

NOTES ON JUDICIAL ORGANIZATION AND PROCEDURE

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The Judicial Council Movement. Woodrow Wilson wrote that no government is better than its courts, to which ex-President Taft replied that our judicial failure has been more outstanding than our failure in municipal government. The task of making our courts as efficient as possible is thus both an important and an urgent one.

Many factors have contributed to the present charges of inefficiency, but none perhaps of greater weight than that of delay. This has been particularly true of the larger cities, with their principal trial courts as much as two years behind in their work. The jury system, both in its expense and delays and in its freedom from control by the courts, has been a frequent source of complaint. English and Canadian writers have been telling us that their juries are generally selected in a few minutes, and that almost never does it take more than half an hour. Having impanelled the jury, the case is disposed of expeditiously, even murder cases consuming but three or four days at most. In Detroit, a murder case was called just as a judge of the Ontario High Court arrived to hold the assize court directly across the river. The Canadian judge tried nearly thirty contested cases, divided equally between criminal and civil actions, sent nine persons to the penitentiary, and adjourned court while in Detroit the jury was still incomplete.

Such comparisons are anything but complimentary to our courts and their procedure. Business has been driven to a realization that even a lean settlement is to be preferred to a law-suit. Substitutes for court action are being found not only in commercial arbitration, but also in administrative boards and commissions. Charges are heard that the rapid expansion of the scope of administrative activity is "standing proof of the inability of our unorganized and decentralized judicial systems to expand to meet modern needs." Dean Pound has expressed fear lest, in the wake of the administrative board, "nothing of importance be left to the courts." Although it may well be that commissions have a more fundamental place to fill than merely to supersede court action, the fact that their development has been hastened by the inability of the courts to keep pace with the social system seems incontestable.

In no other country of the world is so great a force maintained for a given amount of litigation. Yet, in frantic efforts to enable the courts to keep up with their work, we continue to add judge after judge to the bench, only to find that the defects are more fundamental than can be solved by mere numbers. Early in the present century a concerted movement was started to find ways for the more efficient utilization of the existing judicial machinery. One of the most promising products of this movement is the judicial council.

English Court Administration. Our state and federal judicial systems were founded upon the concepts of independence and localism. Not only were the courts rendered independent of the other departments of government, but each court was made largely independent of the others. As expressed by Chief Justice Taft, each judge was free to paddle his own canoe. This independence was further enhanced by the second concept, whereby the courts of each section were virtually distinct from those of the rest of the state or nation. The problem that had to be met was how to knit this mass of courts into a unified whole, and to provide some sort of effective administrative supervision. Above all, a need was felt for some agency whose duty it would be to make a continuous study of the working of the courts, and to advise as to changes that must of necessity be made from time to time. Leaders of bench and bar alike agreed with Judge Cardozo that the absence of some such agency was "one of the anomalies of our legal institutions."

In opening the crusade for a more scientific administration of our courts, Roscoe Pound had called the attention of the legal profession to the advantages of the modern English court organization and procedure.¹ The conspicuous success of the English reforms, as contrasted with our own half-hearted measures, gave promise of a solution. It was but natural that we should turn to them for guidance.

The first glance was singularly disappointing. England has rejected both of the traditions of our court system, and has clung instead to centralized authority within a centralized court. We have no official comparable to the Lord Chancellor, who not only is the true head of all the courts of England and Wales, but also knits together the courts, the cabinet, and Parliament. It was obvious that nothing approaching the English system of organization could be secured without thorough-going amendment of our constitutions; and even then, to secure an

¹ "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 *Am. Bar Assoc. Rep.* 395 (1906).

official occupying the position of a Lord Chancellor was, for the time at least, out of the question. But it was equally obvious that the securing of many of the essentials of the English reforms, such as the mobility of judges and a simplified procedure, need not wait for such a change. We took another look, and our eye fell upon the Rules Committee.

This committee is one of the outstanding contributions of the English reforms to judicial organization, and its success in guiding the development of a business-like procedure is still the marvel of the common law lawyer. Here we saw a small council, made up of *nisi prius* as well as appellate judges, and since 1894 of practicing lawyers as well, proving its worth as an executive agency in one of the most important fields of judicial administration. Why not adapt such a committee to the wider demands of our own court systems? The idea seemed practicable, and it appeared to fit in with the proposals of the leaders for reform.

