KANSAS JUDICIAL COUNCIL BULLETIN

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JOHN A. ETLING
Kinsley, Kansas

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FOREWORD

In this issue we are glad to print an article by John A. Etling of Kinsley, whose picture appears upon the cover, who was chairman of the Senate Judiciary Committee from 1945 to 1953 and who served as a member of the Kansas Judicial Council during that period. Senator Etling is a practicing lawyer, well known in the legal profession in Kansas, and was a valuable member of the Council. His article on "Judicial Discretion" will be of interest to the Bench and Bar of Kansas.

Randal C. Harvey, whose term as a member of the Judicial Council would have expired on July 1, 1953, died at his home in Topeka on June 22, 1953. A word of appreciation of him is printed in this issue.

Chief Justice Harvey has appointed William M. Mills, Jr., of Topeka, to succeed Mr. Randal C. Harvey, and for a four-year term commencing July 1, 1953.

The terms of Judge A. K. Stavely of Lyndon and of James E. Taylor of Sharon Springs expired July 1, 1953, and each was reappointed for a term of four years by the Chief Justice.

We also print in this issue an article by Harry D. Nims of New York, entitled "Four Judicial Councils," which was originally published in *The Canadian Bar Review* for January, 1949. At that time Mr. Nims made an extensive study of Judicial Councils created and organized in various states, and selected the Judicial Councils of Massachusetts, California, New York and Kansas as outstanding among the Judicial Councils then in existence. We reprint this article to illustrate the standing of the Kansas Judicial Council throughout the country.

In this connection we are glad to report that we were represented at the recent meeting of the National Association of Judicial Councils by our member, James E. Taylor. In a later issue we hope that Mr. Taylor will give us a report upon the proceedings at this meeting.

We are also happy to print in this issue a review by James E. Taylor of the recent book by Judge Orie L. Phillips and Judge Philbrick McCoy, entitled "Conduct of Judges and Lawyers." This book is of current interest to Kansas lawyers because of their acquaintance with Judge Phillips.

We call attention to the fact that the article printed in our April, 1953, BULLETIN, "Toward a House Degree," by Miss Mildred Otis of Phillipsburg, received favorable attention in the *Topeka State Journal* of June 6, 1953, which reprinted the greater part of her article as well as her handsome picture from the JUDICIAL COUNCIL BULLETIN.

We also print in this issue the pictures of four of the members of the Judicial Council whose pictures have not previously been published in the BULLETIN, J. Willard Haynes, John H. Murray, Judge Joseph J. Dawes and William M. Mills, Jr.

Governor Edward F. Arn has appointed Justice Jay S. Parker of the Supreme Court and Judge Donald J. Magaw of Osborne (Fifteenth Judicial District) as members of the Kansas Judges Retirement Board created by section 4 of house bill No. 302 which was printed in the April issue of the BULLETIN. Under the statute other members of the board are the state insurance commissioner, the state treasurer and the state auditor.

Judicial Discretion

By JOHN A. ETLING, Kinsley, Kansas

"It was a matter resting in the sound discretion of the trial court," and "no abuse of discretion having been made to appear, the ruling will not be disturbed" or "reviewed." These are familiar phrases. Appellate reports abound with them, or others to like effect, and no wonder, when we consider the numerous matters for decision in which courts must necessarily be invested with some discretionary power.

From the time a lawsuit is filed and until its final conclusion, matters for decision arise for which there is no fixed rule of law. Under such circumstances, since the court is bound to act, he must use his judgment as to what is best under the particular facts and circumstances for arriving at justice. In these matters he exercises the power of decision called "judicial discretion."

Without undertaking to delineate all the subjects of judicial discretion it might help to point up the importance of this phase of judicial function by calling attention to some of them.

