology, writes:[4]

I want to add that in my experience—and I have folowed the Public Defender's work, having twice visited Los Angeles and, of course, being in touch with it in New York, and I have visited the districts of Connecticut—I have found every District Attorney where the Public Defender exists was in favor of it. I have found every single judge with whom I have talked who has had to do with cases where the Public Defender appeared as counsel of the same opinion and I have been astounded by the absolute unanimity of opinion on the part of both prosecuting attorneys and judges. . . . The Public Defender has become the friend of the District Attorney without disloyalty to his client and has become the advisor of the judge and the whole proceeding in the criminal courts has been markedly improved by this relationship.

While the Cleveland Survey in its exceptionally careful study holds that:[5]

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[3] *Monthly Labor Review,* May, 1926.

[4] Conference of Legal Aid Bureaus and Societies, *Proceedings,* 1922, pp. 49-50.

[5] Criminal justice in Cleveland, 368.

The assigned counsel system should give way to the more modern, more efficient, more economical "public defender" system. The greater success attending the assignment of all cases of all accused persons to one central, responsible agency has been demonstrated in Los Angeles. The legislature of California, in its last session made provision for extending this system throughout the state.

The practical administration of the office gives rise to certain difficulties which must be met if the system is to prove successful. Probably the most perplexing of these are the attitude that the public defender should assume toward clients who confess to him their guilt, or whom he believes to be guilty, notwithstanding protestations of innocence on their part; and the extent to which he should avail himself of purely technical defenses in seeking to secure the acquittal of his clients. These questions are discussed by Mr. Smith as follows:[6]

Before passing to a consideration of some of the further particular results of the defender plan, it is necessary to advert briefly to certain questions about the conduct of the work which always obtrude themselves in the discussions. They are mostly philosophical or ethical in their nature, such as "Will the Defender defend men whom he knows to be guilty?" and "Should he require defendants to take the stand against their will?" Such questions are admittedly difficult, but they are not peculiar to the defender in criminal cases. They are precisely those questions which confront all lawyers, and which the codes of ethics can answer only in generalities. So far as the lines of conduct are clear they will be better observed by the defender than has been the case with retained criminal lawyers. He may not be able to prevent his client from using perjured defenses, but certainly he will not be a party to manufacturing them. It is his duty, as it is that of every attorney, to refuse to permit evidence known to him to be false, to be introduced before the court. Though he may believe the defendant guilty it is his duty, under all cases of ethics, to represent the defendant at the trial and give him an honest defense. Mere belief gives to the lawyer, acting under a court assignment, no right to constitute himself judge and jury. If he has independent knowledge of guilt, it must be from facts which would make it his duty to be witness not advocate.

The most troublesome question is as to his duty when his knowledge comes from his client's confession, which is privileged. In practice this issue has not presented itself. In New York, all defendants who have admitted guilt have been persuaded to be honest with the court and plead guilty. When the problem does arise its

[6] Justice and the poor, 120-21.

solution will have to be left to the individual consciences deciding on the facts of the particular case. It is the strongly prevailing present opinion of the bar that in such cases it is the lawyer's duty to defend, refraining from introducing any false evidence, permitting no perjury known to him, but requiring the state to prove fairly the truth of its charges.

On this problem, the following statement of the public defender of Minneapolis regarding how he handled the cases coming before him is of great interest. He said:[1]

While I have always felt that every man who has violated the law and is charged with a crime which he has committed, owes it to himself and to the state to plead guilty and take the consequences of his act, I believe that every man is entitled to a fair hearing and to all the safeguards which the law throws around him. My practice has been when a man is referred to me, first to interview the defendant, and if two or more defendants are indicated upon the same charge, I invariably first interview them separately. If a defendant at once admits his guilt, I then try to ascertain all the facts I can with regard to his previous life, his habits, his environments, and the circumstances of the commission of the crime for the purpose of determining whether it is a case in which I should recommend probation or ask for leniency in sentence, and in many cases where I find that the defendant has committed perhaps his first offense, and his age or the circumstances are such as to entitle him to consideration, I sometimes ask the court to allow him to plead guilty to a lesser degree than that with which he is charged, in order to save him a record of a conviction of serious crime, always, however, informing the court of the true facts as to the offense committed. If a defendant denies his guilt, but if from his whole story I believe that he is not telling me the whole truth, I then gather all the information I can with regard to him and with regard to the offense, both from the county attorney's office and the police and from outside sources, and then lay before him such facts or evidence as I have acquired and ask him to tell me the truth. I do not, however, hold out to him as an inducement to plead guilty, that he will receive a lesser degree of sentence if he pleads guilty than he will if tried and convicted; but, if eventually he does plead guilty, I then take such facts into consideration in my recommendation to the court. I find that usually, except when the man is a confirmed criminal, or has associated with confirmed criminals, he will acknowledge his guilt and be willing to plead guilty. However, if they will not admit their guilt under any circumstances, and although I think them to be guilty, I do not feel that I have a right to place my judgment

[1] National Association of Legal Aid Organizations, *Proceedings*, 1924, pp. 29-31.

directly against their claim of innocence, and any man who insists that he is innocent is entitled to a fair trial and is entitled to have his case considered as favorably as the evidence will warrant, and I go into court and try his case to the best of my ability.

It has sometimes been suggested to me that I am quite zealous in the defense of these fellows and work too hard for them, that being Public Defender and paid by the county, I should not put forth the same effort as an attorney retained by the defendant would be entitled to put forth. To this I have to say that I think the Public Defender should in all honorable and fair ways use his best endeavors to defend his client and that even if the client is guilty he is entitled to a fair trial and should not be convicted unless the evidence is of a sufficient character and weight to meet the requirements of the law.

Another matter of importance is the legal status of the office of public defender and the conditions governing his appointment and tenure and that of his assistants. The position may be taken that, inasmuch as the office of public prosecutor is a part of the administrative branch and the public prosecutor holds office as the result of an executive appointment or direct election by the people, the same status and method of selection should obtain in respect to the office of public defender. On the other hand, the function of assigning counsel has always been deemed one to be exercised by the court; and as the public defender is in effect assigned counsel operating under a continuing and permanent assignment instead of being varying individuals specially selected for particular cases, it may be equally argued that his selection should be made by the court and his office be deemed to be a part of the judicial instead of the administrative branch. This question is one that should be handled in accordance with practical rather than theoretical considerations. Viewed from this standpoint, the weight of the argument is in favor of making the office of public defender one attached directly to the courts, and providing that the public defender himself shall be selected and controlled by the court. It may be readily seen that the opportunities open to the public defender to use his office for personal or political ends are very great. If he owes his office to executive appointment there is always the danger that political considerations will dictate his selection or influence him in the conduct of his office. These dangers are much less if the office is deemed to be a part of the judicial branch and if the powers of selection and control lie in the court.

CHAPTER XLIII

OFFICE OF LEGAL AID: PUBLIC

Though there are exceptions, as in the case of Los Angeles, the office of public defender, as it exists in the United States, has for its function the representation of the defendant only in criminal cases. There is a growing feeling, however, that it is as much the duty of the government to aid the poor in securing their civil rights as in seeing that they are properly represented in their defense against criminal charges, and a beginning has been made in this direction in the United States. In 1910 the Board of Public Welfare of the Municipal Government of Kansas City, at the instigation of Frank P. Walsh, organized a Division of Legal Aid. The creation of this division, writes Mr. Reginald Heber Smith:[1]

> . . . was a step of profound importance, destined to influence the entire history of legal aid work and probably destined to affect the whole course of the administration of justice. The Public Legal Aid Bureau challenged the long accepted conception on which our civil administration of justice was built that the state's duty ends when it has provided judge and court house and that it has no interest and no right to take a part in private litigation.

The example of Kansas City has been followed by a number of other cities. William Draper Lewis mentions St. Louis, Los Angeles, Kansas City, Portland, Omaha, Dallas, Dayton, Duluth, and Hartford as cities which have or have had municipal agencies of this kind.[2] Undoubtedly, the most important municipal service of this kind in the United States, if not in the world, is the Bureau of Legal Aid of the Department of Public Welfare of the Government of Philadelphia, created in 1920. The following extract from the annual report of this bureau for 1923 will give some idea of the nature and importance of the work:

[1] Justice and the poor, 146.

[2] Pennsylvania Commission on Constitutional Amendment and Revision, Memoranda and briefs, No. 26, Courts, Protection of legal rights of poor, February 2, 1920.

With a record of twelve thousand five hundred applications during the year 1923, the Bureau of Legal Aid, Department of Public Welfare, maintained its position as the largest municipally controlled organization of its kind in the world. It served on an average two hundred and forty worthy poor persons of the city every week of the year, rounding out the second largest year of its existence.

This organization is the legal clinic maintained by Philadelphia for the relief of distress among persons unable financially to employ an attorney. Its growth is emphasized by the fact that during its first month in August, 1920, it served one hundred persons and that frequently during the year 1923 there were as many as seventy-five applicants daily and, on one day, more than one hundred.

In the three years and four months that this bureau has been functioning as a branch of the municipal government it has received 42,278 applications and its personnel has interviewed approximately one hundred thousand persons. The bureau has a broader contact with unnaturalized foreign-born persons than any organization in the city.

In its report for 1924 the Bureau states:

The Bureau aims to conciliate and adjust disputes rather than to litigate. That this policy is correct in principle and really effects the desired results is evidenced by the statistics. During the year the Bureau instituted only 255 suits, out of a total of 13,023 cases. Settlement after litigation was effected in 178; seventeen were unsuccessful and sixty are pending in court. The Bureau took into court only one case out of fifty-one which was registered in 1924.

It should be noted that the work of this Bureau is almost wholly confined to the field of civil cases. Only in exceptional cases, does it take up criminal cases. Neither does it take up divorce or negligence cases. In great part, its activities consist in the collection of moneys due those appealing to it for aid. These collections, it is stated, average not more than $15 and in many cases run about $5, being cases with which it is not worth the while of private attorneys to concern themselves.

There can be little doubt that opinion is strongly crystalizing in favor of the position that, as a matter both of principle and of expediency, it is the duty of the government to make provision for a public officer whose services will be available without charge in both criminal and civil cases to those who are financially unable to provide themselves with legal advice and representation. Chief

Justice William H. Taft probably accurately represents this sentiment when he writes:[3]

Without expressing a final, personal conclusion on the subject, it seems to me that ultimately these instrumentalities (for legal aid) will have to be made a part of the administration of justice and paid for out of public funds. I think that we shall have to come, and ought to come, to the creation in every criminal court of the office of public defender, and that he should be paid out of the treasury of the county or state. I think too, that there should be a department in every large city, and probably in the state, which will be sufficiently equipped to offer legal advice in suits and defense in all civil cases, but especially in small claims courts, in courts of domestic relations, and in other forums of the plain people. . . .

It may be necessary, in order to prevent unwise or improper litigation, to impose a small fee for the bringing and carrying through of a suit by such free agencies. The department of free legal aid should be charged with the duty of examining every applicant and looking into his actual poverty and necessity and the probable just basis for his appeal. It may be well to unite both civil and criminal cases and make the public defender a part of the general department of free legal service. The growth of these legal aid organizations is the most satisfactory proof of their necessity.

The authors of the elaborate report on legal aid made for the United States Bureau of Labor Statistics give this system their strong endorsement. They write:[4]

The public bureaus have been more successful than any other type of organization in reaching the persons who need their help. . . . This is partly because of their better financial support, but it is chiefly due to the very fact that they are public. As such they become better known to the community; their work is deemed of greater interest and is accorded more space in the newspapers; as time goes on the average citizen learns that there is a public legal aid office, just as he has already learned that there is a municipal court, a police station, and a district attorney's office, to every one of which he is entitled to go for assistance. If the legal aid organizations are destined to become auxiliary parts of the administration of justice in modern cities, then unquestionably the public office is the most logical form of organization for legal aid work to assume. . . .

[3] Need for free legal aid, *Monthly Labor Review*, May, 1926.

[4] Reginald Heber Smith and John S. Bradway, Growth of legal aid work in the United States, United States Bureau of Labor Statistics, Bulletin No. 398. p. 86, 87, (1926).

In the long run we believe that the public bureau will prove to be the prevailing type. Ultimately, in our opinion, all legal aid work will be taken over by public authority, and it is incumbent on those who are responsible for the direction of the work to shape their course to this end. In no other way, so far as we can see, can the administration of justice finally be rounded out so that it will be able to extend the equal protection of the laws to all persons in our great urban centers of population.

About the only disadvantage of the public legal aid bureau over the private organization is the danger that politics may enter in the selection of the staff and the conduct of the work of that office. That this is a real danger is shown by the experience of Dallas, and Portland, Oregon. The experience of these two cities is set forth as follows by a writer thoroughly familiar with the circumstances:[5]

In Dallas in 1917 a new administration took over the city government. The Director of the Department of Public Welfare, under which the legal aid bureau functioned, was dismissed by the newly elected mayor. He attempted to appoint a personal friend as attorney for the bureau. When this created a public furor, the mayor abolished the bureau utterly. That was the end of the work in Dallas.

In Portland, Oregon, in the same year a new administration was elected. The public defender held the office under the civil service, had received a permanent appointment and was doing excellent work. The newly elected mayor had not received the public defender's personal support. The city council at the mayor's request abolished the office without notification to the public and without a public hearing.

Notwithstanding these failures, Mr. Reginald Heber Smith is strongly of the opinion that the principle of having legal aid furnished by the government instead of by private organizations is sound. He writes:

Despite the blunders of the first public legal aid bureaus I expect to see a constantly increasing tendency to bring legal aid work under public control. This seems to me inevitable and as it ought to be. Legal aid work is part and parcel of the administration of justice and no such function can long remain in private hands.

[5] Claude E. Clarke, Legal aid by privately supported organizations. *Annals of the American Academy of Political and Social Science,* March, 1926.

By public control I do not mean municipal control. I believe that the failure of the public bureaus was largely due to the fact that they were operated as a part of city government. Under no good plan of organization has it ever been proposed to link the administration of justice with municipal affairs. Further our city government is by all odds the weakest part of our entire political structure.

In my judgment legal aid work should be operated under judicial control. Such has for years been the basis of the plan in Scotland and France. It was established in England by the 1913 rules of the High Court of Judicature. It involves little more than reviving the ancient judicial function of assigning counsel to poor persons in a modern, efficient and centralized form.

A condition precedent to the successful working of these services would therefore seem to be the making of such provision as would ensure protection against this danger. Such protection Mr. Lewis finds in making these services adjuncts of the courts instead of parts of the municipal administration strictly speaking. He thus says:[6]

To entrust this function to the executive branch of the local government seems precarious because the choice of an attorney of the Bureau of Legal Aid, which is obviously a matter of prime importance, will almost inevitably be controlled to some extent by political considerations. The abuses to which an unfit attorney might subject the system are plain. His opportunities for making money for himself and his friends would be almost unlimited. There is a strong argument for the proposition that the matter of furnishing free counsel to the poor is properly a matter for the courts.

[6] Pennsylvania Commission, *op. cit.*

CHAPTER XLIV

OFFICE OF LEGAL AID: PRIVATE

In the pages immediately preceding the effort has been made to point out the special problem that exists of making provision in some way for the same enjoyment by the poorer classes of recourse to the courts for protection in their rights that is possessed by the well-to-do, and the steps that can and should be taken by our governments to this end. In the failure of our governments to meet this problem in the past and the certainty that for years to come they will not fully do so, there is presented the question of what can be done under private auspices to improve conditions. This brings us to a consideration of the important work of the private organizations known as "Legal Aid Societies" that have had such a development in recent years in the United States.

These societies, as their name implies, are privately organized and supported organizations for the purpose of furnishing legal advice to persons unable to employ counsel. Such assistance is granted without compensation or only such compensation as the limited resources of those aided will permit.

Gratuitous legal aid has always existed. In many cases attorneys have given and continue to give their advice and services without compensation in the same way that physicians freely give their aid to persons who are unable to pay. To a large extent charitable and relief organizations, as an essential part of their work, have undertaken to assist the needy in the securing of their rights. Valuable as their work is, it only meets in part the needs of the situation. Such organizations quite properly confine their operations to the destitute class, or, at least, to those largely without financial resources of any kind. There is, however, a large class of persons who by no means fall within the destitute class, and, while able to meet their ordinary needs are quite unable to meet the special, extra financial burdens entailed in prosecuting or defending their interests in the courts. Because of the need for aid to meet the circumstances of this class and because the aid

required is of such a special character, there is need of a special type of organization which will undertake to supply this kind of assistance.

Movement for Creation of Legal Aid Societies. The first organization of this kind to be created in the United States was the Deutsche Rechtsschutz Verein, established in 1876 in New York City. At the outset, this organization had in view merely the protection of the German immigrants who at that time were coming in large numbers to the city and were being subjected to extortion and illegal practices by the unscrupulous. Its service was gradually extended to other classes and widened in scope, and finally taken over by the New York Legal Aid Society. In 1886 a protective agency for women and children was created in Chicago, and in 1888, there was established in the same city a Bureau of Justice, which was probably the first legal aid society in the modern sense to be created in the United States. From this start the movement spread, at first slowly and then more rapidly, until at the present time such societies can be found in most of the more important cities of the country.[1]

With the development of these societies came the need of a central organization through which they might keep in touch with each other's work and seek a common solution of the many special problems that confronted them in the way of determining the most desirable form or organization, the scope that should be given to their work, and the principles and procedure that should be followed in the performance of their functions. The nature of these problems and the manner in which their solution is sought will be considered later.

The first step looking toward the creation of such an organization was taken by Marcus W. Acheson, Jr., who, in 1911, called a conference of legal aid societies to meet in Pittsburgh. This led to the assembling of a second conference in New York in 1912, at which there was created the National Alliance of Legal Aid Societies. This Alliance held conferences in Chicago, in 1914, and in Cincinnati, in 1916. The war prevented the holding of other meetings until 1922, when a meeting was held in Philadelphia. By

[1] In 1922 there were forty-eight organizations in the United States providing legal aid. In 1925 this number had increased to seventy-two. *Monthly Labor Review*, May, 1926.

this time it had become apparent that the Alliance was too loose an organization to furnish the leadership that was required. At the Philadelphia meeting it was accordingly determined to effect an entire reorganization of the Alliance and to give to it the character of a national association. This reorganization was effected at a meeting held at Cleveland in the next year, when a new constitution was adopted and the central organization given the name of The National Association of Legal Aid Organizations. Annual meetings of this organization have been held since that time. The Association has proved to be a very influential body, and its publications, together with the proceedings of the old Alliance, constitute the most valuable literature that we have on the work of legal aid societies as well as of other problems of judicial administration.[2] Some idea of the scope of the work of this organization may be seen from the list of its committees. In addition to an executive committee, there are committees on: Relations with Social Agencies; Relations with the Bar; Relations with the International Association of Industrial Accident Boards and Commissions; Relations with Association of Government Labor Officials of the United States and Canada; Arbitration, Conciliation and Small Claims Courts; Domestic Relations Courts; Public Defender; Small Loans and Investments; Financial Accounting; and Records and Publicity.