Judicial Councils Established. It would seem that this movement did not bear definite fruit until 1922, when Ohio provided for the first modern judicial council, and the federal government set up a Board of Senior Circuit Judges. As early as 1913 Wisconsin had established a Board of Circuit Judges, made up of all of the principal *nisi prius* judges of the state. This board, which has met annually since that date, has instituted various reforms in practice and procedure. Through the power of the chairman to "request judges whose calendars are not congested to assist those judges whose calendars are congested," it has been instrumental in equalizing the work of the courts and, except in Milwaukee, in keeping them well up with their work. But the Wisconsin experiment does not seem to have attracted the immediate attention of the other states.

Two years later New Jersey and Colorado, the first by statute, the second by order of the supreme court, set up councils to recommend changes in the rules of practice and procedure. Neither was given administrative powers, and the scope of their activity was too restricted to satisfy the needs of the situation. Neither has been active, and the Colorado council, although still maintaining a paper existence, has lapsed into a state of complete desuetude.

In 1919 the legislatures of two states, Massachusetts and Oregon, appointed commissions to study the entire field of judicial organization and to recommend ways and means of improvement. The Massachusetts commission stated that "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 of individuals," and recommended the establishment of a permanent official body, composed of lawyers and judges, to perform these functions. Chairman Carey of the Oregon commission made a similar suggestion.

Neither legislature acted at the time, and Ohio stepped in to establish what is generally spoken of as the first judicial council. A statute of 1922 made provision for a council consisting of four judges of appellate courts, two *nisi prius* judges, and three practicing attorneys, the chief justice of the supreme court being chairman. The council is required to render biennial reports to the legislature, in addition to submitting suggestions from time to time for the consideration of the judges of the various courts. Power is given the council to compel witnesses to appear and testify, and to require the clerks of the various courts to render periodic reports. The statute is one of the most complete and best drafted of all the judicial council acts, but the legislature has always failed to make the necessary appropriations for expenses. The chief justice reports that consequently the council "has never functioned except in the most perfunctory way. . . . We [the members of the council] have felt that it is useless to try to do anything without funds, and we have also felt that it was hardly the proper thing to solicit private funds, fearing that the people, and perhaps the legislature as well, would feel that anything that might be recommended by the council would reflect the notions of those who had contributed to its expenses."² The council has never made a report to the legislature, and has made but few suggestions to the judges of the various courts.

In spite of the failure of the Ohio act, the year 1922 did not pass without a definite advance being made. Ex-President Taft, always a leader in the movement for judicial reform, now enjoyed the added prestige that accompanies our highest judicial office. In 1914 he had proposed that "authority and duty should be conferred upon the head of the federal judicial system, either the Chief Justice or a council of judges appointed by him, or by the Supreme Court, to consider each year the pending federal judicial business of the country and to distribute the federal judicial force . . . through the various districts and intermediate appellate courts" in accordance with the amount of business to be done.³ It is clear that the essentials of his proposal were the mobility of judges and some sort of administrative control to make this

² Letter from Carrington T. Marshall, president of the council, dated August 18, 1928.

³ "Attacks on the Courts and Legal Procedure," 5 Ky. L. Jour. 14-15.

mobility effective; precisely what sort of body should wield this control was of less immediate importance. When the Senate bill of 1921 to provide for additional judges was amended to provide for a Conference of Senior Circuit Judges, the Chief Justice immediately threw his influence behind the bill.⁴ Its passage in the latter part of 1922 marks one of the most forward-looking steps yet taken by Congress for the unification and efficiency of the federal courts. The provision for the mobility of district judges, under the supervision of the Chief Justice and the senior circuit judges, runs counter to the traditions both of independence and localism, and would appear to indicate a turning point in our federal court system. Many writers have refused to recognize the Conference as a judicial council because it is composed solely of appellate judges, neither the *nisi prius* courts nor the bar being represented. However this may be, it has undertaken the work of such a council and is entitled to rank beside the most successful of them.⁵

With the impetus given by the federal and Ohio acts, agitation for the creation of judicial councils bore fruit in a number of states. In 1923 Oregon established a small council of five, two appellate and three *nisi prius* judges. The next year Massachusetts created a council numbering four attorneys among its nine members. These were followed a year later by California⁶ and Washington, and in 1927 Connecticut, Kansas, and Rhode Island completed the list to date. North Carolina and North Dakota followed the Wisconsin plan of a conference of all the judges from the principal courts of the state.