At the outset of litigation, motions to make more definite and certain are frequently lodged against a pleading. Action on such a motion is, within certain limits not here to be discussed, discretionary. (*Du Bois v. City of Galena,* 128 Kan. 253; *Allison v. Borer,* 131 Kan. 699; *Nelson v. Schippel,* 143 Kan. 546; *Frogge v. Kansas City Public Service Co.,* 159 Kan. 687.) A motion to strike, not amounting to a demurrer, is addressed to the court's discretion. (*Stalker v. DeWitt,* 142 Kan. 709; *Fleming v. Campbell,* 148 Kan. 516; *Munger v. Beiderwell,* 155 Kan. 187.) So also a motion to separately state and number, under certain circumstances, may be one addressed to the discretion of the trial court. (*Hasty v. Bays,* 145 Kan. 463; *Cribb v. Hudson,* 99 Kan. 65.) In a case where there are several defendants it is within the court's discretion to grant or deny application for separate trials, even though the issues between the plaintiff and the several defendants may be different. (*Hoskinson v. Bagby,* 46 Kan. 758; *Lathem v. Brown,* 48 Kan. 190; *Prather v. Eden,* 102 Kan. 545.) The court has discretion in setting actions for trial and causing them to be tried. (*Buchanan v. Insurance Co.,* 94 Kan. 132.) The trial court may limit the number of witnesses upon any particular issue (*State, ex rel., v. Pratt County Commissioners,* 42 Kan. 641). It is within the discretion of the court to grant or refuse an application for separation of witnesses. (*Simpson v. Shift,* 109 Kan. 9; *State v. Sweet,* 141 Kan. 746.) The court has discretion with respect to the order of proof and may allow evidence in rebuttal that was only proper on proof of the case in chief and may even allow a plaintiff, having the burden of proof, to reopen his case in chief after defendant's evidence is in. (*Finley v. Pierce,* 120 Kan. 474.) It has even been declared to be within the discretion of the trial court to allow evidence in rebuttal presenting an entirely new theory. (*Boxer v. Kirkwood,* 119 Kan. 735.) The trial court may, in its discretion, allow additional evidence to be offered after the parties have rested and argument of counsel begun. (*Saville v. Schroyer,* 65 Kan. 303.) The court may do so after final argument. (*Crawford v. Furlong,* 21 Kan. 698; *Overlander v. Confrey,* 38 Kan. 462.) The court may, in its discretion, permit additional evidence after having instructed

the jury (*Stevens v. Clemons,* 52 Kan. 369), or after a party has rested. (*Davies v. Lutz,* 110 Kan. 657.) Time allowed for argument is a matter resting within the court's discretion (*State v. Dunkerton,* 128 Kan. 374). Sending exhibits to the jury room or only a part of them rests in the sound discretion of the trial court. (*Wood v. Wood,* 47 Kan. 617; *Surgeon v. Union National Bank,* 137 Kan. 98; *State v. Stiff,* 148 Kan. 224.) Where evidence is partly written and partly oral the court may, in its discretion, allow the written evidence to be taken into the jury room. (*Hairgrove v. Millington,* 8 Kan. 480.) The court may allow additional evidence after the case has been submitted. (*McKee v. McClain,* 112 Kan. 746.) The trial court has some discretion with respect to the number and form of special interrogatives. (*Morrison v. Hawkeye Casualty Co.,* 168 Kan. 303; *Dotty v. Crystal Ice and Fuel Co.,* 122 Kan. 653.) Approval or disapproval of a verdict or the granting or refusal to grant a new trial, rests, quite largely, in the sound discretion of the trial court. (*Fritchen v. Jacobs,* 138 Kan. 322.) The trial court has some discretion in control of the conduct of the parties (*Nahan v. Kansas City Public Service Co.,* 158 Kan. 206). The court has a wide discretion in permitting amendments to pleadings (*Long v. R. R. Co.,* 100 Kan. 361; *Bank v. Badders,* 96 Kan. 533; *Underwood v. Fosha,* 89 Kan. 768; *Slayton v. Union Electric Ry. Co.,* 158 Kan. 132). Amendments may be allowed during the trial (*Angell v. Ry. Co.,* 97 Kan. 688; *Stevens v. Vermillion,* 102 Kan. 408; *White v. City of Bonner Springs,* 99 Kan. 148; *Torpedo Co. v. Petroleum Co.,* 75 Kan. 530). It is within the court's discretion to allow amendment after close of the trial (*Betis v. Wyandotte County Commissioners,* 116 Kan. 568; *Woodward v. Barnard,* 152 Kan. 199; *Beitz v. Hereford,* 169 Kan. 556). Under certain circumstances amendment may, in the court's discretion, be allowed after verdict or judgment. (*Thompson v. Howard Motors Co.,* 122 Kan. 339; *Horville v. Cement Co.,* 105 Kan. 305; *Harper v. Hendricks,* 49 Kan. 718; *Beeche v. Jones,* 108 Kan. 236; *Harmon v. James,* 146 Kan. 205.) The court may even allow amendment, in its discretion, after the case has been concluded and upon a hearing of a motion for a new trial. (*Tri-State Hotel Co. v. Southwestern Bell Tele. Co.,* 155 Kan. 358.) Amendment may be allowed after a new trial is granted. (*Rowe v. Rowe,* 89 Kan. 592.) It has been said that amendment may be allowed in the discretion of the trial court even after a reversal on appeal. (*Robbins v. Barton,* 9 Kan. App. 650.)