The growing importance of legal aid organizations is evidenced by two other facts. In 1921 the American Bar Association amended its constitution so as to provide for a standing committee on legal aid work. This action had been preceded in 1919 by the New York State Bar Association, the first to take such action. Since then other bar associations have made provision for similar committees. In 1924 the League of Nations, at the suggestion of Professor John H. Wigmore, summoned a conference on legal aid work that was attended by representatives from the United States, England, France, Italy, Norway, Poland, Spain, and Japan; and, on September 24, 1924, the Assembly of the League passed a resolution inviting the Secretariat of the League to secure detailed information

[2] The proceedings of the Alliance, unfortunately, are now difficult to obtain. The publications of the National Association consist of two annual volumes: Reports of Committees and proceedings of the Annual Meetings. The official organization of the Association is the "Legal Aid Review," published by New York Legal Aid Society.

regarding legal aid organizations and their work throughout the world and to compile and keep this information to date.

Scope of Work. There can be no question that these legal aid societies have met a real need and have enabled many thousands of persons to secure justice which, without their assistance, they would have been unable to obtain. The continued development of these organizations may thus be anticipated until the time arrives when public opinion will sanction the assumption by governmental agencies of the functions performed by them. This being so, it is desirable to consider some of the problems confronting them.

Among these problems, the most important is probably that of deciding the scope of the work that shall be assumed. Up to the present time, it has been the policy of these societies to confine their activities to the field of civil cases. Only in exceptional cases do they undertake the defense of persons accused of crime. When criminal offenses have been committed against their clients, they content themselves with bringing the matter to the attention of the proper prosecuting authorities. There is a growing feeling, however, that this limitation in their activities is illogical and that their operations should cover all forms of legal aid. This is the declared opinion of the National Association of Legal Aid Organizations. Thus the Committee on the Public Defender Movement, in its report submitted December 15, 1922, in speaking to this point, said:[3]

Originally there was no difference between civil and criminal law. Today, in the opinion of your committee, there is no difference between the need to represent a poor person in a civil case, and the need to represent a poor person in a criminal case, by competent counsel. As the legal aid movement, in its broadest sense, is the furnishing of an attorney to persons who cannot afford to pay for one, it follows that, whether the service rendered be in the office, in the criminal courts or in the civil courts, there is the same sort of need and the same sort of remedy must be applied.

The Executive Committee in acting on the report of this committee said:

[3] Proceedings of the Central Committee of the National Alliance of Legal Aid Societies [the old name of the national organization], December 15, 1922, p. 15.

We entirely agree with the committee that public defense and legal aid work are not separate things. They are one. This is the accomplished fact in Los Angeles and New York and it should be the fact everywhere. A legal aid organization that limits itself to civil cases is not a complete legal aid organization.

This opinion that the same organization should handle both civil and criminal cases, it will be remarked, applies to public as well as to private organizations. It carries with it, therefore, the position that the duties of the office of public defender and the bureau of legal aid should be entrusted to a single service which shall have the duty of representing those unable to employ counsel in all cases. The leading examples of where the same organization undertakes both classes of work are, as has been pointed out in the quotation just given, New York City, as representing private action, and Los Angeles, as representing public action.

Even in the civil field, the private legal aid societies have not found it advisable or feasible to offer their services in all classes of cases. As a general rule these organizations refuse to take personal injury or divorce cases, the former on account of difficulties involved in handling such cases and the latter because they can be better handled by courts of domestic relations. Characteristic features of these courts are the attempt on the part of their presiding judges to look after the interests of all the parties concerned and to adjust the differences where possible without the issue of formal decrees; and the use by these courts of the services of probation officers to secure information regarding the facts and subsequently to supervise the enforcement of decisions reached. Where such tribunals are in existence, they can do all that a private legal aid society can, and do it in a more effective manner. In this field, the legal aid societies direct their efforts toward securing the establishment of or strengthening these courts. In point of fact, the great bulk of the work of legal aid societies is giving legal advice and the enforcement of petty claims.

Compensation for Services. Another problem confronting legal aid societies is that of determining whether they shall accept compensation for their services. It has been pointed out that the great bulk of their work consists of the collection of claims. It would seem only just that when such collections are made by them they

should be entitled to a reasonable compensation. Most societies, therefore, in addition to requiring that persons seeking their aid shall pay a nominal registration fee of twenty-five cents, fifty cents, or a dollar, make a charge of 10 per cent of collections enforced by them. This policy of not making their services wholly gratuitous is defended on the ground that the purpose of the societies is not that of the grant of charity but of bringing legal aid within the resources of those of moderate means; that it preserves the self respect of their clients; that it deters the misuse of their services by those who are without real cases; and that it adds to the financial resources of the societies and thus enables them to do a larger amount of work. That this policy is a correct one there would seem to be little question.

Relations with Other Organizations. Finally, there is the problem of the establishment of effective working relations with other organizations whose functions have to do with the relief of the poor or the administration of justice. Of organizations of the first class, the most important are the organized charities societies. Many of the persons appealing, or referred, to these societies are in need because they are unable to collect moneys due them for wages, or because they have been the victims of fraud or usurious practices by loan sharks or in other ways deprived of their rights. The aid needed is primarily protection of their rights. If working relations are established between these societies and the legal aid societies, all such cases will be referred to the latter for appropriate action. In like manner, many persons appealing to the legal aid societies directly are in need of immediate assistance. Such cases can be brought to the attention of the organized charities societies, since it is beyond the financial powers of the legal aid societies to grant relief other than that of legal assistance; and to attempt to do so would seriously interfere with the performance of their primary function. The two classes of societies thus supplement each other and their work can be rendered much more effective if close relations are established between them. This is fully recognized by both classes of organizations.

In respect to other agencies for the administration of justice, it is most important that there be sympathetic and close working relations with the organized bar. At the outset, the growth of legal aid societies gave rise to some apprehension on the part of the bar

that it would find in them a competitor for clients. This apprehension has now largely been dispelled through the wise policy of the societies in not furnishing aid to those who are able to pay for assistance. The fact that legal aid societies are not infrequently appealed to by those who are able to employ counsel, though often not able to pay the ordinary charges for legal services, gives rise to the problem as to how such cases shall be handled. This is a matter of importance, since the number of persons who are able to pay something for legal assistance probably greatly outnumber those who can pay nothing. It is the general feeling that such cases should not be handled by the societies themselves, if for no other reason, because they have more than they can do in handling the cases where nothing can be paid except where success is secured in enforcing the collection of claims. The only alternative is that provision be made in some way for the handling of these cases by the general bar. The importance of this problem warrants the reproduction in some detail of the statement of the problem and the means suggested for its solution as presented in 1924 in the able report of the Committee on Relations with the Bar of the National Association of Legal Aid Organizations. This report, which was submitted by John Alan Hamilton, reads in part as follows:[1]

The vastness of the problem deserves the studious consideration of every attorney in the United States. These facts are certain. A large number of persons come within neither the legal aid field nor the field of those who can afford to pay a full fee. We must construct some machinery to care for these people or they will be without legal advice. On the one hand the Legal Aid Organizations cannot handle them on account of rules. On the other side the Bar at large will not care to handle them because the work will require time and attention for which proper compensation cannot be made. An attempt at providing this machinery may be made through the establishment of the general rule that such persons will be taken care of by the Bar. There is no other group in the community to take care of them. Then the problem resolves itself into a consideration of whether we should refer such to the Bar at large or to a particular group at the Bar. If we send the cases to the Bar at large we will be in exactly the same situation as we are now. There are groups of undesirable men at the Bar who do not warrant our sending out cases indiscriminately, and

[1] National Association of Legal Aid Organizations, Reports of Committees, 1924, pp. 80-82.

there are many of the more prominent members of the Bar who are too busy to care for this type of work, no matter how willing they may be to do so. It would therefore appear more satisfactory to send this group of cases as they come to the legal aid office to a particular group at the Bar. There are two sources from which the selection of this group may proceed, the Bar Association and the Legal Aid itself. If the Legal Aid Organization selects the group to which it will send these cases which it cannot handle, it will at once be criticized on the ground that it is favoring a particular lawyer or group of lawyers to the exclusion of the others. This means that it will be proper for the Bar Association to assume such responsibility and to make up each year and give to the Legal Aid Society a list of the selected group of men who will handle such cases. The following matters are to be kept in mind with reference to such a group:

1. There should be supervision by the Bar Association as to the cases so handled, and as to the way in which they are handled, and a report made to the Bar Association each year covering this subject.

2. There should be supervision by the Bar Association as to the fees to be charged, and as to the fees actually charged, and a report made at the end of the year.

3. The Legal Aid Committee of the Bar Association should at all times be ready to advise with the lawyers on this particular list, as to the best methods of conducting the cases, and the proper fees to be charged.

The practice now in force in a number of cities, of sending legal aid applicants who are able to employ private counsel to an attorney whose name has been taken from a list supplied by the Bar Association is so sensible, and withal has worked so satisfactorily, that it would seem the natural solution of this problem. This list in some cities is furnished by the Legal Aid Committee of the Bar Association—a natural and logical source wherever such a committee exists. Where there has been no such committee, the President of the Bar Association has sometimes supplied the list. In any case the attorneys whose names are on the list should be selected with care, and there should be a definite understanding with the officers or committee of the Bar Association that the attorneys named are to be considered as bearing the stamp of approval of the Bar Association so far as probity is concerned.

It is the practice with some Bureaus to send cases in rotation to the lawyers on the Association's list, and this would seem to be advisable. An exception is sometimes made in cases where clients ask to be sent to a lawyer of a given nationality or religion. In such cases the request is usually complied with, and there would seem to be no good reason why it should not be.

Attorneys upon these lists should be made to understand that in most cases referred to them only very moderate fees are to be

expected, and, of course, the Legal Aid Society should follow up these referred cases, sending no further cases to those attorneys whose dealings have been unsatisfactory, and reporting the attorneys to the Bar Association for discipline when such action is desirable. . . . The essence of the treatment should be that the Legal Aid Society should not consider itself released from responsibility as to any border-line referred case until the case has been satisfactorily brought to a conclusion.

For reasons other than the one that has just been considered, it is therefore desirable that each bar association shall have a committee on legal aid work. Where there is no legal aid society, it should take steps for the creation of such a body. Where there is such a society, it should coöperate with it in respect not only to the handling of border-line cases, but also in the prosecution generally of measures to bring the administration of justice within the reach of the poor.

General Services. It would be improper to close this account of the work of legal aid societies without calling attention to two other valuable services rendered by them. The first is the great deterrent effect that their existence and work has upon the commission of injustice. So long as the poorer classes are practically helpless to secure redress for wrong inflicted upon them, direct encouragement is given to the evil minded to defraud and otherwise oppress them. The knowledge that there is an organization to which their victims may address themselves and that vigorous action will be taken by such organization, makes them much more cautious in giving play to their evil intentions. A second service is the prominent part that these services have played in all efforts to secure needed reform in both the substantive law and the organization and procedure employed for the enforcement of rights. When they have not initiated, they have strongly supported such movements as those for the larger use of methods of conciliation, the creation of small claims and domestic relations courts, and the reduction of court costs. Indeed their influence in the whole field of judicial reform has been very great.

It must be evident from the foregoing that the problem of bringing justice within the reach of the poor is by no means a simple one. It involves in the first place the fundamental question of the scope of the functions of government in furnishing the facilities

and means by which all, rich and poor alike, shall have access to the courts for the enforcement of and protection in their rights, not only in theory but in fact. Secondly it requires a careful examination of the nature of the handicaps under which poor litigants suffer and the practical measures that are being or may be taken for removing them. Due to this necessity for considering so many topics it may be well to attempt something in the nature of a general summary of conclusions reached regarding the action which it is believed should be taken for meeting this problem.

First in order to importance is the doing of everything possible in the way of improving the machinery and procedure of the administration of justice generally, especially in the direction of unifying the system of courts, the simplification and rationalization of procedure, the creation of special tribunals, such as small claims courts, courts of domestic relations, and the like, and the larger use of the conciliatory method for the settlement of controversies. Secondly, a much greater development can be given to the policy of entrusting to administrative tribunals, such as workmen's compensation commissions, the handling of those classes of cases where the chief task is that of determining facts, in the operation of which there is a minimum need for the aid of counsel, and where all the financial burden of handling cases is borne by the government. Thirdly, the whole system of court fees should be thoroughly overhauled with a view to their considerable reduction if not entire elimination. Fourthly, the policy should be adopted by all of our governments of establishing the offices of public defender and public legal aid bureaus, or better still of creating a single governmental agency that will perform the functions of both of these services. Finally, pending the accomplishment of these reforms, every encouragement should be given to the creation and strengthening of legal aid societies operating under private auspices.

It will be a long time before all that is required in respect to this phase of the administration of justice is done. In the meantime it is desirable that each state reform its existing legislation bearing upon the aid of the poor litigant. Fortunately, not only has this need been appreciated but important steps have been taken to secure such action on the part of the states. A committee of the American Bar Association has drafted a model "Poor Litigants

Statute" that is in every respect admirable, and the Association is urging its adoption upon the states.

This bill has been carefully drawn to cover all points of difficulty which have been encountered in attempting to operate under existing statutes relative to the remission of court fees and costs and the assignment of counsel. It defines with great care the persons who shall be deemed to be poor litigants and as such entitled to the benefits of the act; sets forth the steps to be taken for the determination of such qualifications; provides that the benefits of the act shall extend to all classes of cases, civil and criminal, and embraces the entire litigation until its final disposition, thus covering proceedings in appellate as well as trial courts; provides that the poor litigant shall not be required to give security for court costs or fees and shall not be personally liable for costs or fees incurred in his cause except to the extent that may be specially determined in view of the particular circumstances of each case; and makes provision for the assignment of counsel, who shall receive an adequate compensation, to represent the poor litigant throughout the proceedings.

An especially interesting and novel feature of this measure is the provision made for meeting the court costs and fees and for compensation of assigned counsel from the payment of which the poor litigant is, in the first instance at least, exempted. This takes the form of providing that in each county there shall be created a special "Poor Litigants Fund," from which the costs mentioned shall be met. This fund will be constituted through appropriation of public funds, but will, in addition, receive from any moneys that may be collected as the result of the action by poor litigants, "all amounts expended for fees, compensation and expenses, in the conduct of the poor litigant's cause," such additional payment as the court which enters the final judgment in the cause may direct to the end that the reasonable cost of the poor litigant's participation in the cause may be upon a parity with the reasonable cost to a person not a poor litigant, and such gifts as may be made to it by private donation.[5]

[5] For a copy of this bill, see Report, American Bar Association, 1924, pp. 386-94.

APPENDIX

BIBLIOGRAPHY

Introductory Note

The literature on the administration of the law in the United States is so voluminous and so widely scattered, in the form of addresses and reports of committees of bar associations, contributions to legal and other periodicals, hearings before legislative committees, proceedings and other publications of national and local associations concerned with special aspects of judicial administration, reports of special investigating committees and the like, that the preparation of anything approximating a complete bibliography of the subject is impracticable in a work of the present character. The best that can be done is to indicate those works which the author has found to be of special value to him and, it is believed, will aid the reader who desires to push his studies further in the field of judicial administration in the United States. It cannot be stated too emphatically, however, that there are undoubtedly many papers in the proceedings of bar associations and the legal journals that are of equal, if not greater value, than those here listed.

Bibliographies. No comprehensive bibliography of judicial administration in the United States is now available. A committee of the Social Science Research Council, operating under a grant of something over $20,000, has under preparation a "Bibliography of Research Material on Crime and Criminal Justice," which, when completed, will undoubtedly be of great value. It will be published by the H. W. Wilson Company and is announced to appear in 1929.

Special bibliographic notes, pertaining to particular aspects of judicial administration, have been prepared by various authors as appendices to their works or articles and are noted in the paragraphs that follow which pertain to such aspects. For periodical articles, see for early years the "Index to Legal Periodical Literature," by L. A. Jones, continued by Frank E. Chapman, and for later and current years the "Index to Legal Periodicals and Law Library Journal." The "Journal of the American Institute of Criminal Law and Criminology" carries exceptionally complete bibliog-

raphies of works and periodical articles, foreign as well as American, on the subjects of penal law and administration. The two works "Materials and Methods of Legal Research: with bibliographical manual," by Frederick C. Hicks (1923) and "Law, Legislative and Municipal Reference Libraries: an introductory manual and bibliographic guide," by John Boynton Kaiser (1914) are of value as keys to legal literature generally.

An unusually good select list of references on a number of phases of judicial administration is to be found in "List of References on Problems of Contemporary Legislation," Northwestern University Bulletin, October 2, 1914, and "Problems of Contemporary Legislation: supplementary reference lists, 1914-1920," Northwestern University Bulletin (not dated).

Periodicals. There are over fifty periodicals published in the United States devoted to a consideration of the law and its administration. The more important of these are published under the auspices of the leading law schools of the country. For a list of these periodicals see "Index to Legal Periodicals and Law Library Journal," and "List of American Learned Journals Devoted to the Humanistic and Social Sciences," by Leo F. Stock, Bulletin No. 8, American Council of Learned Societies, October, 1928. While all of these journals contain articles bearing upon the problem of judicial administration, much the most important from this standpoint are: The Journal of the American Judicature Society, published bimonthly by the American Judicature Society since June, 1917; the Journal of the American Institute of Criminal Law and Criminology, published monthly by the American Institute of Criminal Law and Criminology since 1910; and the American Bar Association Journal, published monthly by the American Bar Association since 1915.

The first named of these journals is especially valuable as recording important legislation and proposals for the reform of judicial administration in the United States. Articles of value relating to judicial administration are also to be found in The Green Bag and Case and Comment and to a less extent in the American Political Science Review. As indicated under the heading "General Works," the Annals of the American Academy of Political and Social Science and the Proceedings of the Academy of

Political Science contain symposiums on judicial administration that are of great value.

Official Commissions of Inquiry. To the student whose primary interest is in the determination of the efficiency of the existing system of judicial administration in the United States and the action required to make such system more satisfactory, the most valuable material is to be found in the reports of the various official commissions of inquiry that have been appointed in recent years, chiefly by the states but to a slight extent by the cities, to study their respective judicial systems and recommend action for their improvement. A list of the more important of these reports follows:

California. Report of the Commission for the Reform of Criminal Procedure. 1927.

Chicago. Report of the City Council Committee on Crime of the City of Chicago. 1915.

Massachusetts. Report of Commission on the Expediency of Revising the Judicial System. Public Doc. No. 32. 1877.

——— Report of Joint Legislative Committee on Judicial System. Senate Doc. No. 10. 1887.

——— Report of Special Committee on Expediency of Revising the Judicial System. Senate Doc. No. 31. 1893.

——— Report of Commission on Simplification of Criminal Pleading. Senate Doc. No. 234. 1899.

——— Report of Commission on Causes of Delay in the Administration of Justice. House Doc. No. 1050. 1910.