Composition. Except for the federal Conference, which contains only appellate judges, and those states which have adopted a general conference of judges rather than a representative committee, the composition of the judicial councils now existing is fairly uniform. Their size varies from five members in Oregon to eleven in California, nine being the most favored number. In each case the final court of appeals is allotted from one to three members, the *nisi prius* courts from two to six. Ohio and California allot one and three seats, respectively, to their intermediate appellate courts. All but two states, Oregon and California, provide for membership of practicing attorneys who hold

⁴ It is possible that the proposal for the Conference originated with him. See the statement of Representative Walsh in the House, 62 Cong. Rec. 202.

⁵ At the time when the bill was passed the Chief Justice was also favoring a mixed council of judges and attorneys to regulate practice and procedure. See 6 Jour. Am. Jud. Soc. 36, 46.

⁶ Constitutional amendment in effect November 2, 1926.

no judicial office,⁷ and Connecticut and Rhode Island add a prosecuting attorney. Two of the most recent acts, those of Kansas and Washington, give membership to the chairmen of the judiciary committees of the legislature.

The judicial members of the council who are not expressly designated by statute are almost universally appointed by the chief justice, whereas in Ohio, Massachusetts, Connecticut, and Rhode Island the governor appoints the practitioners. Except in Massachusetts and Kansas, where the council selects its own chairman, the chief justice or his representative is *ex officio* chairman of the council.

Powers. The natural hesitancy on the part of the legislature to bestow extensive authority upon a new type of agency has restricted most judicial councils to fact-finding and recommending powers. Aside from their powers in connection with fact-finding,⁸ most of the councils have no authority to issue mandatory orders to any judge or court official. Their functions may be summarized as follows: (1) to conduct a continuous survey of the volume and condition of business in the various courts, the work accomplished, and the character of the results; (2) to devise ways of simplifying judicial procedure and improving the administration of justice; (3) to acquaint all courts with the results of various experiments in other jurisdictions, and to foster the adoption of such changes as seem in the interest of uniformity and the expedition of business; (4) to bring to the attention of the political departments of the government all problems which cannot be solved except by amendment of the laws or constitution; and (5) to conduct such special investigations as the legislature or governor may desire, and to act as an advisory body on such bills as shall be submitted for the council's consideration.

A few councils have been given additional powers. The California council has control over the assignment of judges to care for crowded calendars. The Wisconsin and federal conferences, through their chair-

⁷ The Oregon council, in its 1926 report, recommended that two practicing attorneys and one prosecuting attorney be added to the council, as well as the chairmen of the judiciary committees of the legislature. The California council contains one justice of the peace, who is, of course, primarily engaged in the practice of law. R. H. Phillips, secretary of the Connecticut council, reports that "without active practitioners on it, the council would not function."

⁸ Nearly all can require reports of various court officials, and a few of any government officer. An amendment giving such authority was found necessary in California, where its absence seriously handicapped the council in its initial work. Several can compel witnesses to testify and produce books and documents.

men, enjoy similar powers. In addition, the California council has a wide rule-making power to supplement the statutes on practice and procedure. These three, two of which we have mentioned as being frequently classed as other than judicial councils, stand out from the rest as to the scope of their authority.

Accomplishments. To generalize in regard to the activities of the different judicial councils is an impossible task. As in all new undertakings, it is the aggressive spirit of one or a few that counts, over and above mere paper organization. Several of the councils are only getting under way, and it is too early to pass judgment upon their work. Others appear to have failed to take the first steps. The Oregon council was inactive for two years because of lack of funds. For the same reason the Ohio council, after more than six years of statutory life, has not yet set about its tasks. On the other hand, we find the Massachusetts council holding fortnightly, or even weekly, meetings throughout the year, and the California council devoting the full time of one member to its work, he being relieved of his regular judicial duties. The potential value of the judicial council has been well established by the accomplishments of these more active groups.

Assignment of Judges. When the California council was organized in November, 1926, it felt that its first task should be to survey the judicial business of the state. Judge Hollzer was released from his duties as judge of the Superior Court and devoted his entire time to supervising this work. The results revealed some startling inequalities in the division of labor between the different *nisi prius* judges. Whereas those of the metropolitan districts were constantly falling farther behind in their work, some of the judges in the outlying districts tried as few as six cases in a year. The judicial council act provided a remedy for this condition through the mobility of judges, and the council took immediate advantage of this provision.