There are other matters upon which the court may exercise discretion. We have not listed all of them. Neither have we undertaken to cite all the Kansas authorities relating to the matters above set out. This is not intended as a brief and does not propose to review or analyze the decisions cited. We have mentioned the foregoing only by way of indicating the wide field of judicial discretion. Of course, whatever the court may, in its discretion, allow, it may, in its discretion, deny.

It is obvious that judicial discretion has no part in the application of substantive law. This phase of judicial power has to do with law that is procedural, having to do with pleading, evidence and practice, and only upon those phases of procedural law concerning which no rule has been established by statute or precedent. Whenever there is a rule by which a judge is bound there is, of course, no room for the exercise of discretion.

The phrase, "judicial discretion," is perhaps not difficult to define in the

abstract, but even the definitions of the term usually leave something in them yet undefined. In this jurisdiction, judicial discretion has been defined as follows:

"Discretion is the freedom to act according to one's judgment; and judicial discretion implies the liberty to act as a judge should act, applying the rules and analogies of the law to the facts found after weighing and examining the evidence—to act upon fair judicial consideration, and not arbitrarily." (See *State v. Foren,* 78 Kan. 654.)

We like the definition found in 48 C. J. S., page 1,008, note 68. The phrase is there defined as follows:

"It is a liberty or privilege allowed a judge within the confines of right and justice, but independent of narrow and unbending rules of positive law, to act in accordance with what is fair and equitable under the circumstances and as discerned by his wisdom, guided by the principles of law."

An appeal to the judicial discretion is an appeal to a judicial conscience. It is said that the power is not an arbitrary one but must be exercised wisely and impartially, but in its practical application judicial discretion is substantially synonymous with judicial power.

The limitations on this power are those embraced in the phrase, "abuse of discretion." This term, as it is ordinarily used, is said to imply not merely an error in judgment, but perversity of will, passion, or moral delinquency (*Williams v. Parsons,* 79 Kan. 202). On the face of it it would seem that "abuse of discretion," in every case, implies a bad motive or a wrong purpose, partiality, or bad faith. We suggest, however, that such implications may well be removed from the definition of the term for the simple reason that discretion must finally be weighed upon the basis of whether the decision was right or wrong, under all the facts and circumstances without regard to motive. Who can probe the conscience of the court and how can it be said that the decision was a result of prejudice or partiality except by looking to the decision itself? True, there may be situations in which a ruling is such that the decision can only be explained as being the result of caprice, passion or partiality, but even so, it must finally be weighed upon the basis of whether it was right or whether it was wrong, under the circumstances. Has the ruling promoted the administration of justice; has it resulted in what is fair and right as between the parties?

Defining the two terms together it may be said that judicial discretion is the option which the judge may exercise between the doing and not doing of a thing, the doing of which cannot be demanded as an absolute right by the party asking it to be done; and that an abuse of discretion is an erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn from such facts and circumstances. (See *Richardson v. Augustine,* 5 Okla. 667, 49 Pac. 930.)

We have heretofore referred to the fact that the subject of judicial discretion is largely in the field of procedural law. This is true in cases tried to juries. Of course there are other phases of judicial discretion which are not strictly procedural. By way of example, it is said that whether equity will grant or deny specific performance is a matter resting in the discretion of the court. So, too, in suits for injunction and other similar matters. We say that

the judge did not abuse his discretion in refusing or granting an injunction or refusing or granting specific performance. This is said because, under the law as applied to some theory of the evidence which the judge, in his discretion, had the right to accept as true, the result announced was regarded as within the bounds of judicial discretion.

In practically all cases tried by the court, the trial judge exercises a species of judicial discretion with respect to what evidence he will believe and what he will reject. Having the option or the power to decide, he may reject the most reasonable and plausible evidence and embrace that which appears, on the face of things, to be less worthy. However, the appellate court seldom, if ever, reviews this form of judicial discretion. If there is any evidence to support the court's findings, the appellate court will approve them; and if the findings thus made support the judgment, the judgment will be approved. All these are matters familiar to every practitioner and we shall not unduly extend this discussion by reference to decisions or quotations therefrom. It is this phase of judicial discretion that is most difficult to control even though it must be apparent that this is perhaps most likely to be abused in the sense that passion, prejudice or caprice may inhere in the court's decision. In the final analysis this form of discretion may be said to be uncontrollable, except, perhaps, in the most extreme cases. The only control is the conscience of the court.