——— Report of the Special Commission on the Inferior Courts of Suffolk County. House Doc. No. 1638. 1912.

——— Report of the Special Commission to Consider Abolishing the Trial Justice System. Senate Doc. No. 347. 1917.

——— Reports of the Commission Appointed to Investigate the Judicature of the Commonwealth. House Doc. No. 597 and House Doc. No. 1205. 1920-21.

Michigan. Report of the Commission of Inquiry into Criminal Procedure. 1927.

Minnesota. Report of the Crime Commission. 1927.

New Jersey. Report of the Commission to Investigate the Subject of Crime in New Jersey. 1927.

New York. Report of the Commission on Law's Delay. 1904.

——— Reports of the Board of Statutory Consolidation. 1904-19.

——— Report of [Page] Commission to Inquire into Courts of Inferior Criminal Jurisdiction in Cities of the First Class. 1910.

——— Report of the Municipal Court Commission. 1914.

——— Judiciary Constitutional Convention of 1921. Report of Legislature and Appendices. 1922.

——— Report and Recommendations of the Municipal Court Commission of the City of New York to Hon. Alfred E. Smith, Governor. 1924.

——— Report of the [Baumes] Joint Legislative Committee on Coordination of Civil and Criminal Practice Acts. 1926.
——— Reports of the [Baumes] Crime Commission of the State of New York. 1926-27.
——— First and Second Reports of the Special Calendar Committee Appointed by the Appellate Division of the Supreme Court, First Division. 1927-28.
North Carolina. Report of the Commission on Law Reform and Procedure. 1916.
Oregon. Report of the Commission on Revision and Improvement of Judicial Administration. 1919.
Rhode Island. First Annual Report of the Criminal Law Advisory Commission. 1928.
Wisconsin. Report of the Joint Committee of the Legislature on Investigation of the Organization and Systems of Courts in Wisconsin. 1915.

It is reported that provision has been made for the creation of special commissions or committees to investigate crime or judicial administration generally by Rhode Island, Kentucky, Louisiana, New Hampshire, Nebraska, Philadelphia and other states and cities. The reports of these bodies when made will undoubtedly present material of value. Reports of commissions to investigate particular phases of judicial administration, such as probation and commercial arbitration, will be indicated under their appropriate heads in the pages that follow.

Reports of Judicial Councils. The movement for the establishment of judicial councils in the United States is chronicled with considerable fullness in the Journal of the American Judicature Society and the American Bar Association Journal. In many cases the laws providing for these councils are reproduced in full. All of the laws creating these bodies provide for the preparation and publication of reports. These reports, emanating as they do from permanent bodies having the duty of examining into the workings of existing judicial institutions and recommending changes therein, will be of great value to the student. The three annual reports of the Massachusetts Judicial Council, 1926, 1927 and 1928, deserve special mention. On the Federal Judicial Council, see especially Chapter VI, "Conferences of Senior Circuit Judges," in "The Business of the Supreme Court," by Felix Frankfurter and James M. Landis (1928).

Reports of Private Commission of Inquiry. Scarcely second in importance to the reports of the official commissions of inquiry

are the reports of investigations of the problems of judicial administration that have been made under private auspices. The more important of these are "Criminal Justice in Cleveland," Reports of the Cleveland Foundation, Survey of the Administration of Criminal Justice in Cleveland, Ohio (1922); "The Missouri Crime Survey." The Missouri Association for Criminal Justice (1926); and "Report of the Crime Survey Committee," The Law Association of Philadelphia (1926).

The National Crime Commission, organized in 1927, has published numerous mimeographed papers dealing with special aspects of the crime problem. Among these, special mention may be made of the following: "State Crime Commissions: what they are, how they should be organized, what they should do," by Raymond Moley (1926); "A Full Report of the Proceedings of the National Conference on the Reduction of Crime called by the National Crime Commission, Washington, D. C. (1927)"; and "The Relation of the Police and the Courts to the Crime Problem" (1928).

It is hardly necessary to say that future publications of this organization should be of value.

Publications of Permanent Associations. The publications of the permanent associations that have been created for the study of problems of judicial administration contain a wealth of material. Some of these organizations concern themselves with the whole field of jurisprudence while others are confined to special fields. In the present paragraph mention is made of only those falling in the first class. The others will be commented upon in the paragraphs devoted to the topics with which they concern themselves.

Bar Associations. The American Bar Association, all or practically all of the state bar associations, and many of the local bar associations publish the proceedings of their annual meetings. These proceedings contain not only discussions, but also specially prepared papers and reports of standing or special committees dealing with almost every phase of the administration of the law. Especially do the proceedings for recent years concern themselves with matters of administrative organization and procedure as distinguished from the consideration of the substantive law. Of these publications, much the most important are those of the American Bar Association. These consist of the "Report of the Proceedings

of the Annual Meetings" and the American Bar Association Journal, a monthly, the publication of which was begun in 1915. In the annual proceedings the "Reports of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation," from 1909 to date, are of especial value from the standpoint of the present study.

American Judicature Society. At the forefront of organized efforts to secure improvements in the administration of justice in the United States stands the American Judicature Society. This society, organized in 1913 under a charter from the State of Illinois, and with headquarters at Chicago, has for its sole purpose the promotion of improvements in the system of judicial administration in the United States. Its influence has been and is profound. Especially has its secretary, Herbert Harley, been active in promoting reform. Its publications consist of: Journal of the American Judicature Society, issued monthly since June, 1917; and Bulletins of the American Judicature Society, a series of pamphlets the greater number of which were issued during the earlier years of the existence of the society.

The Journal is especially valuable as a source of information regarding current proposals for the reform of judicial administration. Without its aid it would have been difficult for the writer to have prepared the present work. Following is a list of titles of its Bulletins and miscellaneous publications (items starred being out of print):

Bulletins

*I. Causes for Dissatisfaction with the Administration of Justice in Metropolitan Districts: an analysis.

*II. Courts for Smaller Cities: suggestions based upon an investigation of the administration of justice in the City of Grand Rapids, Michigan.

*III. Discussion of Causes for Dissatisfaction, etc., by Members of of the Council.

*IV. First Draft of an Act to Establish a Model Court for a Metropolitan District.

IV–A. Second Draft of so Much of the Metropolitan Court Act as Relates to the Selection and Retirement of Judges.

IV–B. Second Draft of Metropolitan Court Act (Exclusive of selection and retirement of judges).

*V. Interpretation of the Theory and Purposes of the American Judicature Society.

*VI. Organization of Courts, by Roscoe Pound; Methods of Selecting and Retiring Judges, by Albert M. Kales; and Local Courts of Limited Jurisdiction, by Herbert Harley.

*VII. First Draft of a State Wide Judicature Act, in which is Provided a Model System of Courts for a State.

VII-A. Revised Draft of a State Wide Judicature Act.

*VIII. Informal Procedure: The Branch Court of Conciliation of the Municipal Court of Cleveland, by Judge Manuel Levine; Introduction, by John H. Wigmore; and The Small Claims Branch of the Municipal Court of Chicago, by Herbert Harley.

*IX. A Modern Unified Court: a plea for its establishment in Mississippi, by C. J. Sydney Smith, President Mississippi Bar Association.

*X. The Selection, Tenure and Retirement of Judges, by James Parker Hall.

*XI. English Courts and Procedure, by Professor William E. Higgins.

*XII. Commercial Arbitration: a report on same in England, by Samuel Rosenbaum; Arbitration Rules of the Chicago Association of Credit Men.

*XIII. First Nineteen Articles of the Proposed Rules of Civil Procedure Supplementary to the State-Wide Judicature Act.

*XIV. Rules of Civil Procedure Supplementary to the State-Wide Judicature Act.

Miscellaneous Pamphlets:

A Lawyer's Trust: an argument for a self-governing and responsible bar.

Address before the Lancaster County Bar Association at Lincoln, Nebraska, by Herbert Harley.

A Modern Experiment in Judicial Administration: The Municipal Court of Chicago.

Annual Address to the Louisiana State Bar Association, delivered at New Iberia, May 8, 1915, by Herbert Harley.

A Unified State Court System: address before the Nebraska State Bar Association, by Herbert Harley.

American Institute of Criminal Law and Criminology. The American Institute of Criminal Law and Criminology was organized in 1910 in Chicago "to further the scientific study of crime, criminal law and procedure, to formulate and prosecute measures for solving the problems connected therewith and coördinate the efforts of individuals and of organizations interested in the administration of speedy justice." Its publications consist of a monthly, The Journal of the American Institute of Criminal Law and Criminology, and a series of "Criminal Science Monographs," in which the following four numbers have thus far appeared: "Pathological Lying, Accusation and Swindling: a study in forensic psychology," by William Healy and Mary Tenney Healy (1915); "Studies in Forensic Psychiatry," by Bernard Glueck (1916);

"The Unmarried Mother: a study of five hundred cases," by Percy Gamble Kammerer (1918); and "The Unadjusted Girl," by W. I. Thomas (1923). Though treating all phases of crime, the publications of this Institute are especially valuable for their consideration of the psychological aspects of the problem.

American Law Institute. The American Law Institute was organized in 1923 for the purpose set forth in its charter: "The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work." For the support of its work the Institute has received grants from the Carnegie Corporation that give it an annual income of about $100,000. At the outset, this Institute decided to devote its efforts primarily to problems of the improvement of the substantive law and its statement. Most of its publications, therefore, fall without the scope of the present work. One of its reports, however, deals directly with the problem of criminal administration and is of value as giving a general criticism of existing conditions. This is a report presented by a committee, of which Herbert S. Hadley was chairman, entitled "Report to the Council by the Committee on a Survey and Statement of the Defects in Criminal Justice" (1925). This would indicate that this organization may be expected in the future to concern itself with matters of administration as well as the substantive law.

State and Municipal Associations for the Promotion of Judicial Reform. A phase of the recent movement for the reform of judicial administration has been the creation of private organizations in a number of the states and cities to study problems of criminal administration and especially to aid, or to bring to bear pressure upon, local law enforcement agencies in the performance of their duties. Among these, special mention should be made of the Missouri Association for Criminal Justice, the Illinois Association for Criminal Justice, the Pennsylvania Crime Commission, the Cleveland Association for Criminal Justice, the Baltimore Criminal Justice Commission, the Law Association of Philadelphia, and the Law Enforcement Association of Minneapolis. Most, if not all, of these organizations issue publications which are of value. The Missouri Association for Criminal Justice, as has been shown, was respon-

sible for the preparation and publication of the report "The Missouri Crime Survey, 1926." The Illinois Association for Criminal Justice was organized in 1926 under the auspices of the Illinois Bar Association and now has in preparation a general survey of criminal administration in Illinois. The Pennsylvania Crime Commission was organized in 1927 by the District Attorneys' Association of Pennsylvania as a permanent body to concern itself with matters of criminal administration. The Cleveland Association for Criminal Justice was organized in 1922 as an organization to follow up and secure action upon the recommendations of the report of the Cleveland Foundation upon Criminal Justice in Cleveland. Beginning with 1922 it has published an exceedingly valuable "Quarterly Bulletin." The Baltimore Criminal Justice Commission was organized in 1922 and has issued annual reports, a Quarterly Bulletin, and the following special studies in mimeographed form: "A Report on Bail Bonds in Criminal Cases in Baltimore"; "The Domestic Relations Court of Cincinnati, Ohio," "Report of Alan Johnston, Jr., on Consolidated Criminal Court of Detroit," and "Report on Police Courts of Baltimore." The Law Association of Philadelphia has published its "Report of Its Crime Survey Committee" (1926) and "Report of the Special Committee on the Judicial System of Philadelphia County" (1910). The Chicago Crime Commission was organized by the Chicago Association of Commerce in 1919, since when it has published a valuable monthly "Bulletin of the Chicago Crime Commission," which contains in addition to its annual reports studies of particular topics of criminal administration.

Bureaus of Municipal Research. To a limited extent bureaus of municipal research and similar organizations have made investigations into and published reports upon special phases of judicial administration. This is especially true of the Chicago Bureau of Public Efficiency and the Detroit Bureau of Governmental Research. Among the publications of the Chicago Bureau, the following relate to matters of judicial administration:

The Judges and the County Fee Offices. 1911.

Administration of the Office of Clerk of the Circuit Court and of the Office of Clerk of the Superior Court of Cook County, Illinois. 1911.

The Office of Clerk of the Circuit Court and the Office of Clerk of the Superior Court of Cook County, Illinois; a supplemental inquiry into their organization and methods of administration. 1912.

Administration of the Office of Sheriff of Cook County, Illinois. 1911.
The Office of Sheriff of Cook County, Illinois; a supplemental inquiry into its organization and methods of administration. 1912.
Administration of the Office of Coroner of Cook County, Illinois. 1911.
Administration of the Office of Recorder of Cook County, Illinois. 1911.
Administration of the Office of Clerk of the County Court of Cook County, Illinois. 1912.
Unification of Local Governments in Chicago. 1917.

The Detroit Bureau has issued the following:

An Appraisal of the First Year of Operation of the Reorganized Recorders Court of Detroit, April 20, 1920–April 9, 1921. Public Business No. 63, November 1, 1921.
An Appraisal of the Recorders Court of Detroit during its Second Year 1921–22. Public Business No. 72, August 1, 1922.
Crime in Detroit, 1916–1926. Public Business, March 1, 1927.

The Philadelphia Bureau of Municipal Research is now at work upon the preparation of a study of the Philadelphia Municipal Court.

Associations for the Study of Crime as a Social Problem. There are a number of national organizations which are concerned with the study of crime as a social problem, with special reference to the causes and means of prevention of crime. Among these mention may be made of the National Society of Penal Information, the American Crime Study Commission, the Society for the Prevention of Crime, and the National Conference of Social Work, formerly the National Conference of Charities and Corrections. Only incidentally and to a limited extent do the publications of these organizations deal with matters of judicial administration as handled in the present work.

As indicated, there are a number of other organizations devoted to special phases of judicial administration, such as commercial arbitration, legal aid, police, and penal institutions. An account of the organization and publications of these organizations will be given under the appropriate heads.

General Works. As far as practicable, works dealing with the problem of judicial administration in the United States are listed under special heads in the paragraphs that follow. There are, however, a large number of reports, collections of addresses and periodical articles that deal with the problem as a whole or at least with more than one phase of the problem. Of chief value are the reports

of commissions of enquiry, public and private, that have been already mentioned.

Of general works of a comprehensive character, almost the only one is "The American Judiciary," by Simeon E. Baldwin (1905). J. M. Matthews in his "Principles of American State Administration" (1917), gives an excellent consideration of the subject. In "Politics and Administration," by Frank J. Goodnow (1900) is to be found an acute and philosophical consideration of the question of state versus local government in respect to the administration of judicial affairs. Important phases of the problem are discussed in: "Law and Its Administration," by Harlan F. Stone (1915); "Law Reform: papers and addresses by a practicing attorney," by Henry W. Taft (1926); "A Century of Law Reform; twelve lectures on the changes in the law in England during the nineteenth century" (1901); "The American Judge," by A. A. Bruce (1923); "The Old Law and the New Order," by George W. Alger (1914); "Day in Court," by Francis L. Wellman (1910); "The Prisoner at the Bar," by Arthur C. Train (1906); "Courts, Criminal and the Camorra," by Arthur C. Train (1912); "The Enforcement of Criminal Laws of the State in Cities and Villages," by C. B. Grant, Michigan Political Science Association, Publications Vol. 5 (1904); "American Courts; their organization and procedure," by C. N. Callender (1927); and "The Criminal and His Allies," by Marcus A. Kavanaugh (1928). The various official reports of state economy and efficiency commissions also contain much material of value. See especially "The Government of Kentucky," report of the Efficiency Commission (1924); and "County Government in Virginia," Governor's Committee on Consolidation and Simplification (1927).

The following symposiums have the special value of giving the views of a large number of special students of judicial administration regarding existing defects in our judicial system and the action required to remedy them. "Administration of Justice in the United States," Annals of the American Academy of Political and Social Science, Vol. 36 (July, 1910); "Reform of the Administration of Justice," Annals, Vol. 52 (March, 1914); "Law and Justice," Proceedings of the Academy of Political Science, Vol. 10 (July, 1923); "Selected Articles on Criminal Justice," by James P. Kirby (1926); "A Résumé of Opinion on the Rising Tide of

Crime," World's Work, Vol. 52 (May, 1926); and "Progress in the Law," Annals, Vol. 136 (March, 1928).

Other publications dealing with the subject generally are: "Preliminary Report on Efficiency in the Administration of Justice," National Economic League; "Causes for Dissatisfaction with the Administration of Justice in Metropolitan Districts: an analysis," American Judicature Society, Bulletin No. 1; "Discussion of Causes for Dissatisfaction with the Administration of Justice in Metropolitan Districts," American Judicature Society, Bulletin No. III; "Report to the Council by the Committee on a Survey and Statement of Defects in Criminal Justice" (Herbert S. Hadley, Chairman), American Law Institute, April 1, 1925; and "Criminal Justice and How to Achieve It," National Municipal Review, Supplement, Vol. 11 (March, 1922). Various phases of judicial administration are discussed with authority by Elihu Root in his "Addresses on Government and Citizenship" (1916).

Hundreds of reports of committees and addresses on judicial reform are to be found in the proceedings of the national, state, and local bar associations, and there is scarcely an issue of any one of the fifty or more law journals that does not contain one or more articles on the subject. It is impracticable to attempt to list all of them. The following represent only a selection of a certain number of them, many of equal if not greater importance not being listed:

Alger, George W. Swift and Cheap Justice. World's Work, Vols. 26-27, October, 1913–February, 1914.

——— Stopping Point in Litigation. Central Law Journal, Vol. 79, November 6, 1914.

Bettman, Alfred. Criminal Justice in America. American Bar Association Journal, Vol. 11, July, 1925.

Boston, Charles A. Some Practical Remedies for Existing Defects in the Administration of Justice. University of Pennsylvania Law Review, Vol. 61, November, 1912.

Boston, Charles A. and Everett V. Abbott. The Judiciary and the Administration of the Law. American Law Review, Vol. 45, July–August, 1911.

Burdick, Charles Kellogg. Criminal Justice in America. American Bar Association Journal, Vol. 11, August, 1925.

Dodd, W. F. Preventive Justice. American Bar Association Journal, Vol. 6, November, 1920.

Garner, J. W. Crime and Judicial Inefficiency. Annals of the American Academy of Political and Social Science, Vol. 29, May, 1907.

Kavanaugh, Marcus. Improvement of Administration of Criminal Justice by Exercise of Judicial Power. American Bar Association Journal, Vol. 11, April, 1925.

Pound, Roscoe. Causes of Popular Dissatisfaction with the Administration of Justice. American Bar Association, Report, 1906.

——— Administration of Justice in the Modern City. Harvard Law Review, Vol. 26, February, 1913.

——— Justice According to Law. Columbia Law Review, Vol. 14, December, 1913.

——— The Crisis in American Law. Harpers, Vol. 152, January, 1926.