During the year 1927 nearly 800 assignments of judges were made, chiefly for the trial of cases in the superior courts, which are the principal *nisi prius* courts of the state. The same procedure has been followed during the current year. When the council was first organized, the Los Angeles courts were nearly two years behind in their work. Today, without impeding the work of the outlying districts, civil cases are being tried within ninety days and criminal trials are heard less than three weeks after the entry of the defendant's plea. Cases are now being disposed of at a faster rate than they are set for trial. The decrease in the number of cases filed seems to show that this healthy

condition of the calendar has produced many settlements and dismissals, and has reduced to a minimum the opportunities of defending merely for purposes of delay.⁹

The more complete utilization of the trial court personnel placed an added burden upon an already overworked system of appellate courts. By assigning judges of the superior court to the district courts of appeal, a far greater number of appeals was determined than ever before, and these tribunals were prevented from falling even more in arrears. The problem of still further relief for the appellate courts has recently occupied the attention of the council, and a constitutional amendment has been prepared which will permit substantial changes in their jurisdiction.

Similar control over the assignment of judges has also aided the federal and Wisconsin councils in relieving court congestion. Chief Justice Taft has referred to such mobility as "a change that ought to be made in every state."¹⁰ Its success when under the supervision of a judicial council is in striking contrast to its almost negligible influence when left to the individual judge to arrange under a system of reciprocity.

Master Calendar. Through the master calendar the California council is doing for the judge of the busy jurisdiction what the assignment plan does for those of the outlying districts. Under this plan the separate calendars of each department are abolished and a single central calendar substituted. As a judge finishes a case he calls the main office, and the next case on the master calendar is sent to him for trial. In this way the full time of each judge is utilized, and the possibility of a case not being reached on the date set is reduced. The fact that neither parties nor judge know who will try a given case is felt to be not without its advantages.

This plan was first tried in San Diego and Los Angeles. Six months' experience established its usefulness, and early last August, by an order of the council, it went into effect in every superior court of the

⁹ A similar experience in Detroit seems to bear out the conclusion that the number of suits formerly contested for purposes of delay exceeds those now brought because of the certainty of a speedy trial. The Detroit circuit court, feeling that many appeals from justices' courts were taken only for delay, decided to try such cases in the inverse order of their appeal, thus keeping the current appeals to date. Since the city was growing, an increased number of appeals would normally be expected. Instead, the number taken fell off nearly one half.

¹⁰ Quoted by Chief Justice Waste, "One Year of the Judicial Council," *Cal. St. Bar Jour.*, Jan., 1928.

state having two or more judges. The plan seems elementary, yet the fact remains that it took a judicial council to bring it into effective state-wide operation. There are many other jurisdictions where it could be used to advantage, and where a judicial council, charged with finding out what other states are doing, could hasten its adoption.

Practice and Procedure. The California council is the only one thus far given any appreciable measure of direct control over the practice and procedure of the courts. New sets of rules governing the trial of cases in both the superior and appellate courts went into effect last August and September, and are expected greatly to facilitate the business of those courts. Other proposals, involving the amendment or repeal of existing statutes, will be placed before the next session of the legislature in January. The promptness and thoroughness with which the council has entered upon this work, as compared with the hesitancy or total lack of activity on the part of the various supreme courts that have been vested with such powers, raises an interesting question as to the future of the judicial council as a rules committee.

Even in the absence of authority to make binding rules of practice and procedure, many councils have not been without beneficial influence in these fields. We have recently witnessed an outstanding example in the federal courts. When the Fall-Sinclair jury was dismissed because of jury tampering, we took it for granted that we were to witness another of our now famous scandals of the drawn-out examination of prospective jurors on the *voir dire*. We were surprised, on picking up the morning paper, to find that the jury was already impanelled and the case ready to proceed. The court had merely adopted the suggestion of the Board of Senior Circuit Judges that "the examination of prospective jurors shall be by the judge alone." Other recommendations by various councils, although attracting less attention at the moment, are even more promising of future betterment.

Statistics. "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 the dockets and the real business of the courts."¹¹ This condition blocks the solution of many defects, and even prevents agreement as to the presence or absence of the defects themselves. It fosters vague accusations and unworkable proposals for change. If the

¹¹ Report of the Fifth Conference of Senior Circuit Judges, Rep. Atty. Gen. (1926), 5, 7.

judicial council movement does nothing but furnish us with an expert and efficient fact-finding body, it will be well worth its cost. A well developed system of judicial statistics, such as that found today in England, is not to be had for the asking, and its acquisition will be one of the most difficult assignments for our councils to fulfill. Many of them have entered upon the task wholeheartedly, and the results thus far accomplished, considering the short time and limited funds available, are encouraging.