An interesting phase of judicial discretion is the right and extent of appellate review. It is often loosely stated in the cases that certain matters rest within the discretion of the trial court and will not be reviewed on appeal. Such statement is, however, subject to serious question for in many instances where such statement is made the appellate court has proceeded to review the very matter that was said to have been foreclosed in the trial court. Frequent attempts have been made to segregate discretionary matters into the two classes of appealable and nonappealable. However, upon consideration of many cases from this and other jurisdictions, it will be found that no uniformly applied principle has been arrived at. The Kansas cases on this subject are collected in Volume 1 of Hatcher's Kansas Digest, Revised Edition, under Appeal and Error, subdivision G. We do not propose to review the cases. We have examined many of them. We find no definite ruling with respect to segregation of appealable and nonappealable matters which were within the discretion of the trial court. In many of the decisions it is said that since the matter was one resting in the sound discretion of the trial court it is not appealable or subject to review. In other decisions it is said that the matter will not be disturbed unless abuse of discretion is shown. It naturally follows that in order to say whether discretion was abused the matter must be examined and reviewed. From consideration of all the cases it would seem that if a rule may be formulated it is that the court will examine every charge of abuse of discretion; that in those cases in which, upon the record, it appears that there is little likelihood of prejudice having resulted, the appellate court will make disposition of the matter by the simple statement that the ruling, being within the discretion of the trial court, will not be reviewed or disturbed. Where, however, it appears from the record, and from the character of the matter upon which discretion was exercised, that substantial rights may or could have been affected, the appellate court will examine the

facts and circumstances and then approve or disapprove the ruling. In either case the charge of abuse of discretion has been examined, only differently treated. The suggested rule may be said to be so indefinite that it amounts to no rule at all. However, indefiniteness appears to inhere in the very subject itself.

While we say that under certain circumstances the court will review the discretion of the trial court, it would be more accurate to say that the appellate court reviews the facts and circumstances as shown by the record and then substitutes its discretion for the discretion exercised by the trial court. That this is so, is sufficiently made to appear in such cases as *Patterson v. Oil Co.,* 101 Kan. 40, and in *Fincham v. Fincham,* 174 Kan. 199, and many other decisions found in our reports.

In the early case of *Foreman v. Carter,* 9 Kan. 674, Justice Brewer, speaking for the court, had this to say:

"It is further objected that the question of amendments is one of discretion, and will not, therefore, be reviewed in this court unless it appear that that discretion has been abused. This is unquestionably so. Yet, when the question arises on a record, we are generally placed in a better position to weigh that discretion than when it is exercised during the trial of a cause."

In our own judgment, the best statement we have found in the books on this subject is that found in the case of *Feurt v. Caster,* 170 Mo. 289, 73 S. W. 576. The court there said:

"And whilst this court is always loath to interfere with discretionary rulings of trial courts, nevertheless such rulings are not conclusive upon this court, and where they are interfered with it is because the ultimate responsibility for every judgment rests upon the court of final resort to which the case is taken, and therefore that court is in duty bound to approve or reject all rulings of lower courts even when made in the exercise of a judicial discretion."

When we but realize the breadth and scope of powers vested in trial courts under the term, "judicial discretion," and the almost indefinable limits thereof, why should not appellate courts be invested with, more and more, rather than, less and less, appellate supervision and control?

The subject of judicial discretion is almost an inexhaustible one. We have a feeling that we have not treated it very well. We know we have not explored it as thoroughly as its importance warrants. We only hope that this article will encourage one more capable to write more fully on it.

An Appreciation of Randal C. Harvey

Death has taken Randal C. Harvey and thereby the state of Kansas has lost one whose passing has caused great regret not only to the many who knew and admired him for his outstanding character and integrity, but to the Bench and Bar of this state and especially to his colleagues on the Judicial Council.

Mr. Harvey, the son of a distinguished father, Colonel A. M. Harvey, at one time the lieutenant governor of this state, was born in Topeka on November 16, 1897. In 1923 he was married to Miss Marjory Roby of Topeka, who with his mother and other relatives, survives him.

Mr. Harvey's education was acquired in the public schools of Topeka, at the state university and in law-office study. He served his country in the

army during World War I, and on June 26, 1919, he was admitted to the Bar by the Supreme Court. Thereafter he practiced law in Topeka, establishing for himself a distinguished record for professional ability and personal integrity. The Topeka Bar Association made him its president for the year 1944.