Reynolds, James Bronson. Criminal Justice: its simplification, clarification and better adaptation. Journal of the American Judicature Society, Vol. 6, April, 1923.

Sims, Henry Upson. The Problem of Reforming Judicial Adminstration in America. Virginia Law Review, Vol. 3, May, 1916.

Taft, William H. Delays and Defects in the Enforcement of Law in This Country; Address, Civic Forum, New York City, April 28, 1908; also in P. S. Reinsch, Readings on American State Government, pp. 173-81, 1911.

——— The Delays of the Law. Yale Law Journal, Vol. 18, November, 1908.

——— Administration of Justice: its speeding and cheapening. Central Law Journal, Vol. 72, November 17, 1911.

——— Possible and Needed Reforms in the Administration of Justice in the Federal Courts. Report, American Bar Association, 1922.

Our Failure of Criminal Justice. Journal of the American Judicature Society, Vol. 5, February, 1922.

For a general consideration of proposals for reform in judicial administration the following, dealing with the New York Constitutional Convention of 1915, may be consulted with profit:

Report of the Committee of Fifteen on Proposals to be Laid before the Constitutional Convention of 1915, New York State Bar Association. 1915.

Report of Special Committee on Constitutional Convention of 1915 and Resolution thereon. Association of the Bar of the City of New York. 1915.

Report of Special Committee on Constitutional Convention of 1915. Draft of proposed Constitutional provision for the State of New York relating to the judiciary. New York County Lawyers' Association. 1915.

Administrative Adjudication. Though the growth of so-called administrative law, that is, law emanating from administrative and quasi-administrative authorities in the form of orders and regulations, and the development of quasi-administrative quasi-judicial bodies, such as the Federal Trade Commission, the Interstate Commerce Commission, and the like, have attracted much attention and have resulted in the production of not a little literature, com-

paratively little has been written directly upon the subject of the relative advantages of having certain classes of controversies adjudicated by administrative tribunals instead of by the courts. Following, however, are certain articles in which this subject receives at least incidental consideration:

Brinton, Jasper Yeates. Some Powers and Problems of the Federal Administration. University of Pennsylvania Law Review, Vol. 61, January, 1913.

Goodnow, Frank J. Private Rights and Administrative Discretion. Report, American Bar Association, 1916.

Grandfield, Robert E. Workmen's Compensation Administration in Massachusetts. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.

Parkinson, Thomas I. Review of Important Legislation in the United States during 1916. American Bar Association Journal, Vol. 3, April, 1917.

——— The Relation of Administrative Procedure and Devices to the Restatement and Clarification of the Law. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

Pound, Roscoe. Organization of Courts. Journal of the American Judicature Society, Vol. 11, October, 1927.

Smith, Reginald Heber. Justice and the Poor. (Chapter XII, "Administrative Tribunals"). Carnegie Foundation for the Advancement of Teaching. Bulletin No. 13. 1919.

——— Administrative Justice. Illinois Law Review, Vol. 18, December, 1923.

Thelen, Max. Advantages of Administrative Tribunals in the Determination of Controversies. The Utilities Magazine, Vol. 3, January, 1918.

Compulsory Compensation for Traffic Accidents. The matter of compulsory compensation for traffic accidents is of significance from the standpoint of judicial administration, since it embraces the proposals for the adjudication of conflicts by administrative rather than judicial agencies. The best consideration of this subject is to be found in three articles by Robert S. Marx: "The Curse of the Personal Injury Suit and a Remedy," Address, Cincinnati Bar Association, April 15, 1924, republished in the American Bar Association Journal, Vol. 10 (July, 1924); "Compulsory Automobile Insurance," Address, Ohio Bar Association, July 17, 1925, republished in the Ohio Law Bulletin and Reporter, Vol. 23 (July 27, 1925); and "Compulsory Automobile Insurance," National Municipal Review, Vol. 16 (August, 1927). The New Jersey Commission on Compulsory Automobile Insurance published a report

in 1926. The "Law Relating to Automobile Insurance," by John Simpson, was published in 1928.

Arbitration and Conciliation. For an exceptionally well prepared bibliography on conciliation and arbitration, see "Selected Articles on Commercial Arbitration," by Daniel Bloomfield (1927). "Justice and the Poor," by Reginald Heber Smith, Carnegie Foundation for the Advancement of Teaching, Bulletin No. 13 (1919), also contains valuable references, especially to bar association reports and periodicals.

Of general works on the subject, in addition to that of Bloomfield, just mentioned, the most important are "Commercial Arbitration and the Law," by Julius Henry Cohen (1918), and "Arbitration and Business Ethics," by Clarence F. Birdseye (1926).

For a detailed and technical consideration of the problem of conciliation and arbitration with documents giving forms and rules of procedure, much the most important sources of information are the publications of the various national organizations that have been created for the purpose of promoting this method of adjusting commercial disputes. These are the Arbitration Society of America, founded in 1922, the Arbitration Foundation, founded in 1925, the Arbitration Conference, founded in 1925, and the American Arbitration Association, founded in 1926, as a consolidation of the three organizations first named. This Association has published a comprehensive work on the subject in an 1170 page "Handbook on Commercial Arbitration in the United States" (1927), which gives a detailed account by trades of the provision made for arbitration in the United States. It has also announced for early publication the following volumes: "International Yearbook on Civil and Commercial Arbitration," "Manual of American Laws on Commercial Arbitration," "Arbitration and Award," "Guide for Arbitration," "Handbook on International Arbitration," and "State Practice on Arbitration."

Among the publications of the organizations absorbed by the American Arbitration Association, mention may be made of the following, issued by the Arbitration Society of America: "Information Series, I, Commercial Arbitration in the United States: Laws and Procedure" (1925), which contains a reproduction in full of the arbitration laws of the United States, New York, New

Jersey, Oregon, and Massachusetts, the standard arbitration clauses, and other documents; and "Information Series II, The Promotion of Arbitration through Education, Legislation, Co-operation" (1925).

The publications of the Chamber of Commerce of the State of New York, which for years has been active in promoting arbitration, are also of especial value. Among these, mention may be made of the "Annual Reports of the Committee on Arbitration"; "Report of Special Committee on Commercial Arbitration" (1911); "Handbook for Arbitration," prepared by J. H. Cohen; "A Brief History of Commercial Arbitration in New York" (1922); "Commercial Arbitration: a method for the adjustment without litigation of differences arising between individuals, firms and corporations established by the Chamber of Commerce of the State of New York" (1924); and "Rules for the Prevention of Unnecessary Litigation," prepared by the joint committee of the Chamber of Commerce of the State of New York and the New York State Bar Association (1917).

The United States Department of Commerce has published a number of reports dealing with arbitration, among which mention may be made of "Commercial Arbitration and Prevention of Waste," by A. J. Wolfe, Commerce Reports, September 18, 1922; "Progress of Commercial Arbitration," by A. J. Wolfe, Commerce Reports September 11, 1922, and May 4, 1923; and "Trade Association Activities" (1923). "Bulletin No. 98 U. S. Bureau of Labor" (1912) gives information regarding the use of conciliation in the United States, Canada, Great Britain, and other countries.

On the work of trade associations in promoting arbitration, see "Trade Associations: their economic significance and legal status," National Industrial Conference Board (1925), and "Trade Association Activities and the Law," by Franklin D. Jones (1922).

On the use of arbitration in the settlement of international commercial disputes much the most important work is "Comparative Study of American Legislation Governing Commercial Arbitration," Inter American High Commission, United States Section (1928). Appendixes to this work give all the more important documents. See also publications of the International Chamber of Commerce on the subject.

On the federal arbitration law, see "Arbitration of Interstate Commercial Disputes," Joint Hearings before the sub-committees of the Committees on Judiciary," 68th Congress, 1st session, January 9, 1924, which contains authoritative statements concerning arbitration and a brief on the legal aspects of the question by Julius Henry Cohen; a publication by the Arbitration Foundation on "The United States Arbitration Law and Its Application," and recent reports of the American Bar Association.

On the conciliation system of Denmark and Norway, see "Informal Procedure," American Judicature Society, Bulletin VIII (1915); "Courts of Conciliation," by Nicolay Grevstad, Atlantic Monthly, Vol. 8 (1891); "Norway's Conciliation Tribunals," by Nicolay Grevstad, Journal of the American Judicature Society, Vol. 2 (June, 1918); "Conciliation in Denmark," by Axel Teisen, Pennsylvania Law Review, Vol. 65 (1923); "Monthly Labor Review," U. S. Bureau of Labor Statistics, May and June, 1926; and "The Danish Conciliation System," by Reginald Heber Smith, Journal of the American Judicature Society, Vol. II (October, 1927).

On arbitration in England, see especially "A Report on Commercial Arbitration in England," by Samuel Rosenbaum, American Judicature Society, Bulletin XII (1916).

The Journal of the American Judicature Society contains numerous notes recording the progress of legislation in the states to provide for arbitration. A list of some other special pamphlets and articles is given below.

Ausmann, F. R. Des Moines Tries the Conciliation Court. National Municipal Review, Vol. 27, April, 1928.

——— The Des Moines Conciliation Court. Journal of the American Judicature Society, Vol. 11, June, 1928.

Bernheimer, Charles L. The Advantages of Arbitration Procedure. Annals of the American Academy of Political and Social Science, Vol. 124, March, 1926.

Curtis, Richard C. A Comparison of the Recent Arbitration Statutes. American Bar Association Journal, Vol. 13, October, 1927.

Greene, J. Kent. Chicago's New Trade Court. American Bar Association Journal, Vol. 7, July, 1921.

Grossman, Moses H. The Need of Arbitration to Relieve Congestion in the Courts. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

Harley, Herbert. Conciliation Procedure in Small Cases. Annals of the American Academy of Political and Social Science, Vol. 124, March, 1926.

Lauer, Edgar J. Conciliation: a cure for the law's delay. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.

Smith, Courtland. The Significance of Arbitration in the Motion Picture Industry. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

Smith, Reginald Heber. Small Claims Courts and Conciliation Courts. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

——— Conciliation and Legal Aid: an opportunity for pioneering. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.

Stone, Harlan F. The Scope and Limitations of Commercial Arbitration. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

Sturges, Wesley A. Commercial Arbitration or Court Application of Common Law Rules of Marketing. Yale Law Journal, Vol. 34, March, 1925.

Vance, W. R. The Minneapolis Court of Conciliation. Minnesota Law Review, Vol. 2, June, 1918.

Wheless, Joseph. Arbitration as a Judicial Process of the Law. West Virginia Law Quarterly, Vol. 30, June, 1924.

The Arbitration Court of the New York Building Congress. New York Building Congress. March 3, 1927.

Commercial Arbitration: a plan for constituent members and the national chamber. Chamber of Commerce of the United States. 1922.

Progress in Commercial Arbitration. New York Law Review, Vol. 6, September, 1928.

The United States Arbitration Law and Its Application. American Bar Association Journal, Vol. 11, March, 1925.

Declaratory Judgments. The best consideration of the desirability of authorizing courts to render declaratory judgments is to be found in two articles by Edson R. Sunderland: "A Modern Evolution in Remedial Rights: the declaratory judgment," Michigan Law Review, Vol. 16 (1917), and "The Courts as Authorized Legal Advisors of the People," American Law Review, Vol. 54 (March-April, 1920); and articles by Edwin M. Borchard: "The Declaratory Judgment: a needed procedural reform," Yale Law Journal, Vol. 28 (November-December, 1918) reprinted as Senate Committee Print, 65th Congress, 3d session (1919), "Constitutionality of the Declaratory Judgment," Yale Law Journal, Vol. 30 (December, 1920); and "The Supreme Court and the Declaratory Judgment," American Bar Association Journal, Vol. 14 (December, 1928). The American Bar Association Journal for September, 1920 (Vol. 6, pp. 18-19) contains a review of declaratory judgment legislation.

Advisory Opinions. The volume by Albert R. Ellingwood, "Departmental Coöperation in State Government" (1918), is devoted

entirely to a study of the subject of advisory opinions. It gives an exhaustive account of the extent to which provision has been made in the United States, and to a certain extent in foreign countries, for the rendition by courts of advisory opinions and the character of the opinions that have actually been rendered. It contains also a detailed bibliography. A recent article on the subject is "Advisory Opinions," by Paul C. Clovis and Clarence M. Updegraff, Iowa Law Review, Vol. 13 (February, 1928).

State Indemnity for Errors of Criminal Justice. Comparatively little has been written by American authors on the subject of state indemnification for errors of criminal justice. In the two articles by Edwin M. Borchard, "European System of State Indemnity for Errors of Criminal Justice, with editorial preface by J. H. Wigmore," Journal of the American Institute of Criminal Law and Criminology, Vol. 3 (January, 1913), and reprinted as Senate Document 974, 62d Congress (1912), and "State Indemnity for Errors of Criminal Justice," Annals of the American Academy of Political and Social Science, Vol. 52 (March, 1914), may be found an exceedingly able philosophical consideration of the subject supported by a description of the practice in foreign countries and full foot-note references.

Public Defender. Consideration of the proposal for the creation of office of public defender will be found in the general literature regarding legal aid listed under that head. One of the best treatments of the subject is that contained in "Justice and the Poor," by Reginald Heber Smith, Carnegie Foundation for the Advancement of Teaching, Bulletin No. 13 (1919). Other references are:

Bradway, John S. Notes on the Defender in Criminal Cases. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.

DeForrest, Robert G. The Public Defender in Connecticut. Connecticut Bar Journal, Vol. 1, October, 1927; also Journal of the American Institute of Criminal Law and Criminology, Vol. 18, February, 1928.

Foltz, Clara. The Public Defender. American Law Review, Vol. 31, May–June, 1897.

Goldman, Myer C. The Public Defender, 1917.

Gray, R. S. The Advisability of a Public Defender. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

National Alliance of Legal Aid Societies. Report of Committee on the Public Defender Movement. Record of Proceedings at the Meetings of the Central Committee. December 15, 1922.

New York City Bar Association. Fifth Report of the Law Reform Committee on the Necessity and Advisability of Creating the Office of Public Defender. 1915.

New York County Lawyers' Association, Majority Report of the Sub-Committee on Public Defender of the Committee on Courts of Criminal Procedure. Bench and Bar (N. S.), Vol. 9, p. 309.

Orfila, Ernest R. Public Defender in the Police Court. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.

Rubin, Samuel. The Public Defender an Aid to Criminal Justice. Journal of the American Institute of Criminal Law and Criminology, Vol. 18, November, 1927.

Wood, Walton J. The Office of Public Defender. Annals of the American Academy of Political and Social Science, Vol. 124, March, 1926.

——— The Place of the Public Defender in the Administration of Justice. 1914.

Police. Much the most thorough consideration of the whole problem of police administration is to be found in the two volumes by Raymond B. Fosdick, "European Police Systems" (1916) and "American Police Systems" (1920). The best consideration of the special problem of a state constabulary is the volume "The State Police, Organization and Administration," by Bruce Smith (1925), which contains a good bibliography. Other volumes dealing with police administration are: "Police Administration: a critical study of police organization in the United States and abroad," by L. F. Fuld (1909); "American Police Administration Handbook on Police Organization and Methods of Administration," by S. D. Graper (1921); "The Policeman," by C. F. Cahalane (1923); "Police Practices and Procedure," by C. F. Cahalane (1914); "Our Police Protectors," by A. E. Costello (1885); "Policeman and the Public," by Arthur Woods (1919); "Guarding a Great City," by William McAdoo (1906); "How to Become a Patrolman," by J. J. E. O'Reilly (1924); "Moss' Chicago Police Manual" (1923); and "Women Police," by Chloe Owings (1926).

There are a number of police organizations, the most important of which are the International Association of Chiefs of Police, the International Police Conference, and the International Association of Police Women, the publications of which are of value. There are also periodicals devoted to police matters, among which may be mentioned, "The Chief," published in New York City.

The "Legislative Index" and "State Research," published by the New Jersey State Chamber of Commerce, contain a number of

articles on the subject of a state constabulary: "The State Police Problem in America: including a special study of the problem in New Jersey," Legislative Index, March 10, 1917; "The Rural Patrol Problem: the need for a state rural patrol in New Jersey," Legislative Index, March 17, 1917; "State Police: New Jersey the only state in the metropolitan district which has no state police," Legislative Index, March 31, 1917; "Why New Jersey Needs a State Police," by Paul Willard Garrett, Legislative Index, February 2, 1918; "The Pending State Police Bill," by Paul Willard Garrett, Legislative Index, February 9, 1918; "The State Police Bill in the Senate," by Paul Willard Garrett, Legislative Index, February 16, 1918; "The Fate of the State Police Bill," by Paul Willard Garrett, Legislative Index, February 23, 1918; "Proceedings of State Police Hearings," State Research, December, 1917; "Proceedings of State Police Hearings," "New Jersey," July, 1920; "The New York State Troopers," State Research, October, 1917; "Why New Jersey Needs a State Police," State Research, December, 1917; and "The Pennsylvania State Police," State Research, November, 1917. Some other references on police are:

Baltimore Bureau of State and Municipal Research. Business Methods of the Baltimore Police Department. March 15, 1917.

Conover, Milton. Note on State Constabulary. American Political Science Review, Vol. 15, February, 1921.

Corcoran, Margaret M. State Police in the United States. A Bibliography. Journal of the American Institute of Criminal Law and Criminology, Vol. 14, February, 1924.

Fosdick, Raymond B. "Police Administration." A chapter in Criminal Justice in Cleveland. 1922

——— Policing the Cities of Europe. Century Magazine, Vol. 89, November, 1914.

McCaffrey, George H. The Police and the Administration of Justice. Annals of the American Academy of Political and Social Science. Vol. 52, March, 1914.

Miller, H. C. The State Police. Minnesota Academy of Social Sciences, Proceedings, Vol. 3, 1909.

New York (State) Crime Commission. Report of the Sub-Committee on Police. 1927.

Rochester Bureau of Municipal Research. Report on a Survey of the Police Bureau of Rochester, N. Y. 1921.

Smith, Bruce. "The Metropolitan Police Systems." A chapter in The Missouri Crime Survey. 1926.

United States House Committee on the Judiciary. Hearing on Bills to Create a National Police Bureau and to Create a Bureau of Criminal Identification. April 13 and 24, 1924.

Following are three papers appearing in the Annals of the American Academy of Political and Social Science, Vol. 36 (July, 1910) dealing with the special question of the Third Degree: "The Sweating or Third Degree System," by William F. Baker, Police Commissioner of New York; "Administration of Criminal Law: third degree system," by Theodore A. Bingham, Ex-Police Commissioner of New York; and "The Treatment of the Accused," by Richard Sylvester, Superintendent of Police, Washington, D. C.

Sheriff. There is little in the way of special literature dealing with other than the historical aspects of the office of sheriff. The following three contributions, however, deal with present-day aspects of the office: "The Sheriff and the Coroner," by Raymond Moley, The Missouri Crime Survey (1926); "The Sheriff's Office: Report of the investigation made by the Municipal Association of Cleveland in the interest of economy and efficiency" (1912); and "The County Sheriff," by William A. Jackson, County Government and Administration in Iowa. Applied History, Vol. IV (1925).