One of the greatest defects of the past has been that most jurisdictions were unacquainted with what other states and foreign countries were doing. The judicial council is furnishing a clearing house for exchanging and utilizing such information. Several councils have felt that first-hand contact with the work of other jurisdictions is the most valuable. Soon after organizing, the Massachusetts council sent one of its members to England to study court organization and procedure. His report has been the basis of many successful reforms. The recently organized council of Connecticut has sent a prominent member of the bar to study English appellate procedure. One of the most promising investigations is the recent survey, made by the California council, of the methods of court administration and the practice and procedure of the principal metropolitan centers of the United States. At the suggestion of Governor Young, correspondence was supplemented by a two-months' survey tour by a member of the council which carried him into the principal cities of the East and Middle West, as well as certain portions of Canada. The results of this survey are now being compiled, and will be published by the end of the present year. It should prove valuable, not only to California, but to other jurisdictions as well.

Advisory Body on Legislation. Although no attempt is here made to give a complete account of the activities of our various judicial councils, mention must be made of their value as advisory bodies on legislation. Several state legislatures have apparently adopted the regular practice of referring all important bills dealing with the courts to the judicial council. At the request of the legislature or the governor, various special investigations have been undertaken as a basis for future legislation. Many important statutes have been completely drafted by them. Such a permanent official body, intimately acquainted with what the courts are doing and trying to do, would seem to be the logical agency for such work.

Expense. The charge of excessive cost can scarcely be brought against the judicial council. Many councils have been seriously handicapped in their work by lack of funds. Most of them are working under appropriations of \$500 to \$1,000 a year, which, although sufficient for minor undertakings, make impossible the extensive surveys that conditions would seem to require. The activity of the California council is no doubt to be explained largely by the fact that the governor and legislature have placed \$50,000 at the body's disposal for two years' work. Unless the results fall far short of present indications, the saving to the state will be greatly in excess of this sum, and should give impetus to other states to follow a similar course.

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The Justice of the Peace—Recent Tendencies. The justice of the peace system exists today in every one of the forty-eight states. It was a product of a type of civilization in which such an arrangement for the trial of petty cases seemed appropriate. Increased population, the construction of modern highways, the development of means of transportation and communication, the establishment of a more definite system of legal principles and rules—all these have contributed to remove the conditions that formerly made justices of the peace necessary in every community. In recent years there has been much discussion and some action looking to the curtailment or the abolition of justices of the peace courts, but there has been little outright abolition of the justices courts in rural communities.¹ The decision of the Supreme Court of the United States in the *Tumey* case² has served to direct attention to the defects of the justice of the peace system.

An examination of the constitutions of the forty-eight states reveals the fact that the provisions concerning justices of the peace may be grouped in reasonably definite classes, first, with respect to legislative control over the office as such, and secondly, with respect to legislative control over the jurisdiction of the justices.³

¹ "The Passing of the Justice of the Peace," 12 *Virginia Law Register* 110 (1926); *County Government in Virginia*, prepared by the N. Y. Bureau of Municipal Research (January, 1927), pp. 48-50; *Constitutional Convention Bulletins Illinois* (1920), pp. 762-764; "County Government and Administration in Iowa," *Applied History* (1925), pp. 322-330.

² *Tumey v. Ohio*, 47 U. S. 437 (1927).

³ Chester H. Smith, "The Justice of the Peace System in the United States," 15 *Cal. Law Review*, 118-141 (1926-27).

The types of provisions relating to legislative control over the office of justice of the peace as such are: (1) those which provide expressly that the judicial power shall be vested in designated courts of which the justice of the peace is one,⁴ (2) those which provide that the judicial power of the state shall be vested in such inferior courts as may be established by law, and in which the justice of the peace is not mentioned,⁵ (3) those which provide that the judicial power of the state shall be vested in such courts as may be established by law, and further provide that a competent number of justices of the peace shall be appointed or elected,⁶ and (4) those which provide expressly for the justice of the peace as one of the courts of the state, but which provide further that the legislature may abolish the office of justice of the peace throughout the state, or which permit such abolition.⁷

The types of provisions relating to legislative control over the jurisdiction of justices of the peace are: (1) those which definitely specify the jurisdiction,⁸ (2) those which provide that the legislature may fix the jurisdiction, but not to exceed a specified limit, which is expressly stated,⁹ (3) those which provide specifically that the legislature may fix the jurisdiction,¹⁰ and (4) those which imply that the legislature may exercise this power.¹¹ Some of the constitutional provisions in regard to jurisdiction fall in one classification for civil cases and another for criminal trials, but, by and large, the classification as given includes both types of jurisdiction.