Mr. Harvey's connection with the Judicial Council was close and effective. He was first appointed by Chief Justice John S. Dawson for a term commencing July 1, 1941, and the first BULLETIN issued after his appointment (October, 1941) contains a short biographical sketch. He commenced immediately to translate into action his great interest in the advancement of the cause of justice, the improvement of our judicial processes to expedite the business of the courts and to eliminate unnecessary delay in the settlement of public and private matters coming before the courts. Not only was he a faithful member in attending the various meetings of the Council, where he took an active part in considering questions presented, but between meetings his inquisitive and fertile brain was always at work. He was ever alert to see to it that the BULLETINS of the Council were ample to reflect what was being done, and only the writer hereof is aware of the great amount of work done by him in arranging and procuring the content of the BULLETINS, and in editing them for publication. He had prepared copy for most of this issue prior to his death. In various of our BULLETINS containing reports of the business of the courts may be found "Comment on Statistical Tables." Those comments are entirely the work of Mr. Harvey. But all of the activities just noted were only a part of the way he indicated his interest. Out of his busy life, he took time to write a manual of forms in connection with the administration of estates in the probate court and his original "*In re* John Doe and Richard Roe, deceased," in the April, 1946, BULLETIN and his rewrite, "The Doe and Roe Estates" in the April, 1950, BULLETIN, have been of immeasurable value to the Bench and Bar of the state. The change in the statutes with reference to obtaining service of process by publication lead him to write "Quieting Down the Title" which appeared in the December, 1951, BULLETIN. The Council is aware from the repeated calls therefor that many lawyers, especially of the younger-age group, put great reliance on Mr. Harvey's works.

Excluding its present personnel, thirty-two men of outstanding ability have served on the Judicial Council, but we think it may well be said that when anyone of them left the Council, his leaving was not so much felt as will be the absence of Randal C. Harvey. His record as an able member of the Council has been made. The present members will always be mindful of their association with him.

WALTER G. THIELE.

Four Judicial Councils

By HARRY D. NIMS, New York

Prior to 1923, when the first judicial council[1] was created, the efficiency of the administration of justice in the United States seems to have been nobody's particular business.

The total annual expense of the courts in the United States, as a whole, was probably not less than $150,000,000. Today it is at least $200,500,000.

1. A judicial council may be defined as an agency created by a legislature, by court order or by the bar to make a continuous study of the courts and to receive, consider and make suggestions as to the service rendered by them to the public.

The cost of the federal courts was substantial. It is now about $19,000,000. In 1948, the state government of New York paid at least $3,900,000 for its courts and the local communities in the state, about $25,500,000. Of this latter sum, New York City alone spent some $18,500,000. The cost of the administration of justice is not a negligible item.

Yet in most states, in 1924, there was little central supervision, in the public interest, of this vast expense or of the performance of those who received the money. Not only was supervision on a state-wide basis lacking, but usually there was no administrative head of the separate courts in a single state.

The legislatures were interested in a mild way in problems of this sort when they were in session, but they did not, and could not, study or supervise all the activities and expense involved. They passed legislation when there seemed to be a demand for it, but that was about all.

The judges did not supervise the courts in any over-all way. Their authority was limited. There was much they could not do. In Brooklyn, for instance, some years ago there were two courts in the same building. In one, the judges had little to do; the court was overmanned. The other was desperately undermanned, and the public waited three to four years to get cases to trial in that court. Yet the judges in the first court could not sit in the other and help to relieve the congestion. To remedy this absurd situation required a constitutional amendment, but there was no one interested enough to do much about it.

The lawyers did not insist on improvement. As a body they had little interest in bettering conditions for the litigant; and bar associations have never had the financial means or the machinery for such a complicated job. As Dean Roscoe Pound once said, "They have no means of surveying the whole field." [2]

The public, in 1924, did not have the organization or the "know how" to insist on changes. The same is true today. If a judge saw fit to take long vacations, although his calendars were behind or prisoners were in jail awaiting trial in his court, there was no one to prevent it. There was no one to champion the cause of either the litigants or the prisoners.

In only a few of the states was there any over-all control of the personnel of the courts so that judges could be assigned to the localities where they were most needed, nor was there anyone to take responsibility for the prompt despatching of court business. The same is true today.

In 1924 the selection of judges was almost entirely in the hands of the politicians. For the most part, judgeships were, and are still, created by the legislatures. The *New York Times,* in commenting on a bill which was passed in 1948 adding what to many seemed an unnecessary judgeship in the Bronx, New York City, spoke of the process as "devious skulduggery." Taxpayers and citizens did not then and, for the most part, do not now choose the judges; they merely vote for them. The political leaders choose them. Often the main question was, and still is, reward for political service.

After the turn of the century, however, various public-spirited people had begun to ponder these problems.