Coroner. All works dealing with the history of English law contain material regarding the office of coroner, and there are numerous books and articles on the office itself. See "Bibliography of the Office of Coroner," by F. W. Powell, National Municipal Review, Vol. 4 (July, 1915). The literature regarding the present workings of the office is comparatively meager. Much the most valuable consideration of the office is "The Coroner and the Medical Examiner," by Oscar T. Schultz and E. M. Morgan, Bulletin National Research Council (1928). This gives the result of a special investigation of the practical workings of the office in the United States. The "Report on Special Examination of the Accounts and Methods of the Office of Coroner in the City of New York," by Leonard W. Wallstein, Commissioner of Accounts, City of New York (1915), is also of special value. The Missouri Crime Survey (1926) contains a chapter on the subject by Raymond Moley. The article, "The Ancient Office of Coroner," by David I. Macht, in the Johns Hopkins Hospital Bulletin (May, 1913), is of interest. Other studies are: "The Coroner's Office. Report of the investigation made by the Coroner's Committee of the Municipal Association of Cleveland in the interest of efficiency and economy" (1912); "The County Coroner," by Jay J. Sherman, County Government

and Administration in Iowa, Applied History, Vol. IV (1925); "The Medical Examiner versus the Coroner," National Municipal Review, Vol. 9 (August, 1920); "The Coroner's Office," by Oscar T. Schultz, Annals of the American Academy of Political and Social Science, Vol. 47 (May, 1913); "The Abolition of the Office of Coroner in New York City," New York Short Ballot Organization (1914); and "Why the Coroner System Has Broken Down," by Alexander O. Gretler, National Municipal Review, Vol. 13 (October, 1924). This last article is of special value as being by the Medical Examiner of New York City, and showing the superiority of the medical examiner system.

Grand Jury. The reports of all of the recent inquiries, official and private, into the administration of criminal justice in the United States devote more or less attention to the grand jury and constitute probably the most valuable source of information regarding the present workings of this institution. One of the best accounts of the practical workings of the grand jury system at the present time is to be found in the article "The Drafting of a Code of Criminal Procedure," by Edwin R. Keedy, American Bar Association Journal (January, 1929). In this article are given the provisions of the state constitutions and statutes regarding the grand jury and an account of the special investigation made by the committee of the American Law Institute into the use of the indictment by a grand jury and the information as methods of putting persons in accusation. "The Panel," the monthly organ of the Association of Grand Jurors of New York County, published since June, 1924, contains much information regarding the system. An excellent special consideration of this office is "The Grand Jury Considered from an Historical, Political and Legal Standpoint," by George J. Edwards (1906). The article on "The Grand Jury," by Jesse C. Adkins, Georgetown Law Journal, Vol. 2 (June, 1914) gives a good description of the practical manner in which a grand jury functions. The article "Informations or Indictments in Felony Cases," by R. Justin Miller, Minnesota Law Review, Vol. 8 (April, 1924), presents the case against the grand jury as a method of accusation. Other contributions on the subject are: "The Grand Jury of the County of New York," by George Haven Putnam, Annals of the American Academy of Political and Social Science,

Vol. 52 (March, 1914); "Grand Jury Reform," Journal of the American Judicature Society, Vol. 4 (October, 1920); "Michigan's One Man Grand Jury," Journal of the American Judicature Society, Vol. 8 (December, 1924); and "Judicial Department, Jury, Grand Jury and Claims Against the State," Illinois Constitutional Convention, Bulletin No. 10 (1920-21).

System of Courts in the United States. All of the standard treatises on the government of the United States devote more or less attention to the judicial branch of the governments described. This is especially true of the works on state government, among which may be mentioned "State Government in the United States," by A. N. Holcombe (Rev. ed., 1926); "American State Administration," by J. M. Mathews (1917); "American State Government," by J. M. Mathews (1924); and "State Government," by W. F. Dodd (1922). "The Government in Illinois," by W. F. Dodd and Sue H. Dodd (1923) is of especial value as giving a more complete account of the court system of a typical state. For an account of the system of courts in the states generally, see "The American Judiciary," by Simeon E. Baldwin (1905) and "American Courts: their organization and procedure," by Clarence N. Callender (1927).

On the federal judiciary much the most valuable study is "The Business of the Supreme Court: a study in the federal judicial system," by Felix Frankfurter and James M. Landis (1928). Two works of importance, though not dealing to the same extent with organization and procedure, are "The Supreme Court in United States History," by Charles Warren and "The Supreme Court of the United States," by Charles E. Hughes (1928).

Unified Court Movement. An exceptionally complete bibliography of the movement for the establishment of unified courts in the United States is to be found on pages 224-26 of "The Business of the Supreme Court," by Felix Frankfurter and James M. Landis (1928). From its organization the American Judicature Society has devoted a great deal of attention to the subject and its "Journal" contains many contributions regarding it. All of these are listed in the bibliography mentioned. Most of them are devoted to recording proposals brought forward in the several states for

unification. The following represent the publications of this society that are of a more general character:

Courts for Smaller Cities: Suggestions based upon an investigation of the administration of justice in the City of Grand Rapids, Michigan. Bulletin No. II.

First Draft of an Act to Establish a Model for a Metropolitan District. Bulletin No. IV.

Second Draft of a Metropolitan Court Act. Bulletin No. IVB. 1916.

Organization of Courts. By Roscoe Pound. Bulletin No. VI.

First Draft of a State Wide Judicature Act in which is Provided a Model System of Courts for a State. Bulletin No. VII.

A Revised Draft of a State Wide Judicature Act. Bulletin No. VIIA. 1917.

A Modern Unified Court: a plan for its establishment in Mississippi. By C. J. Sydney. Bulletin No. IX.

The State Wide Judicature Act. Journal, Vol. 1, 1917.

Unified Courts. By Orrin Kip McMurray. Journal. Vol. 1, December, 1917.

The Courts in the New Constitution: a plan for organizing the courts of the State of Illinois in a unified system, together with comments upon the judiciary. Article proposed by the Sub-Committee of the Committee on Constitution of the Illinois State Bar Association. Submitted by the Illinois Division of the American Judicature Society. January, 1920.

How Courts May be Coördinated. Journal, Vol. 5, December, 1921.

Unified Court Proposed to New York Constitutional Convention. Journal, Vol. 5, December, 1921.

Model Judicial Article. Journal, Vol. 6, August, 1922.

How to Unify State Courts. Journal, Vol. 6, December, 1922.

Unification of the Judiciary; a record of progress. By C. S. Potts. Journal, Vol. 8, October, 1924.

Organization of Courts. By Roscoe Pound. Journal, Vol. 11, October, 1927.

Unification of the Judiciary: the Nation's greatest need. Journal, Vol. 11, December, 1927. (Contains latest revision in full of the Society's Model Act for the unification of the judiciary.)

Other articles on the reform of the system of courts are:

Denslow, Van Buren. The Relation of Organization of Courts to Law Reform. Illinois State Bar Association, Proceedings, 1885.

Harley, Herbert. Organizing the Law Courts for Efficiency. The Survey, Vol. 32, August 1, 1914.

——— A Unified State Court System. Nebraska State Bar Association, Proceedings, 1914.

——— Court Organization for a Metropolitan District. American Political Science Review, Vol. 9, August, 1915.

——— A Model Act to Establish a Court for Metropolitan Districts. Yale Law Journal, Vol. 25, April, 1916.

Gustin, J. D. Observations on Reform of the Law and the Courts. Central Law Journal, Vol. 78, March 13, 1914.

Kales, A. M. A proposed Judicature Act for Cook County, Illinois. Illinois Law Review, Vol. 5, November, 1910.
——— Judicial Reorganization. Illinois Law Review, Vol. 7, June, 1912.
——— Reorganization of the Circuit and Superior Courts of Cook County, Illinois Law Review, Vol. 7, November–December, 1912.
McChesney, N. W. A Plan for Modern Unified Courts. Tennessee State Bar Association, Proceedings, 1914.
McElreath, Walter. Justice Courts. Georgia State Bar Association, Report, 1910.

Municipal Courts. For a general consideration of municipal courts see works cited in the preceding paragraph. To a greater extent than other courts, municipal courts publish annual reports of their operations that can be consulted with profit. See especially the annual reports of the municipal courts of Chicago, Cleveland, Boston, New York, Philadelphia, Atlanta, and Buffalo; also the Milwaukee Civil Court of Allegheny County Court of Pittsburgh. There is a large body of addresses and periodical articles dealing with the special problems of organization and procedure of municipal courts. A list of some of the more recent contributions of this character follows:

Bundy, Charles S. Are Municipal Courts Desirable? Bulletin, City Club of Philadelphia, April 12, 1911.
Harley, Herbert. The Municipal Court Idea. The American Leader, Vol. 4, September 25, 1913.
——— The Model Municipal Court. National Municipal Review, Vol. 3, January, 1914.
——— A Model Act to Establish a Court for a Metropolitan District. Yale Law Journal, Vol. 25, April, 1916.
——— The Need for a Criminal Court. Yale Law Journal, Vol. 28, April, 1919; also Journal of the American Judicature Society, Vol. 3, June, 1919.
Pound, Roscoe. The Administration of Justice in the Modern City. Harvard Law Review, Vol. 26, February, 1913.
Saby, R. S. Simplified Procedure in Municipal Courts. American Political Science Review, Vol. 18, November, 1924.
Second Draft of a Model Act to Establish a Court for a Metropolitan District. American Judicature Society, Bulletin IVB. 1916.
Court Organization for Large Cities. Journal of the American Judicature Society, Vol. 1, April, 1918.

Following are articles dealing with the organization and procedure of particular municipal courts:

Municipal Court of Chicago:

Gilbert, H. T. The Municipal Court of Chicago. 1928.
Hale, W. B. A Court that Does Its Job: The Municipal Court of Chicago. World's Works, Vol. 19, March, 1910.

Harley, Herbert. Modern Experiment in Judicial Administration: The Municipal Court of Chicago. Louisiana State Bar Association, Proceedings, 1915; reprinted by the American Judicature Society. 1915.

——— Business Management for the Courts. Virginia Law Review, Vol. 5, October, 1917.

Olson, Harry. The Municipal Court of Chicago: a tribunal of procedural reform and social service. Reprint from San Francisco Recorder, May 12, 1916.

——— The Proper Organization and Procedure of a Municipal Court. Proceedings, American Political Science Association, 1910.

Success of Organized Courts. Journal of the American Judicature Society, Vol. 1, February, 1918.

Unified Court for Chicago. Journal of the American Judicature Society, Vol. 3, June, 1919.

Chicago Demands Unified Court. Journal of the American Judicature Society, Vol. 5, April, 1922.

Recorders Court of Detroit:

Detroit Wins New Court. Journal of the American Judicature Society, Vol. 3, June, 1919.

Detroit Votes on Criminal Court. Journal of the American Judicature Society, Vol. 3, April, 1920.

Detroit Gets Real Criminal Court. Journal of the American Judicature Society, Vol. 4, June, 1920.

Cleaning Up Detroit. Journal of the American Judicature Society, Vol. 4, August, 1920.

Detroit's Unified Criminal Court. Journal of the American Judicature Society, Vol. 5, October, 1921.

Detroit Reduces Crime 58 per cent. Journal of the American Judicature Society, Vol. 5, April, 1922.

An Appraisal of the First Year of Operation of the Recorder's Court of Detroit, April 20, 1920–April 19, 1921. Detroit Bureau of Governmental Research, Public Business, November 1, 1921.

An Appraisal of the Recorder's Court of Detroit during Its Second Year, 1921-1922. Detroit Bureau of Governmental Research, Public Business, August 1, 1922.

Municipal Court of Cleveland:

Moley, Raymond. The Municipal Court of Cleveland. National Municipal Review, Vol. 5, July, 1916.

Municipal Court of Cincinnati:

Report on the Municipal Court of Cincinnati. Cincinnati Bureau of Municipal Research, 1915.

Small Claims Courts. The best consideration of the problem of organizing special tribunals or the adoption of a special procedure for the adjudication of small claims is to be found in "Justice and the Poor," by Reginald Heber Smith, Carnegie Foundation for the Advancement of Teaching, Bulletin No. 13 (1919). This work also contains a valuable bibliography. Much of the discussion of the reform of judicial procedure and municipal courts relates to the

improvement of methods of handling petty civil cases. Some other references on the subject are:

Goodrich, Robert M. Small Claims Conciliation Courts. Minnesota Municipalities, Vol. 11, April, 1926.

New York City Bar Association. Justice for the Poor: a report on changes in the organization of courts required by the exigencies of petty business. 1915.

Root, Elihu. "Courts of Justice for Small Causes." Addresses on Government and Citizenship. 1916.

Smith, Reginald Heber. Small Claims Courts for Massachusetts. Journal of the American Judicature Society, Vol. 4, August, 1920.

——— Small Claims and Conciliation Courts. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

Informal Procedure, etc. American Judicature Society, Bulletin VIII. 1915.

Massachusetts Judges Adopt Rules for Small Claims. Journal of the American Judicature Society, Vol. 4, April, 1921.

Small Claims Procedure is Succeeding. Journal of the American Judicature Society, Vol. 8, June, 1924.

Juvenile and Domestic Relations Courts. There is a wealth of material dealing with juvenile and domestic relations courts in the United States. A number of the publications of the United States Children's Bureau listed below contain exhaustive bibliographies of this literature. Two other valuable bibliographies are those contained in the "Proceedings of the National Probation Association: the development of juvenile courts and probation" (1925); and "Juvenile Courts in the United States," by Herbert N. Law (1927). Reference should also be made to the works listed under the head of "probation," since most of them concern themselves to a considerable extent with the probation of children as a feature of the work of juvenile courts. Most of the juvenile and domestic relations courts publish annual reports that are of value. Since its organization, the Children's Bureau has given especial attention to the subject of juvenile delinquency and has published the results of elaborate studies on the subject. These reports constitute much the most valuable material on the subject and have the advantage of being readily obtainable. A list of these reports follows:

Children before the Courts in Connecticut. By William B. Bailey. No. 43. 1918.

Courts in the United States hearing Children's Cases: results of a questionnaire covering the year 1918. By Evelina Belden. No 65. 1919.

A Summary of Juvenile Court Legislation in the United States. Sophonisba P. Breckinridge and Helen R. Jeter. No. 70. 1920.
Probation in Children's Courts. By Charles L. Chute. No. 80. 1921.
The Practical Value of Scientific Study of Juvenile Delinquents. By William Healy. No. 96. 1922.
Proceedings of the Conference on Juvenile Court Standards. Held under the auspices of the U. S. Children's Bureau and the National Probation Association, Milwaukee, Wisconsin, June 21-22, 1921. No. 97. 1922.
The Legal Aspect of the Juvenile Court. By Bernard Flexner and Reuben Oppenheimer. No. 99. 1922.
The Federal Courts and the Delinquent Child: A study of the methods of dealing with children who have violated federal laws. By Ruth Bloodgood. No. 103. 1922.
The Chicago Juvenile Court. By Helen Rankin Jeter. No. 104. 1922.
Juvenile Court Standards. Report of the Committee Appointed by the Children's Bureau August, 1921, to Formulate Juvenile Court Standards. Adopted by a conference held under the auspices of the Children's Bureau and the National Probation Association. Washington, D. C., May 18, 1923. No. 121. 1923.
List of References on Juvenile Courts and Probation in the United States: and a selected list of foreign references. No. 124. 1923.
Juvenile Courts at Work: A study of the organization and methods of ten courts. By Katherine F. Lenroot and Emma O. Lundberg. No. 141. 1925.

"The Development of Juvenile Courts and Probation: Proceedings of the National Probation Association, 1925" contains a number of valuable addresses and articles. The recent work "Juvenile Courts in the United States," by H. H. Lou (1927) is one of the most comprehensive studies of the subject that has been made. Following is a list of articles on the subject:

Baker, H. H. Private Hearings: their advantages and disadvantages. Annals of the American Academy of Political and Social Science, Vol. 36, July, 1910.
Baldwin, William H. The Court of Domestic Relations of Chicago. Journal of the American Institute of Criminal Law and Criminology, Vol. 3, September, 1912.
Day, L. B. The Development of the Family Court. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.
DeLacy, W. H. Functions of the Juvenile Court. Annals of the American Academy of Political and Social Science, Vol.. 36, July, 1910.
Doty, Madeline Z. Treatment of Minor Cases of Juvenile Delinquency. Proceedings, Academy of Political Science, Vol. 1, July, 1911.
Eliot, Thomas D. The Trend of the Juvenile Court. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.
Folks, Homer and A. W. Towne. The Probation System in the Juvenile Court. Proceedings, Academy of Political Science, Vol. 1, July, 1911.

Flexner, Bernard. The Juvenile Court: Its Legal Aspects. Annals of the American Academy of Political and Social Science, Vol. 36, July, 1910.

——— and Roger N. Baldwin. Juvenile Courts and Probation. 1914.

Gemmill, W. H. Chicago Court of Domestic Relations. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Hart, H. H. Distinctive Features of the Juvenile Courts. Annals of the American Academy of Political and Social Science, Vol. 36, July, 1910.

Lacy, Arthur J. What the Detroit Court of Domestic Relations Accomplished. American Legal News, Vol. 25, September, 1914.

Lindsay, Ben B. The Juvenile Court Law of the Future. National Conference of Social Work, 1925.

Lindsey, Edward. The Juvenile Court Movement from a Lawyer's Standpoint. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Mack, J. W. The State and the Child. Proceedings, Academy of Political Science, Vol. 1, July, 1911.

Perkins, Willis B. Family Courts. Michigan Law Review, Vol. 17, March, 1919; also Journal of the American Judicature Society, Vol. 3, June, 1919.

Staake, W. H. Juvenile Courts and Probation in Philadelphia. Annals of the American Academy of Political and Social Science, Vol. 36, July, 1910.

Thurston, H. W. Ten Years of the Juvenile Court. The Survey, Vol. 23, February 5, 1916.

Waite, Edward F. Courts of Domestic Relations. National Probation Association, 1922.

——— The Origin and Development of the Minnesota Juvenile Court. Minnesota State Board of Control, 1920.

Zunzer, Charles. The Domestic Relations Courts. Annals of the American Academy of Political and Social Science, Vol. 124, March, 1926.

Selection, Tenure, and Removal of Judges. All of the standard works on American government, in dealing with the judicial branch, give attention to the method of selecting, and the tenure and removal of judges as an incident to their discussion of the problem of an independent judiciary. The recall of judges also received great attention in the literature of some years ago dealing with the general proposal for the initiative, referendum, and recall. Probably the best single work on the subject is "Judicial Tenure in the United States: with special reference to the tenure of federal judges," by William S. Carpenter (1918). Some special references on the subject are:

American Bar Association. Report of the Committee to Oppose Judicial Recall. Report, American Bar Association, 1916.

——— Report of Committee on Judicial Selection. Report, American Bar Association, 1924.