⁴ Ariz., Ark., Del., Fla., Ga., Idaho, Ill., Kans., Ky., Md., Mich., Minn., Miss., Mo., Mont., Nev., N. Mex., N. C., Okla., Oregon, S. D., Tenn., Texas, Utah, Wash., W. Va., Wis., Wyo.

⁵ California.

⁶ Ala., Colo., Conn., Iowa, Ind., Me., N. H., N. Y., Ohio, Pa., R. I., S. C., Vt.

⁷ La., Neb., N. J., N. D., Va. The North Dakota constitution (1913), Sec. 112, reads: "The legislative assembly shall have power to abolish the office of justice of the peace and confer that jurisdiction upon judges of county courts or elsewhere." The Massachusetts constitution (1780) contains provisions with reference to tenure of office (Ch. 111, Art. iii) and removals (Amends., Art. XXXVII) of justices of the peace, and nothing more. On jurisdiction, see 3 Pick. (Mass.), 508 (1827).

⁸ Ala., Ark., Fla., Ga., Ia., Miss., N. M., N. C., N. D., Tex., W. Va., Wyo.

⁹ Ariz., Cal., Colo., Idaho, Mich., Minn., Mont. Neb., Nev., N. H., S. C., S. D., Utah.

¹⁰ Conn., Del., Ill., Ind., Kans., Ky., La., Md., Mo., N. J., Okla., Ore., Pa., R. I., Tenn., Va., Wash., Wis.

¹¹ The office is created by constitutional provision, but with no provision for jurisdiction, in Maine, Mass., N. Y., Ohio, Vt.

To abolish outright, then, the office of justice of the peace would require in most states a change in the constitution; in a minority of states legislative enactment would suffice. But no state has abolished the system throughout its bounds, and in only a few states has any serious suggestion to this end been made. In the Louisiana constitutional convention of 1921 an attempt was made to abolish the office throughout the state, but the argument that it was a poor man's court fulfilling the needs of rural communities prevailed; hence, instead of abolishing the justices courts, a provision was adopted which gives the legislature complete power over these courts, even the power to abolish them.

The question of fee compensation for minor courts has been the subject of legislation in some states. Justices of the peace in California are paid by salary.¹² All minor courts in Nevada and Arizona are on a salary basis.¹³ By constitutional provision in Louisiana and South Carolina, the justices receive a salary instead of fees in criminal cases.¹⁴

Legislatures have used indirect methods of impairing the jurisdiction of the justices of the peace, either by taking away from the justices practically all civil and criminal jurisdiction, where the legislature is empowered to do so, or by creating other types of minor courts with concurrent jurisdiction. There has been a tendency in recent years to establish municipal courts, small claims courts, and juvenile and domestic relations courts in towns and cities, with the result of reducing materially or abolishing the jurisdiction of justices.¹⁵ In some instances these courts have jurisdiction over a considerable area adjacent to the town or city, or even throughout the county. Where county courts are established, they in some cases supersede justices of the peace courts; in most instances the county courts exist alongside justices' courts.

In Ohio the system of compensation whereby the remuneration of justices of the peace is directly dependent on the outcome of criminal cases before them was the subject of attack on constitutional grounds in the *Tumey* case. The result of the holding in that case is that a judge is disqualified, on grounds of personal interest, where he receives

¹² California Code of Civil Procedure (1915), Sec. 102(b).

¹³ "The Constitutionality of Fee Compensation for Courts," 36 *Yale Law Jour.*, 1171-75 (1926-27).

¹⁴ Louisiana constitution (1921), Sec. 50; South Carolina constitution (1895), Art. V, Sec. 20.

¹⁵ Reginald H. Smith, *Justice and the Poor* (N. Y., 1919).

his fees only if the defendant is convicted.¹⁶ Apparently this decision has been largely responsible for two immediate results in Ohio, first, the enactment of a statute designed to save to the justices of the peace their fees in spite of the holding in the Tumey case, and secondly, a definite move on the part of the bar of the state for the establishment of a system of uniform inferior courts.

Senate Bill No. 72 enacted by the 1927 session of the Ohio legislature amends the General Code on the matter of fees for justices of the peace in criminal proceedings.¹⁷ Under the terms of this act the justices of the peace are required to pay into the treasury of the county all fees collected in state criminal cases in which the magistrate has final jurisdiction. Once a month the magistrate and other officers receive as compensation from the county general fund an amount equal to the sum-total of fees earned by them in such cases. It is doubtful whether the objection of the Tumey case is met by such an expedient.