Some lawyers realized something of the extent to which court procedure could injure the litigant. For instance, Elihu Root said that: "Every lawyer

2. The Crisis in American Law (1926), Journal of the American Judicature Society.

knows that the continued reversal of judgments, the sending of parties to litigation to and fro between the trial courts and the appellate courts, has become a disgrace to the administration of justice in the United States. Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves as a denial of justice in the name of form. It is a disgrace to our profession; it is a disgrace to our law, and a disgrace to our institutions."

But comparatively few lawyers shared Mr. Root's views or do so today. Most of them believed then, and still believe, that conditions are about as satisfactory as is reasonably possible. This attitude was demonstrated recently in Ohio. The Judicial Council in that state sent out a questionnaire to some 9,000 lawyers asking their opinion on fifty or more suggestions for improvement in the administration of justice. Only about 1,000 were interested enough to reply.

It was demonstrated also in the state of New Jersey which, in 1947, adopted a new constitution with a modern judiciary article. In commenting on this new article, Chief Justice Vanderbilt recently said: "It would be pleasant to be able to record that the new judiciary article was the inspiration of the organized bar, but clearly the honor must go to the laity." [3]

In 1921 Judge Cardozo, then Chief Judge of the Court of Appeals of New York, writing before the organization of the first judicial council, called for the creation in each state of what he called a "ministry of justice . . . to observe and classify and criticize and report," and he adds: "I have marveled and lamented that the great fields of private law, where justice is distributed between man and man, should be left without a caretaker. A word would bring relief. There is nobody to bring it. . . . Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them. This task of mediation is that of a ministry of justice. . . . The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when the function is deranged." [4]

This idea was not new in 1921. It had already been voiced in England. It is said that Bentham once made a suggestion somewhat similar to that of Justice Cardozo, and that Lord Westbury had urged that there should be machinery for ascertaining how "the law is worked," inquiring: "Why is there not a body of men in this country whose duty it is to collect a body of judicial statistics, or . . . to see how far the law is fitted to the exigencies of society, the necessities of the times, the growth of wealth, and the progress of mankind?" In another place he said, "There is not even a body of men concerned to mark whether the law is free from ambiguity or not; whether its administration is open to any objections; whether there be a defect either in the body or conception of the law or in the machinery for carrying it into execution."

In 1919 the Massachusetts legislature created a "judicature commission" to study the work of the courts of the commonwealth. In its report this commission said: "It is not a good business arrangement for the commonwealth to leave the study of the judicial system and the formulation of sug-

3. Address to New Jersey State Bar Association, March 13, 1948.

4. "A Ministry of Justice" in volume of Justice Cardozo's Essays and Addresses entitled "Law and Literature" (1931), pp. 41 et seq.

gestions for its development almost entirely to the casual interest and initiative of individuals." Following up this thought, this commission recommended the creation of a permanent body to study judicial affairs.

Apparently the commission's suggestion reached Ohio, for, on April 6, 1923, the Ohio legislature passed a statute which began, "There shall be a judicial council . . ." [5]

Massachusetts followed suit and, in 1924, its legislature passed a statute which also began, "There shall be a judicial council . . ." [6]

The name "judicial council" was used presumably because it was intended that such an agency should deal with the judicial system of the state and with its judicial problems. The name was unfortunate because, to the public, it has little or no significance. Even today many lawyers, editors and businessmen, if they ever heard of a judicial council, have not the remotest idea what it is.

The object of these councils seems to have been to interpose between the courts and the public a small body, the members of which possessed the "know how" to better conditions in the courts, which "know how" the public did not have; a body that possessed also a real desire to improve conditions. It was to be a body to which the public could bring criticisms and complaints regarding the work of the courts.

Apparently, the organization of these and other councils was an attempt to answer the almost tragic problem of finding a workable method for improving the administration of justice in a democracy and to offset some of the difficulties involved, such as the indifference of lawyers, legislators and courts to the delay and expense that is often experienced by litigants, and their unwillingness to adopt new and better methods of trying cases and selecting judges or to remove the blighting effects of politics on the judicial process.

Many believe that the judges are responsible for the efficiency of their courts, just as the officers and directors of a corporation are responsible for its effectiveness; but that is only partially true. In colonial times the courts were pretty much sufficient unto themselves. They ran their own business, made their own rules and took responsibility for the effectiveness of their work. This was before the echoes of the French Revolution reached our shores. When these echoes arrived, there came a revulsion against authority in any form, a by-product of which was the transfer of most of the control of the courts from the courts to the legislatures; and the powers of judges were very much curtailed.