Cleveland Bar Association, Report of Special Committee Concerning Conditions for Judicial Office and Cognate Matters. American Bar Association Journal, Vol. 13, July, 1927.

Frothingham, Louis A. The Removal of Judges by Legislative Address in Massachusetts. American Political Science Review, Vol. 8, May, 1914.

Hall, James Parker. The Selection, Tenure, and Retirement of Judges. American Judicature Society, Bulletin X. 1915.

Harley, Herbert. Taking Judges out of Politics. Annals of the American Academy of Political and Social Science, Vol. 64, March, 1916.

Kales, Albert M. Methods of Selecting and Retiring Judges. American Judicature Society. Bulletin VI, 1914; reproduced in Journal of the American Judicature Society, Vol. 11, February, 1928.

——— Methods of Selecting and Retiring Judges in a Metropolitan District. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Lodge, Henry Cabot. The Compulsory Initiative and Referendum and the Recall of Judges. Address, Princeton University, March 8, 1912. 62d Cong., Sen. Doc. 406. 1912.

Massachusetts Constitutional Convention, 1917. The Removal of Judges in Massachusetts. Bulletin No. 32.

——— The Selection and Retirement of Judges. Bulletin No. 16.

Owen, Robert L. Election and Recall of Judges. 62d Cong., Sen. Doc. 99. August 18, 1911.

Rosenbaum, Samuel. Election of Judges or Selection. Illinois Law Review, Vol, 9, 1915.

Taft, W. H. The Selection and Tenure of Judges. Report, American Bar Association, 1913.

Trabue, Edmund F. The Security of Judicial Tenure. American Law Review, Vol. 47, September-October, 1913.

United States President [W. H. Taft]. Special Message returning without approval House Joint Resolution No. 14 [providing for admission of Arizona and New Mexico as states]. 62d Cong., House Doc. 106. August 15, 1911.

Walsh, T. J. Recall of Judges. Address, Washington State Bar Association, July 28, 1911. 62d Cong., Sen. Doc. 100. Aguust 18, 1911.

How Shall Judges Be Chosen? Journal of the American Judicature Society, Vol. 3, October, 1919.

Selecting and Retiring Judges. Journal of the American Judicature Society, Vol. 3, April, 1920.

Report Recommends Appointment of Judges. Journal of the American Judicature Society, Vol. 10, April. 1927.

The Bar and Legal Education. The best general consideration of legal education and training generally for the profession of the law is to be found in the following publications of the Carnegie Foundation for the Advancement of Teaching: "Training for the Public Profession of the Law; historical development and principal

contemporary problems of legal education in the United States, with some account of conditions in England and Canada," by Alfred Zantzinger Reed, Bulletin No. 15 (1921); "The Common Law and The Case Method in American University Law Schools," by Joseph Redlich, Bulletin No. 8 (1914); "Present-Day Law Schools in the United States and Canada, Bulletin No. 21 (1928); and the "Annual Review of Legal Education," which has been published since 1913, with the exception of 1914 and 1926. The last named publication contains data regarding bar admission requirements, law schools, recent developments, etc.

The "American Law School Review," the organ of the American Association of Law Schools, the "Reports" of the American Bar Association, and the "American Bar Association Journal" abound in contributions on the subject. Of especial value are the "Reports of the Committees of Conference of Delegates American Bar Association on Bar Organization" (1920), reproduced in the Journal of the American Judicature Society, and the reports of the "Conference on Legal Education, Washington, D. C., 1922," reported in the American Bar Association Journal. Of interest as showing conditions in the past is the "Report on Legal Education. Prepared by a Committee of the American Bar Association and the U. S. Bureau of Education," in the Annual Report of the United States Commissioner of Education, 1890-91.

On the special subject of the statutory organization of the bar, see "Redeeming a Profession," Journal of the American Judicature Society, Vol. 2 (December, 1918), an excellent general statement of the question, with draft of a model act for the states for the organization of the bar; and the numerous articles in the Journal of the American Judicature Society chronicling the movement for an integrated bar in the United States.

On ethics of the legal profession, see the valuable symposium, "The Ethics of the Profession and of Business," Annals of the American Academy of Political and Social Science, Vol. 101 (May, 1922). This symposium contains a copy of Code of Ethics approved by the American Bar Association and an extensive bibliography. See also "Reports of the Committee on Ethics," in Reports, American Bar Association; "Cases and Other Authorities on Legal Ethics," by George P. Costigan, Jr. (1917); and "Ethics of the

Legal Profession," by Orrin N. Carter (1915). Other works and articles dealing with the bar and legal education are:

Baldwin, Simeon E. Education for the Bar in the United States. American Political Science Review, Vol. 9, August, 1915.

Bruce, Andrew A. The Judicial Prerogative and Admission to the Bar. Illinois Law Review, Vol. 19, May, 1924; also Journal of the American Judicature Society, Vol. 8, August, 1924.

Cohen, Julius Henry. Is Law a Business or a Profession? 1916.

——— Lay Practice of the Law Injures Clients, Not the Legal Profession. Journal of the American Judicature Society, Vol. 5, August, 1921.

Hepburn, Charles M. The Modern Law School in England and America. Virginia Law Review, Vol. 2, November, 1914.

Nilsson, George W. Legal Education and Admission to the Bar. Address Arizona Bar Association. Journal of the American Judicature Society, Vol. 6, December, 1922.

Reed, Alfred Z. Recent Progress in Legal Education. American Law School Review, Vol. 5, May, 1926.

——— Recent Progress in Legal Education. U. S. Bureau of Education, Bulletin No. 3. 1926.

Root, Elihu. Public Service by the Bar. Report, American Bar Association, 1916.

Stone, Harlan F. Some Phases of American Legal Education, American Law Review, Vol. 58, October, 1924.

Warren, Charles. History of the American Bar. 1911.

Winslow, John B. Legal Education and Court Reform. Journal of the American Judicature Society, Vol. 3, October, 1919.

Procedure. The recent movement for the improvement of the administration of justice in the United States has had as its chief purpose the reform of judicial procedure. The most valuable consideration of the subject is thus to be found in the reports of the official and private inquiries into judicial matters and the reports of the state judicial councils. The reports of the annual proceedings of the American Bar Association and of the state bar associations and the files of the legal periodicals contain many contributions on the subject. Among these the reports of committees on procedural reform of the several bar associations, and particularly the "Reports of the Special Committees to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation of the American Bar Association," beginning with 1909, are of especial value. Special mention may also be made of the "Reports of the New York Board of Statutory Consolidation," particularly that of 1912, which is devoted to this subject and contains a valuable bibliography; the "Report of the Committee to Consider the Simplification of New York Procedure of the

Association of the Bar of the City of New York" (1909); and the two reports of the New York State Bar Association: "Report of the Committee to Examine the Practice Act Proposed by the Board of Statutory Consolidation" (1910) and "Reform of Procedure; Symposium on report of the Committee on Revision of the Civil Practice Act" (1912).

On the important question of vesting the rule making power in the courts, see especially the following:

American Bar Association. Committee of the Conference of Bar Association Delegates. The Rule-Making Power of the Courts. American Bar Association Journal, Vol. 13, March, 1927.

——— ——— The Rule-Making Power of the Courts in the Several States. 1927.

Marvel, Josiah. The Rule Making Powers of the Courts. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.

Newboldt, Frank and Samuel Rosenbaum. The Rules Committee and Its Work. Law Magazine and Review, Vol. 40, February, 1915.

Pound, Roscoe. The American Attitude toward the Trial Judge. Dakota Law Review, Vol. 2, February, 1928.

——— Regulation of Judicial Procedure by Rules of Court. Illinois Law Review, Vol. 10, 1915.

——— The Rule Making Power of Courts. American Bar Association Journal, Vol. 12, September, 1926; also Journal of the American Judicature Society, Vol. 10, December, 1926.

Rosenbaum, Samuel. The Rule-Making Authority. University of Pennsylvania Law Review, Vol. 63, April, 1915.

——— Rule-Making Authority in the English Supreme Court. University of Pennsylvania Law School, Series No. 4, 1917.

——— Rule-Making in the Courts of the (British) Empire. Journal of the Society of Comparative Legislation, Vol. 15 July, 1915.

——— Rule-Making in the (English) County Courts. Law Quarterly Review, Vol. 31, July, 1915.

Sunderland, Edson R. The Exercise of the Rule-Making Power. American Bar Association Journal, Vol. 12, August, 1926.

United States Senate. Power of Supreme Court to Prescribe Common Law Rules. Procedure in Federal Courts. Hearings before Sub-Committee of the Committee on the Judiciary. 68th Cong. 1st sess. February 2, 1924.

Walsh, Thomas J. Rule-Making Power on the Law Side of Federal Practice. American Bar Association Journal, Vol. 13, February, 1927.

Whittier, Charles B. Regulating Procedure by Rules of Court. Journal of the American Judicature Society, Vol. 11, June, 1927.

Act Conferring Rule-Making Authority. Journal of the American Judicature Society, Vol. 2, April, 1919.

Rule-Making Principle Enacted in Delaware and Washington. Journal of the American Judicature Society, Vol. 9, February, 1926.

Why Confer Rule-Making Powers on Courts. Journal of the American

It is impracticable to attempt to list all of the works and articles that have appeared in recent years on the subject of procedural reform. The following gives certain titles chiefly by prominent members of the bar who have given especial consideration to the subject:

Clark, Charles E. History, Systems and Functions of Pleading. American Law School Review, Vol. 5, May, 1926.

Denison, J. H. Civil Procedure. Colorado Bar Association, Proceedings, 1919.

——— Simplification of Procedure in Civil Cases. New York State Bar Association, Proceedings, 1912.

Garner, James W. Criminal Procedure in the United States. North American Review, Vol. 191, January, 1910.

Gray, R. S. The Conduct of Trials in Courts; Some Radical Suggestions for Reform. San Francisco Recorder, July 28, 1913.

Hadley, Herbert S. The Reform of Criminal Procedure. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

——— and Jesse W. Bartlett. Necessary Changes in Criminal Procedure. The Missouri Crime Survey, 1926.

Hand, Learned. Discussion of the Improvement of Technical Rules of Evidence. Proceedings, Academy of Political Science, Vol. 3, July, 1913.

Harley, Herbert. Present Tendencies in Judicial Reform. American Political Science Review, Vol. 9, August, 1915.

——— Revised Civil Procedure in New York. Illinois Law Review, Vol. 11, May, 1916.

——— The Scientific Attitude Towards Reform in Procedure. Central Law Journal, Vol. 75, August 23, 1912.

Kales, Albert M. Short Cuts in Procedure Accomplished by Agreement. Journal of the American Judicature Society, Vol. 2, April, 1919.

Lehman, Frederick W. Conservatism in Legal Procedure. Green Bag, Vol. 21, March, 1909.

Limburg, Herbert R. The Privilege of the Accused to Refuse to Testify. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

MacChesney, N. W. A progressive Program for Procedural Reform. Journal of the American Institute of Criminal Law and Criminology, Vol. 3, 1912.

McMurdy, Robert. Procedural Reform. Michigan Law Review, Vol. 13. June 1915.

Mikell, William E. Reform in Criminal Procedure. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Millar, Robert W. The Modernization of Criminal Procedure. Journal of the American Judicature Society, Vol. 9, February, 1926.

——— Some Comparative Aspects of Civil Procedure under Anglo-American and Continental Systems. American Bar Association Journal, Vol. 12, June, 1926.

Osborne, G. E. Some Problems of Procedural Reform. American Bar Association Journal, Vol. 7, May, 1921.

Perkins, Willis B. Procedural Law Reform. Michigan Law Review, Vol. 10, May, 1912.

——— Proposed Remedies in Court Procedure. Michigan Law Review, Vol. 12, March, 1914.

Pillsbury, W. H. Experiment in Simplified Procedure. California Law Review, Vol. 3, March, 1915.

Pound, Roscoe. The Canons of Procedural Reform. American Bar Association Journal, Vol. 12, August, 1926.

——— Practical Program of Procedural Reform. Illinois State Bar Association Proceedings, 1910; also Green Bag, Vol. 22, August, 1910.

——— Principles of Practice Reform. Central Law Journal, Vol. 71, September 30, 1910.

——— Some Principles of Procedural Reform. Illinois Law Review, Vol. 4, January-February, 1910.

Rodenbeck, Adolph J. Principles of a Modern Procedure. Journal of the American Judicature Society, Vol. 2, December, 1918.

Root, Elihu. "Reform in Judicial Procedure," Addresses on Government and Citizenship, 1916.

——— The Reform of Procedure. Central Law Journal, Vol. 73, December, 1911.

Saby, Rasmus S. Simplified Procedure in Municipal Courts. Journal of the American Judicature Society, Vol. 8, April, 1925.

Scoville, Samuel Jr. The Evolution of our Criminal Procedure. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Shelton, Thomas W. Mental Attitudes of Bench and Bar toward Reform in Judicial Procedure Contrasted. Central Law Journal, Vol. 71, November 11, 1910.

——— Procedural Principles. Minnesota State Bar Association, Proceedings, 1914.

——— The Proposal for Federal Legislation on Uniform Judicial Procedure. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

——— The Reform in Federal Procedure. Law Magazine, Vol. 1, January, 1913.

——— The Relation of Judicial Procedure to Government. Case and Comment, Vol. 18, April, 1912.

——— Simplification of Legal Procedure: Expediency must not sacrifice principle. Central Law Journal, Vol. 71, November 11, 1910.

Sims, Henry Upson. An Analysis of the Problem of Reforming American Judicial Administration. Virginia Law Review, Vol. 1, January, 1914.

Storey, Moorfield. The Reform of Judicial Procedure. 1911.

Sunderland, Edson R. Control of Procedure Through Court Rules. Journal of the American Judicature Society, Vol. 12, June, 1928.

——— The Problem of Appellate Review. Texas Law Review, Vol. 5, February, 1927; also Third Annual Report of the Judicial Council of Massachusetts, 1927.

——— The Problem of Trying Issues. Journal of the American Judicature Society, Vol. 10, April, 1927.
——— The Reform of Civil Procedure. Proceedings, Academy of Political Science, Vol. 10, July, 1923.
United States Senate. Reports and Hearings before the Committee on the Judiciary on the Simplification of Judicial Procedure, held in all the Congresses from the 62d to the 69th.
Wheeler, E. P. American Bar Association's Recommendations as to Judicial Procedure. New York State Bar Association, Proceedings, 1909.
——— Procedure on Appeal. New York State Bar Association, Proceedings, 1912.
——— Procedural Reform. Case and Comment, Vol. 18, April, 1912.
——— Reform in Criminal Procedure. Annals of the American Academy of Political and Social Science, Vol. 36, July, 1910.
——— Reform of Legal Procedure from the Practitioner's Standpoint; a review of the New Jersey act of 1912. Central Law Journal, Vol. 75, August 23, 1912.
——— Reform in Judicial Procedure. Chicago City Club Bulletin, Vol. 2, 1909.
——— Reform of Procedure in the Courts of New York. New York State Bar Association, Proceedings, 1912.
Whipple, Sherman L. The Duty of Disclosure. Florida State Bar Association, Proceedings, 1913.
Rules of Civil Procedure. Journal of the American Judicature Society, Vol. 2, April, 1919.
Civil Practice Act for New York. Journal of the American Judicature Society, Vol. 3, August, 1919.
New Jersey Practice Act. Journal of the American Judicature Society, Vol. 4, October, 1920.
Model Short Procedural Act. Journal of the American Judicature Society, Vol. 4, December, 1920.
New York Practice Act. Journal of the American Judicature Society, Vol. 4, April, 1921.

Petty Jury. For a general consideration of the development of the petty jury, see such standard works as Holdsworth, "History of English Law" (1922); Thayer "Preliminary Treatise on Evidence" (1898); and Moschizisker, "Trial by Jury" (1922). For a select bibliography, see "Jury Systems" by Julia E. Johnsen (1928).

Much of the extensive literature on the reform of judicial procedure in the United States deals in an incidental way with the present day workings of the petty jury system. The same is true of all of the recent inquiries into the administration of justice in this country by official and private commissions of enquiry. The proceedings of bar associations and the files of the legal periodicals also abound with material on the subject. The following list of

works and articles thus represent but a few of the many citations to authorities that might be made:

Blymyer, William H. The Jury System in Civil Cases the Greatest Drag in Delaying Justice. Green Bag, Vol. 26, May, 1914.

Boston, Charles H. Some Practical Remedies for Existing Defects in the Administration of Justice. University of Pennsylvania Law Review, Vol. 61, November, 1912.

Burr, A. G. Progress in Trial by Jury. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.

Callender, Clarence N. The Selection of Jurors: a comparative study of the methods of selecting and the personnel of juries in Philadelphia and other cities. Dissertation. University of Pennsylvania, 1924.

Choate, Joseph, H. Annual Address. Report, American Bar Association, 1898.

Civic League of Cleveland. The Jury System in Cuyahoga County. Report of Investigation into the Jury System and Merit System. Municipal Bulletin, January, 1916.

Coleman, Charles T. Trial by Jury. Arkansas State Bar Association, Proceedings, 1914.

Fleming, Rufus. The Scottish Jury. Michigan Law Review, Vol. 5, May, 1907.

Green, Leon. A New Development in Jury Trial. American Bar Association Journal, Vol. 13, December, 1927.

Henry, Thomas M. Jury Reform in Civil Cases. Green Bag, Vol. 26, May, 1914.

Judson, Frederick N. A Modern View of the Law Reform of Jeremy Bentham. Columbia Law Review, Vol. 10, January, 1910.

Maltbie, William M. Criminal Trials Without a Jury in Connecticut. Journal of the American Institute of Criminal Law and Criminology; also Third Report of the Judicial Council of Massachusetts, 1927.

Murdoch, H. B. Jury Justice. Juridical Review, Vol. 20, April, 1908.

Perkins, Willis B. Some Needed Reforms in the Methods of Selecting Juries. Michigan Law Review, Vol. 13, March, 1915.

Phillips, John Burton. Modification of the Jury System. Green Bag, Vol. 16, August, 1904.

Rembaugh, Bertha. The Proposal to Reduce the Number of Jury Trials. Proceedings, Academy of Political Science, Vol. 10, July, 1923.

Shelton, Thomas W. Is the Common Law Relation of Judge and Jury Subject to Legislative Change? Virginia Law Review, Vol. 3, January, 1916.

Sunderland, Edson R. The Inefficiency of the American Jury. Michigan Law Review, Vol. 13, February, 1913.

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Train, Arthur C. The Jury System: defects and proposed remedies. Annals of the American Academy of Political and Social Science, Vol. 36, July, 1910.