A committee of the Ohio State Bar Association made a report on June 19, 1928, in which it recommends the passage of a bill by the legislature to create a rural court in each of the counties of the state.¹⁸ In each county this rural court, a court of record, would succeed to the powers, duties, and jurisdiction of justices of the peace.¹⁹ The "rural judge," who must be a practicing lawyer of three years' experience, and one or more magistrates are to be elected in each county; the judge, by the electors of the county outside municipal court districts; the magistrates, by the electors of magisterial districts, each such district to contain eight thousand to eighteen thousand inhabitants. The only requirements for magistrates are that they must be of good moral character and electors of the magisterial districts. The judge, magistrates, and constables are to be paid by salary, all fees being paid into the general county fund. The seat of the rural court is to be at the county court house, although provision is made that the rural judge, or a magistrate at the direction of the judge, may hold court at any place in the rural district where so doing would contribute to the convenience of the parties or to the ends of justice. Under this plan the fee system would disappear. If there were a real supervision of the magistrates by the rural judge, the system would have obvious merits.

¹⁶ *Tumey v. Ohio*, 47 U. S., 437, decided March 7, 1927.

¹⁷ *Laws of Ohio*, 1927, p. 269.

¹⁸ Committee on Establishment of Uniform Inferior Courts.

¹⁹ Constitution of Ohio (1851), Art. 4, Sec. 9, as amended Sept. 3, 1912.

Something has already been done in Ohio toward replacing justices of the peace. Over a score of the large cities have for many years had municipal courts which, speaking generally, have jurisdiction not only in the city where they sit, but also in the township or in a district composed of one or more townships. These courts exercise the jurisdiction usually held by justices of the peace.

In Virginia, cities, for the most part, are excluded from the jurisdiction of the county governments, and the problem of the justice of the peace is essentially rural. The constitution requires that "the General Assembly shall provide for the appointment or election and for the jurisdiction of such justices of the peace as the public interests may require,"²⁰ and the usual system of justices of the peace courts has been established by legislation. Recent acts passed by the Virginia Assembly make a beginning toward reform in the justice of the peace system. The act establishing juvenile and domestic relations courts in cities of twenty-five thousand or more inhabitants, with concurrent jurisdiction with justices of the peace within and one mile beyond the corporate limits of the city,²¹ and the act permitting counties to have trial justices appointed by the circuit court²² are indicative of the trend. Even more important in Virginia is the legislation of 1926 permitting the establishment for certain counties of courts with powers comparable to those of civil and police justices of the cities.²³ Chesterfield county has adopted the system provided for by this legislation. The trial justice appointed in this county holds court weekly in several places in the county, and sits in the more sparsely settled portions once a month. The Virginia act of 1926 is optional and is unlikely to solve promptly the justice of the peace problem throughout the state.

A Kansas statute passed in 1927 establishes city courts in Kansas City to take over the jurisdiction of justices of the peace courts, not only in the city, but throughout the county in which the city is situated.²⁴ A statute of the same year provides for judges for every township located in a county having a population of one hundred thousand to one hundred twenty-five thousand, and these judges have the jurisdiction formerly exercised by justices of the peace.²⁵ The act

²⁰ Constitution of Virginia (1902), Sec. 108.

²¹ General Laws of Virginia, 1923, Ch. 81.

²² Virginia Code, 1924, Secs. 4988-4988 (29).

²³ Acts of Virginia Assembly, 1926, Ch. 511.

²⁴ Laws of Kansas, 1927, Ch. 180.

²⁵ *Ibid.*, Ch. 182.

provides that justices of the peace of such townships shall have no jurisdiction over any case, civil or criminal, "except in civil actions for the recovery of money only where the amount claimed, exclusive of costs, does not exceed the sum of one dollar."²⁶ The provisions of this act may be adopted by any cities of the first class, or by cities of the second class having over thirteen thousand inhabitants. The judges of these courts must be lawyers of five years' practice.

In Mississippi a 1926 statute establishes a county court in each county having a population exceeding thirty-five thousand, or, not having such a population, if it has an assessed valuation of real and personal property exceeding seventeen million dollars, and in either event containing a municipality of five thousand or more inhabitants as shown by the federal census of 1920.²⁷ Any other county in the state may establish a county court. The judges of the county courts must have the qualifications required for judges of the circuit and chancery courts.