But the courts, like most noncompetitive organizations, do not worry very much about their own defects or try very hard to improve their methods. They follow precedent; their primary purpose is to administer the law, using the methods to which they are accustomed. If they function to their own satisfaction, most of them are content. As Professor Edson R. Sunderland of the University of Michigan once put it, "The judiciary is the element which conserves; it does not create." [7]

If we are to rely on the judges to improve conditions, they must have facilities to collect court statistics, to study the needs of the public, to acquaint

5. 110 Ohio Laws, 364.
6. Acts of 1924, c. 244.
7. Judicial Affairs, 35 Am. Political Science Rev. 936.

themselves with methods used in other jurisdictions, and be in position to examine the complex problems involved in modernizing a system as intricate as, unfortunately for the litigant, the present procedure in most states has become. But such facilities are seldom available to them and few of them have time to devote to such efforts.

The same is true of the legislators. They too lack such facilities. In a busy session of limited duration they have little time for such questions.

Those who devised the idea of the judicial council must have understood these facts and intended that the councils should give to judges and legislatures this sort of service.

The Massachusetts Council is made up of the chief judge, or other judge or a retired judge, of the Supreme Judicial Court, the Superior Court, the Land Court and the Municipal Court of the City of Boston, and a probate judge and a justice of a district court—six judges in all—together with four members of the bar. At present only one of the judges on the Council is retired. He was formerly on the Supreme Judicial Court.

This Council has had a remarkable experience. It has been continuously at work since 1924. It has issued a report each year. The last one deals with liabilities of parents for damages done by minors, termination of trusts, proving of wills, jurisdiction of courts, charitable trusts, rising cost of the administration of justice, work of jury commissioners, limitation of tort actions, disqualification of judges—in all 16 subjects, the first 7 of which were studied by the Council at the specific request of the legislature. Indeed, it has become a custom in Massachusetts for the legislature to ask the Council for reports on problems of this sort. Again and again its studies have lain apparently forgotten in the files of the legislature for several years, only to be taken up and converted into law.

This Council meets once, and often twice, a month during most of the year. It reports to the governor on December first of each year. The governor transmits the report to the legislature. Sixty percent or more of its recommendations have been adopted. Due to the unselfish and devoted efforts of Frank W. Grinnell, who has been its secretary for many years, and to the work of its members, it operates on a budget of $1,800 for expenses and a salary of $5,000 a year for the secretary. Its members are faithful in their attendance. Although the membership changes from time to time, almost never has it lacked a quorum at its meetings, and generally eight or nine or all ten members are present. It has no power other than that of study and recommendation and to collect statistics. Each year 2,500 copies of its report, which runs from fifty to sixty pages, go to the lawyers and editors of the state. Its value to the citizens of the state is not open to question.

The co-operation between the legislature and this Council has been continuous and effective. Taking its reports at random, we find that in 1932 the legislature requested it to report on four problems, on nine in 1943, on sixteen in 1945, on seventeen in 1946, and on seven in 1948. All dealt with subjects of public importance, such as "mortgage foreclosures" (1943), "majority or split verdicts" (1945). Most of these requests had to do with bills that had been introduced in the legislature and deferred pending the Council's report on them.

This Council has investigated many problems on its own initiative, such as "Congestion in the Superior Court" (1943).

Each report lists the recommendations of the Council that have been adopted by the legislature since the preceding report. For instance, the 1945 report lists thirteen; the 1946, six; and the 1947, eleven. Frequently the Council recommends no action, and in most instances such recommendations have been followed.

The California Council was created by an amendment to the state constitution in 1926.[8] It is the only council that is a constitutional body. It is the only council, except those of Arkansas and Kentucky, which is composed entirely of judges. All these judges are in active service; none is retired. They are chosen by the Chief Justice of the Supreme Court, who is ex officio chairman of the Council. If a judge's term expires while he is on the Council, he ceases to be a member.

This Council is unique also in that, in addition to the usual duties of a council, the constitution authorizes it to promulgate rules of practice and procedure for the courts of the state.

It is unique for the further reason that substantial administrative power is granted to its chairman by the constitution, which provides that "The chairman shall seek to expedite judicial business and to equalize the work of the judges and shall provide for the assignment of any judge to another court of like or higher jurisdiction."[9] Approximately 550 to 650 assignments of judges are made each year by the chairman. Those in the less populous communities and counties where there is not much court business are assigned to assist in the larger and busier counties where they have an opportunity to broaden their judicial experience. In Los Angeles county alone during the last year an average of ten judges were under assignment every month to assist the Superior Court. Some of these judges were assigned from rural areas, others from the Municipal Court of the city of Los Angeles.