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The reports of the recent official and private inquiries into the administration of justice in the United States devote much attention to the subject and are especially valuable as pointing out defects in existing systems of pardon, probation, and parole administration. The annual reports of probation bureaus and departments, of course, contain a large amount of valuable information. Especially valuable are the annual reports and other publications of the New York State Probation Commission and the Pennsylvania State Parole Commission. The same is true of the proceedings and other publications of the National Probation Association and the American Prison Association. The proceedings of the Nineteenth Annual Conference of the first named association published under the title of "The Development of Juvenile Courts and Probation" (1925), contains a large number of special addresses and papers that are of unusual interest. Practically all of the works dealing with juvenile and domestic relations courts devote much attention to the parole system.

For a valuable abstract of the laws of the states and the federal government regarding indeterminate sentences and parole, see "Eighty-Second Annual Report of the Prison Association of New York" (1927), reprinted in the Journal of the American Institute of Criminal Law and Criminology, Vol. 18 (February, 1928). "The Working of the Indeterminate-Sentence Law and the Parole System in Illinois," a report to the Honorable Hinton G. Clabuagh, Chairman, Parole Board of Illinois (1928) gives an exceptionally valuable account of the practical operation of one of the oldest parole systems in the United States.

On the subject of the pardoning power "The Pardoning Power in the American States," by Christen Jensen (1922) is of special value and contains a select bibliography. See also "Some Phases of the Pardoning Power," by Ernest Morris, American Bar Asso-

ciation Journal, Vol. 12 (March, 1926); "The Use of the Pardoning Power," by William W. Smithers, Annals of the American Academy of Political and Social Science, Vol. 52 (March, 1914); and "The Pardoning Power," Massachusetts Constitutional Convention 1917, Bulletin No. 4. A list of some special reports, works, and articles on the subject follows:

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Bolster, Wilfred. Adult Probation. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.
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Chute, Charles L. The Extension of Probation in Criminal Courts. Annals of the American Academy of Political and Social Science, Vol. 136, March, 1928.
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New York. Crime Commission. Report of the Sub-Commission on Adjustment of Sentences 1927. (Important for its consideration of the subject of state supervision of probation and parole officers).
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Stokes, Harold W. A Review of the Pardoning Power. Kentucky Law Journal, Vol. 16, November, 1927.
United States. House Committee on the Judiciary. Probation System in the Federal Courts. Automatic Parole. Hearings. March 9, 1920. 66th Cong. 2d sess. (Valuable as giving a summary of state laws regarding probation, etc.)
——— ——— Establishment of a Probation System in the United States Courts. Hearings. February 21, 1924. 68th Cong. 1st sess.
——— ——— Probation System in the United States Courts. Report. April 1, 1924. 68th Cong. 1st sess.
——— ——— Probation System in the United States Courts. Report. February 4, 1925. 68th Cong. 2d. sess.

Legal Aid. The whole problem of furnishing legal aid to the poor and the history of the movement for furnishing such aid in the United States are set forth in: "Justice and the Poor: a study of the present denial of justice to the poor and of the agencies making more equal their position before the law, with particular reference to legal aid work in the United States," by Reginald

Heber Smith, Carnegie Foundation for the Advancement of Teaching. Bulletin No. 13 (1919); and "Growth of Legal Aid Work in the United States: a study of our administration of justice, primarily as it affects the wage earner, and of the agencies designed to improve his position before the law," by Reginald Heber Smith and John S. Bradway, Bulletin of the United States Bureau of Labor Statistics, No. 398 (January, 1926). Other general considerations of the subject are: "The Law and the Poor," by E. A. Parry (1915); "Poverty and Civil Litigation," by John M. Maguire, Harvard Law Review, Vol. 36 (February, 1923), and, by the same author, "The Lance of Justice: a semi-centennial history of the Legal Aid Society (of New York City 1876-1926," (1928). The subject of legal aid in England is handled in "Justice and the Poor in England," by F. C. G. Gurney-Champion (1925).

Of great value also are the "Record of Proceedings of the Annual Meetings" and the "Reports of Committees" of the National Association of Legal Aid Organizations. This organization was created in 1923 to take over and continue the work of the National Alliance of Legal Aid Societies and the National Conference of Legal Aid Bureaus and Societies which had been in existence for several years and had published their proceedings. The reports of the New York Legal Aid Society and the "Legal Aid News," also published by the society, can also be consulted with profit. The symposium, "Legal Aid Work," Annals of the American Academy of Political and Social Science, Vol. 124 (March, 1926), has the special value of giving the views of a large number of persons on the subject. A recent report of value is "Report of Committee on Legal Aid," Pennsylvania Bar Association (1927).

Judicial and Criminal Statistics. There is an almost complete absence of statistical data regarding the operation of courts in the adjudication of civil cases. Nor is there much in the way of the consideration of the problem of devising and operating a system for the collection and presentation of such statistics. One of the few contributions to this subject is the article "The Need of Statistical Information on Civil Litigation with Tables," by Albert Kocourek, in the Journal of the American Judicature Society, Vol. 1, April, 1918.

The matter of criminal judicial statistics has received more attention, and valuable information is to be found in the reports of commissions of inquiry into the administration of the criminal law in the United States, in the publications of such organizations as the Cleveland Association for Criminal Justice, and in the annual reports of certain municipal courts. Probably the most thorough study of criminal judicial statistics is the report made by the Department of Public Welfare of Georgia on "Crime and the Georgia Courts: a statistical analysis," which was published in the Journal of the American Institute of Criminal Law and Criminology, Vol. 16, August, 1925. A Committee on Statistics of the American Institute of Criminal Law and Criminology has outlined a system of records and statistics for use in criminal courts that is of value. Reference may also be made to "Report of the City Council Committee on Crime of the City of Chicago" (1915); "Crime in Detroit, 1916-1926," Detroit Bureau of Governmental Research, Public Business, March 1, 1927; "A Statistical Analysis of the Criminal Cases in the Courts of the State of New York for the year 1925," a report by the sub-committee of the Crime Commission of the State of New York (1927); and "Prisoners in Ohio," Ohio Institute, The Ohio Citizen, December 10, 1927. The Detroit Bureau of Governmental Research had now in preparation a comprehensive report on criminal statistics, the expenses for which are provided for by a special grant on behalf of the Committee on Standardization of Police Crime Statistics of the International Association of Chiefs of Police. This report when published will undoubtedly be of great value.

In respect to penal statistics proper, that is, statistics of prisoners committed to and in prisons, there is a wealth of literature in the form of annual reports of prison authorities. The national government has also made repeated attempts to secure statistics of prison population in connection with its decennial enumeration of population or as special enquiries.

The first attempt to secure data of this kind was made by the census of 1850. Special inquiries regarding this subject were also made in connection with the investigation of social statistics. This attempt was repeated at the censuses of 1860 and 1870, but at the latter census the inquiries were limited to the ones contained on the schedules for social statistics. At the censuses of 1880 and 1890,

use was made of supplemental schedules which called for information in greater detail concerning both the number of criminals and criminal judicial proceedings. In addition to the inquiries made on the supplemental schedule relating to crime at the census of 1880, various other sources of information were utilized in order to secure as complete data as possible concerning the criminal element of the population. The results of the 1880 investigation are contained in Volume XXI of the Reports of the Tenth Census entitled, "Defective, Dependent and Delinquent Classes." The results of the 1890 investigation appear in the report of the Eleventh Census entitled, "Crime, Pauperism and Benevolence." This report was made by Frederick Howard Wines.

No effort was made at the Twelfth Census, 1900, to cover this field, this being one of the subjects to be investigated after the conclusion of that census. Such a subsequent investigation was accordingly made, and the results appeared in 1907 as a "Special Report" under the title "Prisoners and Juvenile Delinquents in Institutions: 1904." The report consists of four parts: (1) The population of all prisons and reformatories for adults in the United States on June 30, 1904; (2) the commitments to all such prisons and reformatories during 1904; (3) the population of all special institutions for juvenile delinquents in the United States on June 30, 1904; and (4) the commitments to all such special institutions for juvenile delinquents during 1904. The classes treated are classified by sex, color, race, nativity, offense, and sentence, and shown by states and territories. In the case of prisoners committed during the year, previous occupations are shown.

Subsequent investigations made by the Census Bureau on these subjects are: "Prisoners and Juvenile Delinquents, 1910" and "Number of Prisoners in Penal Institutions 1922 and 1917." This Bureau has now undertaken an annual census of prisoners in federal and state prisons and reformatories, beginning as of January 1, 1927. On the nature of the reports to result from this enumeration, see the official pamphlet "Instructions for Compiling Criminal Statistics: a manual for the use of penal institutions, police departments, courts, prosecutors and parole and probation agencies" (1927). These reports will undoubtedly give authoritative statistics of criminals, but there will still be the need for data on the persons in jails and other local institutions.

For years Frederick L. Hoffman, Statistician of the Prudential Insurance Company, has published in "The Spectator," an insurance journal, statistics of homicide in the United States.

A list of publications, chiefly contributions to periodicals, on criminal and judicial statistics follows:

Falkner, Roland P. Statistics of Crime in the United States. Proceedings, Academy of Political Science, Vol. 1, July, 1911.

Fosdick, Raymond B. Crime in America and the Police. 1920.

Healy, William. Critique on Recording Data Concerning Criminals. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Kocourek, Albert. The Need of Statistical Information on Civil Litigation, with Tables. Journal of the American Judicature Society, Vol. 1, April, 1918.

Koren, John. Crime from a Statistical Viewpoint. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Robinson, Louis N. Criminal Statistics and Identification of Criminals. A Report Submitted to the Sub-Committee of the National Crime Commission on Pardons, Parole, Probation, Penal Laws and Institutional Correction. National Municipal Review, Vol. 16, December, 1927.

——— The History and Organization of Criminal Statistics in the United States. 1911.

——— The Need for Adequate Criminal Statistics. Journal of the American Statistical Association, Vol. 23, Supplement, March, 1928.

Truesdell, Leon E. The Problem of Collecting and Standardizing Statistics of Crime in Forty-eight States. Journal of the American Statistical Association, Vol. 23, Supplement, March, 1928.

Uspon, Lent D. Crime Statistics as a Police Problem. Journal of the American Statistical Association, Vol. 23, Supplement, March, 1928.

Wardens Association of the United States and Canada. Statistics of Prisoners 1890; with an introduction by Roland P. Falkner. 1892.

Willcox, Walter F. The Need of Social Statistics as an Aid to the Courts. American Law Review, Vol. 47, March-April, 1913.

Psychopathic Clinics for Courts. There is a large amount of literature dealing with the general problem of psychopathic examination of the defective and delinquent classes. On the special subject of the use of psychopathic clinics by courts, see the following articles in the Journal of the American Judicature Society: "Psychopathic Laboratory of the Municipal Court of Chicago Points the Way to Solution of Great Problem of Delinquency," Vol. 2 (October, 1918); "The Psychopathic Laboratory; Head of the Municipal Court of Chicago on work of the psychopathic laboratory of his court in the field of the criminal defective," Vol. 4 (June, 1920); "The Psychopathic Clinic in a Criminal

Court: its uses and possibilities," Vol. 7 (June, 1923); and "Crime and Heredity," by Harry Olson, Chief Justice of the Municipal Court of Chicago, Vol. 7 (August, 1923); and books as follows: "Elements of Crime," by B. L. Brasol and W. A. White (1927); "New Criminology," by Max Schlapp and E. H. Smith (1928); "Legal Psychology," by M. R. Brown (1926); "Insanity and the Criminal Law," by W. A. White (1923); and "Crime, Abnormal Minds and the Law," by E. B. Hoag (1923).

English Judicial System. There is a vast literature dealing with the English judicial system. The most valuable literature from the standpoint of the present study, however, is the works and articles written by Americans and having for their purpose to describe those features of the English system which are different from the American system and may be with profit incorporated in the latter. The most important are the studies by Samuel Rosenbaum: "The Rule Making Authority in the English Supreme Court" (1916); "Studies in English Civil Procedure; the (English) county courts," in University of Pennsylvania Law Review, Vol. 64 (February-April, 1916); the studies by Edson R. Sunderland, "An Appraisal of English Procedure," Reports, American Bar Association, 1925, reproduced in the First Report of the Judicial Council of Massachusetts, 1925, and also in Journal of the American Judicature Society, Vol. 9, (April, 1926), as well as in several other periodicals; and "Hundred Years War for Legal Reform in England," Massachusetts Law Quarterly Vol. 12 (November, 1926); also the "Report of Robert G. Dodge on Certain Features of English Practice," in the First Report of the Judicial Council of Massachusetts, 1925, "A Philadelphia Lawyer in the English Courts," by Thomas Leaming (1911); "Criminal Procedure in England: Report of the Committee on Reform in Legal Procedure of the American Institute of Criminal Law and Criminology," by John D. Lawson and Edwin R. Keedy, in the Journal of the American Institute of Criminal Law and Criminology, Vol. 1 (November, 1910), reprinted as Sen. Doc. 495, 63d Cong., November, 27, 1914; and "English Courts and Procedure," by W. E. Higgins, American Judicature Society, Bulletin XI. Other articles are:

Griffiths, John L. Legal Procedure in England. Annals of the American Academy of Political and Social Science, Vol. 52, March, 1914.

Kales, A. M. A Comparative Study of the English and Cook County Judicial Establishments. Illinois Law Review, Vol. 4, December, 1909.

——— The English Judicature Acts. Illinois State Bar Association, Proceedings, 1913.

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Macy, Jesse. The Efficiency of English Courts. McClures Magazine, Vol. 33, September, 1909.

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INDEX

Accusatorial system
  Compared to inquisitorial, 205, 206-08
  Description of, 195-203
Accused
  Comment on refusal to testify, 467, 473-77
Adkins, Jesse C.
  Grand jury operation, 176-80
Administrative adjudication
  Advantages of administrative agencies as fact-finding bodies, 18-21
  "Blue Sky" laws, 37
  In England, 38
  License and permit systems, 23
  Movement for increase of, 21
  Personal damage cases, 30-33
  Public utilities, 28
  Small loan laws, 37
  Tax matters, 21
  Trade practices, 24
  Wage claims, 33
  Workmen's compensation commissions, 26
Administrative branch
  Agencies for judicial administration, 9-10
  Responsibility for judicial administration, 8-9
Administrative courts, 227-31
Advisory opinions
  Character of, 86, 87
  Defined, 85
  In England and Canada, 85
  In United States, 86, 87
Alibi
  Plea of, 449
American Bar Association
  Adjudication on matters of procedure, 417-18
  Admission to bar requirements, 406-09
  Business administration of courts, 339-40
  Controlling force of rules, 437
  Court records and statistics, 347
  Justice of the peace courts, 305
  Method of selecting judges, 373-80
  Office of clerk of court, 341, 342
  Organized bar, 403-05
  Report of Committee on Judicial Reform, 256-59
  Small claims procedure, 316-19
American Judicature Society
  Controlling force of rules, 438
  Declaratory judgment, 82-83
  Model conciliation act, 41
  Organized bar, 401-04
  Unitary court, 255
American Law Institute
  Statement of law by, 17
Appeals
  Double, 524-27
  In England, 531-32
  In unitary court, 532
  Nature of action on, 529
  Problem of, 513-32
  Right or grant, 521
  Subject matter of, 516-21
  To U. S. Supreme Court, 522-24
Appellate courts, 238, 525
Arbitration
  Advantages of, 53-55
  Agreement to arbitrate, 55-56, 59, 62, 69-71
  California act, 65-66
  Court review, 57, 60-61, 65
  Distinguished from conciliation, 40, 53
  Enforcibility of agreements, 56, 65, 67
  Enforcibility of awards, 56, 65, 67
  England, 58-64
  Federal act of 1925, 66-69
  Field for, 54
  Government contracting, 75-76
  Industrial disputes, 76-77
  International commercial disputes, 77-79
  Massachusetts act, 65-66
  Model act, 66
  Motion picture industry, 72-73
  New Jersey act, 65-66
  New York act, 64-65

Oregon act, 65-66
Procedure, 57
Requirements of, 55-58
Selection of arbitrators, 57-58, 61
Trade associations, 56, 60, 61, 71-75
United States, 64-77
Arraignment
Nature of, 202
Arrest, 223
Compensation for wrongful, 101-02
Right to make, 197-99
Summons in lieu of, 199-201
Attorney. See *Bar*.
Attorney General
Functions of, 115
Relation to governor, 111

Bail
Faulty administration of, 561-66
Bailey, Joseph W.
Personal failings of judges, 393
Baldwin, Simeon E.
Arrest, power to, 198
Consolidation law and equity courts, 235
Dissenting opinions, 218
French inquisitorial system, 205-06
Grand jury, 184-85
Hearsay evidence, 472-73
Justice of the peace courts, 303-04
Multiplicity of appeals, 513-14, 526-27
Personal failings of judges, 392-93
Right of comment on refusal of accused to testify, 474-75
Right of judge to comment on evidence, 463
Balster, Wilfred
Probation system, 542-43, 544-45
Baltimore
Municipal court proposed, 297-98
Bar
Admission to, 399, 404-09
Educational requirements, 405-09
Ethics, 409
Function in respect to selection of judges, 374-79
Legal aid function, 596, 599-602
Regulation of conduct, 400, 404
Status of members, 399
Statutory organization of, 400-05
Bettman, Alfred
Lack of coordination of prosecuting attorney and police, 135
Prosecuting attorney as local minister of justice, 130-39
"Blue Sky" laws
Enforcement of, 37
Borchard, Edwin M
Civil liability of judges, 358
Declaratory judgment, 81, 84
State indemnity for judicial error, 100, 104
Boston, Charles A.
Petty jury, 491-92
Bradway, John S.
Office of legal aid, public, 591-92
Brown, Rome G.
Independent judiciary, 356
Burdick, C. K.
Alibi and insanity pleas, 451
Summons, use of, 200-01
Bureau of Identification, 159-61

California Commission on Reform of Criminal Procedure
Petty jury, 501, 512
Power of judge to comment on evidence, 465-66
Rôle of judge, 458-59
Sentence, 538-39
Sentence by administrative board, 553
Unsatisfactory condition of judicial administration in United States, 5, 6
Canada
Advisory opinion in, 83-84
Petty jury, use of, 493-94
Carpenter, W. S.
Judicial tenure, 385
Removal of judges, methods of, 390
Selection of judges, methods of, 372, 380
Chicago Crime Commission
Probation administration, 546-47
Chicago Municipal Court, 282-90
Domestic relations branch, 286-87, 329-30
Small claims branch, 314
Chief Executive
Emergency powers, 113