The Mississippi county courts have jurisdiction concurrent with justices of the peace in all matters, civil and criminal; they are given exclusively the jurisdiction previously exercised by justices of the peace in eminent domain, in the partition of personal property, and in actions of unlawful entry and detainer. In addition, the county courts have concurrent jurisdiction with the circuit court in misdemeanor cases, and concurrent jurisdiction with circuit and chancery courts in all cases where the principal amount involved is one thousand dollars or less, excluding divorce and alimony, matters testamentary and of administration, minors' business, cases of idiocy, lunacy, and persons of unsound mind.

Ten of the eighty-two counties of Mississippi come within the classification in which the establishment of the county court is made mandatory. Three other counties have by election adopted the system, while three counties by election rejected a proposal to establish it.²⁸ The Mississippi county courts take a good part of the work from justices of the peace. It is believed that if the court held sessions in each of the five supervisors' districts of the county, instead of at the

²⁶ In *re Greer* (1879), 58 Kans. 268, 48 Pac. 950, the constitutionality of a similar statute was upheld. But see *contra*, *St. ex. rel. Burke v. Hinkel* (1911), 144 Wis. 444, 129 N.W. 393.

²⁷ Laws of Mississippi, 1926, Ch. 131.

²⁸ Biennial Report of the Secretary of State of Mississippi (1926-27), pp. 156-157 (figures are as of May 31, 1927).

county court-house alone, the court would rapidly supplant the justices of the peace.

In Wisconsin, although there has been no amendment of statutes relating directly to justice of the peace courts since the code of 1898, nevertheless these courts have gradually lost much of their former importance. This has been accomplished in part by the creation of special municipal courts, and in other cases by conferring much of the statutory jurisdiction of the justice of the peace upon county courts. The acts creating county courts frequently deprive the justices of the peace of a given county of all criminal jurisdiction and frequently, also, of most of their civil jurisdiction. In Milwaukee county, by special statute, there is only one justice of the peace, and he has been deprived of practically all jurisdiction, though he retains the right to perform marriage ceremonies. A special district court has been created for Milwaukee county, with substantially the criminal jurisdiction of the old justices of the peace courts, and a number of special civil courts set up in the county have relieved the justices of their civil jurisdiction. There are also in Wisconsin thirty-four municipal courts and two superior courts, with jurisdiction co-extensive with that of justices of the peace. In the greater part of the state, however, the old system of justices of the peace remains in effect.²⁹

In Maryland a 1927 statute provides for legally trained judges to serve as justices of the peace for Allegheny county. Two courts, known as "the people's courts," have been provided; they have jurisdiction over minor criminal matters and in civil cases involving not over three hundred dollars.³⁰

The system of minor courts existing in Hawaii is of interest. The organic act vests the judicial power of the territory in "one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."³¹ Twenty-seven judicial districts have been created.³² The chief justice of the supreme court of the territory appoints one or more magistrates for each judicial district. They must be lawyers, and they may be removed by the supreme court. The magistrates have exclusive jurisdiction in civil matters involving amounts up to fifty dollars, and concurrent jurisdiction with the circuit courts

²⁹ Wisconsin Statutes, 1927, Vol. 1, Chs. 253 and 254; Laws of Wisconsin, 1909, Ch. 549; Laws of Wisconsin, 1913, Ch. 702.

³⁰ Laws of Maryland, 1927, pp. 521-530.

³¹ Chap. IV, Sec. 81.

³² Revised Laws of Hawaii, 1925, Vol. 1, Chs. 14 and 137.

in cases involving amounts up to five hundred dollars. Their criminal jurisdiction extends to offenses punishable by fine or by fine and imprisonment not exceeding one year. Each magistrate must make an annual report to the chief justice of the supreme court of the territory. The magistrate of the Honolulu district receives an annual salary of \$4,800; the other twenty-six districts, with four exceptions, pay an annual salary of \$1,200 or more.

Three methods of solving the justice of the peace situation present themselves: (1) the office may be abolished outright; (2) other types of minor courts may be created alongside the justices of the peace courts, with jurisdiction similar to that exercised by the justices; (3) there may be a limitation of the number of justices and the abolition of the fee system. Abolition of the office of justice of the peace may be accomplished by (1) constitutional provision directly abolishing the office, (2) constitutional provision or amendment authorizing the legislature to abolish the office, followed by legislative enactment, (3) legislation abolishing the office, in the few states where under present constitutional provision that is possible, (4) legislation taking away all, or practically all, jurisdiction and vesting such jurisdiction in other courts. This fourth method of indirect replacement is now being actively employed. Justices of the peace are, however, likely to continue in most of the states, and the evils of the justice system in such states may largely be met by abolishing the fee system, by reducing the number and jurisdiction of justices, and by setting up a more adequate judicial organization for small cases.

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