Law enforcement functions, 8-9, 91-99, 105-14
Relation to Attorney General, 111-12
Use of military forces, 113
Chief Justice
Administrative functions of, 255-56, 261-62, 339-40
Administrative powers, Chicago Municipal Court, 284
Administrative powers, New York City Municipal Court, 296-97
Children's Courts. See *Juvenile Courts*
Choate, Joseph H.
Petty jury, 497-501
Right of judge to comment on evidence, 463-64
Civil courts, 231-33
Clerk of Court
Duties and requirements of, 340-42
Cleveland Municipal Court, 298-99
Conciliation branch, 45-46, 311-13
Cleveland Survey
Abolition grand jury, 191-92
Abolition office of coroner, 167
Bail, 562
Method of selection of judges, 363-64
Police administration, 155-56, 157-58
Private practice, prosecuting attorney, 132
Probation administration, 547
Prosecuting attorney, 133-35, 136
Sentence, 539, 540
Unsatisfactory condition of judicial administration in United States, 5
Common law courts, 233
Consolidation with equity courts, 234-37
Conciliation
Advantages of, 42
Cleveland Municipal Court, 45-46
Definition, 41
Des Moines Municipal Court, 51
Distinguished from arbitration, 40
Memphis Municipal Court, 46-48
Model act for, 41
Necessity for legal provision for, 40
New York Municipal Court, 48-50
North Dakota act, 50-51
Norway and Denmark, 42-45
Present situation in United States, 51-52
Constabulary. See *Police*
Contempt
Power of court to punish for, 219, 225
Contract forms
Improvement of, 15
Standard, 16
Coroner, office of
Duties, 164-65
History, 163-64
Proposed abolition of, 165-69
See also *Medical Examiner, office of*
Costs
Action *in forma pauperis*, 574
Counsel, 576
Court, 571-73
Miscellaneous, 573-75
Poor litigants statute, 603-04
See also *Legal Aid; Public Defender*
Counsel
Assignment of, 578-81
Elimination of need for, 576-77
See also *Legal Aid*
County courts, 245
Courts
Administrative powers, 220-22
Advisory function, 220
Analysis of functions, 10-11, 211
Business administration of, 255-56, 261-62, 338-50
Classes of, 227-38
Comparison American and Canadian system of, 248-49
Control of administrative agencies, 18
Control of bar, 401
Determination and construction of law function, 215-18
Dual system, federal and state, 247-53
Enforcement powers, 222-26
Fact determining function, 212
Injunction power, 219
Power to nullify laws, 217-18
Records and reports, 242-45

Rule-making powers, 226, 420-39
Specialization in, 260-61
See also special names for particular classes of courts
Courts of record, 238
Crane, Newton
Office of master, England, 452-54
Crime
Prevention of, 13
Criminal courts, 231-33
Criminals
Segregation of, 14-15

Declaratory judgments
Defined, 80
In England, 89
Movement for in United States, 82-84
Demurrer
Abolition of, 445-46
Denmark
Conciliation in, 42-45
Department of Justice
Federal, 118
Louisiana, 121
Need for in cities, 139-41
Need for in states, 119-21
Porto Rico, 121
Proposed in England, 124-26
Des Moines Municipal Court
Conciliation branch, 51
Detroit Recorders Court, 290-91
Disclosure. See *Discovery*
Discovery, 446-50, 452-54
Dissenting opinion, 218
District Attorney. See *Prosecuting Attorney*
Dodd, W. F.
Administrative powers of courts, 220-21
Attorney General, power of, 116
Consolidation law and equity courts, 236
Coroner, abolition of, 116
Grand jury, 182
Petty jury, size of, 504; unanimity requirement, 507-08
Power of courts to nullify legislation, 362

Domestic relations courts
Administrative character of, 335-37
Chicago Municipal Court, 286-87, 329-30
Consolidation with juvenile courts, 330-33
Fundamental features of, 333-37
History, 324-30
Psychological clinics, 334-35

Ellingwood, Albert R.
Advisory opinions, 85, 86, 87
England
Administrative adjudication in, 38-39
Advisory opinions in, 83-84
Appeals, nature, of, 531-32
Arbitration in, 58-64
Declaratory judgment in, 80-82
Department of justice, proposal for, 124-26
Early criminal administration in, 93-94
Equity courts, rise of, 233
Independent judiciary, 354-55
Judge, rôle of, 450, 459-61
Judicial council, 279
Judicial procedure, general characterization of, 428-29
Master, office of, 310, 446, 447-49, 451-54
Petty jury, rise of, 483-87
Police, rise of, 144
Procedure, court, 447-49
Small claims procedure, 309-10
Equity courts, 233-34
Consolidation with common law courts, 234-37
Evidence
Admissibility of, 471-72
Complexity of rules regarding, 468-70
Expert, 479
Hearsay, 472-73
Rules of, 416

Family courts. See *Domestic Relations Courts*
Federal courts, 239-43
Rule-making powers, 432-36
Form of action, 440-43

Formalism
Common law, 441-43
Fosdick, Raymond B.
Police administration, 147, 148, 152-53, 154, 155-56, 157-58
France
Criminal procedure in, 203-08
Frankfurter, Felix, and James M. Landis
Federal judiciary, 252-53

Garner, James W.
French inquisitorial system, 204-05, 206
Petty jury, 505-06, 510-11
Procedure, 425-26
Right of judge to comment on evidence, 462
Gemmil, W. M.
Domestic relations branch Chicago Municipal Court, 329
Goodnow, Frank J.
Administrative courts, 230-31
Governor. See *Chief Executive*
Grand Jury
As organ for special investigations, 192, 193-94
Constitutional provisions regarding, 186-87
Evolution of, 180-86, 190-93
Functions and procedure, 176-80
History, 174-76
Non-use of in Michigan, 188-89
Size, 187
Use of in England, 185-86
Use of in United States, 186-88

Habeas corpus, 225
Habitual offender acts, 537-38
Hadley, Herbert S.
Right of judge to comment on evidence, 466-67
Hall, James Parker
Method of selection of judges, 362-63
Hamilton, John Alan
Legal aid societies and the bar, 600-02
Harley, Herbert
Chicago Municipal Court, 282-83, 329-330
Conciliation branch, Cleveland Municipal Court, 46
Justice of the peace court, 306
Revision judiciary article, Missouri Constitution, 275
Rule-making power, Chicago Municipal Court, 286
Hart, H. H.
Juvenile courts, 322-33
Henderson, Girard C.
Federal Trade Commission and the courts, 25
Hughes, Charles E.
Statutory organization of bar, 403

Impeachment
Removal of judges through, 388-95
Indeterminate sentence. See *Sentence*
Indictment
Technical wording of, 189
See also *Grand Jury*
Industrial disputes
Arbitration of, 76-77
Information
Use of, 188-90
See also *Grand Jury*
Injunctions, 219
Inquisitorial system
Compared with accusatorial, 205-08
Description of, 203-06
Insanity
Plea of, 449, 480

Jacoby, A. L.
Psychopathic clinic, 555
Johnstone, Alan
Domestic relations court, Cincinnati, 335-36
Joint address
A method of removal of judges, 389-91
Judges
Civil liability of, 357-59
Guaranteed compensation, 359
Impeachment, 388-89, 390-95
Liability for improper action, 102
Method of selection, 361-81
Personal failings of, 392-95
Recall of, 306-97
Removal, German system, 398
Removal, methods of, 388-98

Right to comment on evidence, 459-67
Rôle in selecting jury, 512
Rôle in small claims courts, 317
Rôle of, 455-67
Tenure of office, 359, 384-87
Judicial councils, 264-80
Judicial error
Indemnity for, 100-04
Judiciary. See *Judges*
Judiciary, independent
Means of securing, 357-60
Need for, 353-57
Juge d'instruction, 203-05
Jury. See *Grand Jury; Petty Jury*
Justice
Free administration of, 99
Justice of the peace courts
Description of, 243-44
Proposed abolition of, 302-06
Juvenile courts
Administrative character of, 335-37
Consolidation with domestic relations courts, 330-33
Fundamental features of, 333-37
History, 320-23
Psychological clinics, 334-37

Kavanaugh, Marcus A.
Controlling force of rules, 437-38
Judicial administration in United States, 67
Keedy, Edwin R.
Information, 189

Lauer, Edgar J.
Conciliation work, Municipal Court of New York City, 48-50
Law
Adjective distinguished from substantive, 8
Restatement of, 16-17
Use of bill-drafting agencies in formulation of, 17
Law, enforcement of
Centralization and decentralization in, 11, 108, 116, 120, 122-24
Criminal, attitude of government towards, 93-95, 107-12
Function of executive, 8-9
General problem of, 3-12
Importance of, 3
Joint responsibility, judicial and administrative branches, 8-9
Private, attitude of government towards, 95-96
Public, 93, 105-07
Unsatisfactory conditions in United States, 3-7
Law schools
Rise of in United States, 406
Legal aid organizations
Bar association committee on, 596
Compensation, 598-99
Need for, 594
Organization of in United States, 595
Public, 589-93
Relations with other organizations, 599
Scope of work, 597-98
Services for judicial reform, 602
Legal aid, public
Argument for, 97-99
Legal education. See *Bar*
Lehman, Frederick W.
Appeal in unitary court, 532
Form of action, 441
Form of indictment, 414
Levine, Manuel
Justice of peace system, Cleveland, 303
Litigation
Elimination of causes of, 15-17

Magrath, George Burgess
Medical examiner system, 171
Maguire, John MacArthur
Court acts, 574
Maitland, F. W.
Origin of petty jury, 483-84
Marx, Robert S.
Administrative adjudication of personal damage cases, 30
Massachusetts Judiciary Commission
Appeals, 516-17
Domestic relations courts, 327
Force of rules, 423
Masters
England, 310, 446, 447-49, 451-54
Mathews, J. M.
Decentralization of judicial administration, 108-11, 117, 118

Need for greater centralization in judicial administration, 119-20, 122-23
Medical examiner, office of
Massachusetts and New York, 169-73
See also *Coroner, office of*
Michigan Commission on Inquiry into Criminal Procedure
Petty jury, 502
Millar, Robert W.
Alibi as a defense, 450
Miller, R. Justin
Grand jury, 183
Minneapolis Municipal Court
Conciliation branch, 46-48
Minnesota Crime Commission
Sentence by administrative board, 552
Missouri Crime Survey
Abolition office of coroner, 166-67
Parole administration, 549
Petty jury, 502
Police administration, 148
Motion picture industry
Arbitration in, 72-73
Municipal courts
Baltimore, 297-98
Chicago, 282-90, 314, 329-30
Cleveland, 45-46, 298-99, 311-13
Description of, 245-46
Des Moines, 51
Detroit Recorders Court, 290-91
Minneapolis, 46-48
Need for unified, 299-301
New York City, 48-50, 291-97
Philadelphia, 314
Rise of in United States, 281-82
Murdoch, H. B.
Origin of petty jury, 483, 487

National Association of Legal Aid Organizations
History and description of, 595-96
National Crime Commission
Bail, 565-66
Insanity plea, 480-81
Nolle prosse, 141
Petty jury, 503, 508
Power of judge to comment on evidence, 466-67
Rôle of judge, 458
New York City Municipal Court, 291-97
Conciliation procedure, 48-50
New York Crime Commission
Abolition office of coroner, 167
Justice of the peace courts, 306
Nolle prosse, 141
Police administration, 153, 156-57
Power of judge to comment on evidence, 446
Nolle prosse
Power of prosecuting attorney, 129, 137
Statement of reasons for, 140-41
Norris, Charles
Medical examiner system, 172-73
Norway
Conciliation in, 42-45

Olson, Harry
Chief Justice, Chicago Municipal Court, 284-85
Grand jury, 181-82
Segregation of criminals, 14

Pardon
Nature of, 550
Provisions governing in United States, 550-51
Parole
Faulty administration of, 549
Nature of, 548
Requirements of, 549
Perkins, Willis R.
Domestic relations courts, 326, 328
Personal damage cases
Administrative adjudication of, 30-33
Petty jury
Civil cases, 489-501
Criminal cases, 502-03
Evaluation of, 488-512
History, 482-88
Modification of, 503-12
Selection of, 509-12
Size, 503-04
Unanimity requirement, 503-09
Philadelphia Municipal Court
Conciliation, small claims and legal aid division, 314
Pleading, 444-46

Police
Bi-partisan board, 148
Board type of administration, 152
Federal, 162
History, 144-45, 151
Internal organization, 152-57
Political authority controlling, 145, 146-49
Recruitment and promotion, 157-58
Relation of prosecuting attorney to, 132-35, 139-41
Specialization of functions, 161-62
Police courts, 244
Posse comitatus, 225
Pound, Roscoe
Courts as agencies for enforcement of public law, 18-19, 21
Importance of prosecuting attorney, 128
Justice and the poor, 569
Rôle of judge, 456
Rôle of rules of procedure, 418-19
Statutory organization of the bar, 402-03
Unsatisfactory condition of judicial administration in United States, 4
Preliminary examination, 174, 191-93, 201-02
Probate courts, 245
Probation
Children and domestic relations courts, 334
Definition, 541, 542
Faulty administration of, 545-47
History, 542-43
Requirements of, 543-48
Procedure
Comparison courts and administrative bodies, 214
Controlling force of rules of, 417, 420-39, 518
Dominance of formalism, 416
Judicial, dual character of, 457
Preparation of case, 440-50
Rôle of judge in administering, 455-67
Single form of action, 440-43
Technical character of 413-17
Prosecuting Attorney
As agent of Department of Justice, 120
As local minister of justice, 138
Fee system, 132
Foreign countries, 131
Importance of, 127-29
Lack of business methods, 135-37
Legal status, 130-31
Powers, 127-28
Private practice, 131
Relations to grand jury, 176-80
Relations to police, 132-35, 139-41, 151-52
Responsibility for coroner's work, 165-66, 173
Responsibility for initiating prosecutions, 181-85
Proskauer, Joseph M.
Complexity of rules of evidence, 469-70
Petty jury, 495-96
Psychopathic clinic, 334-37
As adjuncts to courts, 554-56
Chicago Municipal Court, 287
Detroit Recorders Court, 291
Rise of in United States, 556-57
Public Defender
Arguments for, 584-86
Connecticut act, 582-83
Problem of, 586-88
Rise of in United States, 582-84
Public utility commissions, 28-30
Punishment
Capital, 434-35
Character of, 434
Corporal, 536
Fine, 537
Imprisonment, 536
Individualization of, 533-34, 558
Sterilization, 537

Records, reports, and statistics
Bureau of, Judicial Council, North Dakota, 272
Character of needed, 342-50
Lack of, 343
Municipal courts, 344
Office of prosecuting attorney, 136-37
Police, 158-59
Reports. See *Records, reports, and statistics*
Reynolds, James Bronson
Public defender, 585
Right of comment on refusal of defendant to testify, 475-76

Riddell, W. R.
Petty jury in Ontario, 493-94
Root, Elihu
Administrative adjudication of claims, 28
Right of judge to comment on evidence, 462
Statutory organization of bar, 403
Unsatisfactory condition of judicial administration in United States, 4
Rosenbaum, Samuel
Arbitration, 54, 58
Arbitration, Great Britain, 61, 62-63
English trade association standard contract form, 16
Rule-making powers, 226, 420-39
Chicago Municipal Court, 285-86
Judicial determination, 421-36
Legislative determination, 421-36
Massachusetts small claims courts, 315

Salmon, Thomas H.
Conciliation branch, Minneapolis Municipal Court, 47
Sentence
As part of judicial process, 533-34
Character of, 434
Imposition by administrative board, 551-54
Indeterminate, 540
Judicial discretion in fixing, 538-39
Mitigation of, 539
Remission of, 550
Suspended, 550
See also *Punishment; Probation; Pardon; Parole*
Shafer, George G.
North Dakota conciliation act, 50-51
Shelton, Thomas W.
Rule-making power of federal courts, 436
Sheriff, office of
Duties, 143-44
History, 142
Small claims courts
Chicago Municipal Court, Small Claims Branch, 314
Cleveland Municipal Court, Conciliation Branch, 311-13
District Court for Multnomah County, Small Claims Department, 313-14
England, 309-10
Kansas small debtors' courts, 311
Massachusetts, California, South Dakota, Nevada, Idaho, and Iowa, small claims court acts, 315-16
Movement for in United States, 310-19
Need for, 307-09
Requirement of, 309, 316-19
Spokane, 314
Small loans acts
Enforcement of, 37
Smith, Herbert Arthur
Comparison of American and Canadian court systems, 248-49
Smith, Reginald Heber
Administrative adjudication of wage claims, 35
Administrative adjudication of workmen's compensation claims, 27-28
Advantages of administrative adjudication, 39
Assignment of counsel, 480
Causes for limited success of conciliation, 52
Conciliation Branch, Cleveland Municipal Court, 311-13
Conciliation defined, 40
Court costs, 572-73
Domestic relations courts, 326
Justice and the poor, 570
Office of legal aid, public, 589, 591-92, 593
Public defender, 584-85
Pubic legal aid, 98-99
Small claims courts, 307-08
Small Claims Department, District Court for Multnomah County, Oregon, 313
Small claims procedure, 319
Specialization
Chicago Municipal Court, 286
Detroit Recorders Court, 290
State constabulary
Creation of, 149-50
Porto Rico and Philippines, 150, 155
Possible general use of, 150, 155

State courts, 243-47
Statistics. See *Records, Reports, and Statistics*
Stokes, Harold W.
Pardons, 550-51
Stone, Harlan F
Action upon appeal, 530
Arbitration, 70-71
Double appeal, 520-26
Form of action, 441-42
Formation of rules, 429-30
Impeachment process, 394
Prosecuting attorney, criticism of work of, 130-31
Summons
Use of in lieu of arrest, 199-201
Sunderland, Edson R.
Complexity of rules of evidence, 468-69
Declaratory judgments, 81, 84
Discovery, 447-49
Dominance of procedure in adjudication, 417-18
English appeal system, 531-32
Formulation of rules, 422, 428, 431
Judicial, dual character of procedure, 457
Right of judge to comment on evidence, 464
Small claims procedure in England, 310
Suspended sentences. See *Sentence*
Sutherland, George
Formulation of rues, 422
Rule-making power, federal courts, 433

Taft, William H.
Administrative adjudication of personal damage cases, 33
Appeals, 524, 526
Consolidation law and equity courts, 239
Federal judicial conference, 276, 278
Independent judiciary, 356-57
Multiplicity of appeals, 515
Need for judicial statistics, 347-48
Petty jury, 493, 511
Public legal aid office, 591
Right of comment on refusal of accused to testify, 474
Right of judge to comment on evidence, 462-63
Rule-making power ot federal courts, 433-34
Unsatisfactory condition of judicial administration in the United States, 4
Tenure. See *Judges*
Testimony. See *Evidence*
Thelen, Max
Procedural methods, utility commissions, 29
Trade associations
Arbitration by, 56, 60, 71-75
Standardization of contract forms, 16
Train, Arthur
Importance of prosecuting attorney, 127-28

Unitary courts
Appeals in, 532
Argument for, 254-63
Model act for, 262
Movement for in United States, 262-63
Municipalities, 299-301
Need for in Chicago, 287-90
Need for in New York City, 295
United States commissioners, 240-41

Wage claims
Adjudication of, 33-36
California and Massachusetts system for enforcement of, 34-36
Washington, George
Provision for arbitration in will, 64
Wigmore, John H.
Compensation for judicial errors, 103
Conciliation Branch, Cleveland Municipal Court, 46
League of Nations study of legal aid societies, 596
Wilbur, Curtis D.
Unanimity requirement, petty jury, 509,
Witnesses
Status of, 477-78
Workmen's Compensation Commissions, 26-28
Writs, 225

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