From 1926 to 1940 this Council enjoyed the great good fortune of having as its leader the late Chief Justice William H. Waste, who possessed a deep interest in the law and its future and translated that interest into action through the Council. The present Chairman of the Council is Chief Justice Phil S. Gibson of the Supreme Court.

When the Council was organized, delay and congestion in litigation existed throughout the state. Using its powers, the Council mobilized the judges of the state, reduced the delay and greatly improved the service which the public receives from the courts.

Immediately on its organization, in 1926, it began to collect judicial statistics, which were entirely lacking, and it has continued to do so.

Two years after its organization, exercising its rule-making powers, it issued rules regulating the business of the superior courts, which put into effect the master calendar system and many other improvements.

Four years after its organization, its then research director visited the courts of several of the eastern states to study their methods. The results were embodied in a most interesting report which was published by the Council.

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8. Article VI, section 1(a).
9. C. 48, Stat. 1925.

In the same year (1930), the report to the governor and the legislature stated that: "When the Judicial Council was created six years ago, the congestion of judicial business of the state was apt to be described as 'shameful,' 'disgraceful' and 'unbearable,'" and added that its report of that year would show that long delay "is practically a thing of the past."

In 1941, the legislature gave the Council a special mandate to prescribe rules for all appellate courts in civil and criminal cases. The resulting report was sent to the legislature in 1943 and the rules became effective in July, 1943 (Report of 1944). In connection with this work, the Council maintains a standing committee of four judges on appellate rules to consider suggestions for amendment of the rules.

Between 1943 and 1945, again at the request of the legislature, it undertook an administrative agency survey which culminated in the administrative procedure act and the creation of a division for administrative procedure which gave to the state a uniform procedure for all administrative bodies in the state. The Council's 1944 biennial report of 172 pages is devoted almost exclusively to this subject. This work has received national recognition.

Each legislature calls on the Council for information and advice regarding proposed legislation affecting courts, number and salary of judges, etc. The governor also seeks the assistance of the Council and requests its recommendation on practically all legislation affecting courts and the judiciary.

At the request of the 1947 legislature the Council has made a thorough study of the organization, jurisdiction and practice of the trial courts, in California, inferior to the court of general trial jurisdiction. As a result of its investigation a plan for the general reorganization of these minor courts and for the improvement of the administration of justice in them has been developed. A report of its conclusions and recommendations in this field, together with drafts of proposed constitutional and legislative materials, will be submitted to the state legislature which meets in January, 1949.

The Council has saved the taxpayers of California substantial expense by preventing the establishment of specialized courts, such as a court of criminal appeal and one of tax appeals. It has developed improvements in probate and in calendar practice which were recommended and adopted. These changes effected savings in one county alone estimated by the Council at $200,000 a year.

It is preparing a revision of the judiciary article of the constitution. It is completing a revision of the Superior Court rules and is studying uniform court forms, extraordinary legal remedies, juvenile court procedure, and is co-operating with the governor's commission on the study of crime.

The Council reports to the governor and the legislature at the commencement of each biennial session of the legislature. These reports are published in pamphlet form.

When it promulgates new rules of court, it gives them wide advance publicity and thus secures criticism and assistance from bench, bar and public prior to their adoption.

The seventh report (1938) was devoted almost exclusively to exhaustive statistics of the work of all of the courts of the state.

The legislature annually appropriates sufficient funds to support the Council and to pay the state's share of the increased compensation and expenses of assigned judges.

In 1947 it filed a carefully prepared report on the cost of justice in the courts and on the disposal of the many cases that "sleep" on court calendars.

Most of its work deals with procedure, but occasionally it has considered questions of substantive law, such as libel and defamation by radio. Usually problems of this sort are studied at the request of the legislature.

The Kansas Council was created by the state legislature. It is also unique in that it has a publication of its own—the "KANSAS JUDICIAL COUNCIL BULLETIN." In December, 1947, this BULLETIN contained a review of the Council's work, entitled "The First Twenty Years of the Judicial Council." The October issue usually contains statistical data; that of December, the motion days for the following year. In the years in which the legislature meets, it summarizes, in the April issue, the new statutes.

At the outset, this Council faced court delay and largely solved it. It instituted a system of statistics and arranged for their current publication. It discovered that its publication of court statistics speeded up litigation, for soon the judges took pride in not permitting a large number of cases to be pending at the end of the year or to remain long on the dockets. It also formulated a series of rules (which were adopted by the Supreme Court on its recommendation) to expedite the business of the trial courts, such as providing for frequent motion days to get cases at issue and tried, instead of carrying them from term to term. It has made studies of appellate practice that have resulted in shortening the time for appeal and in faster disposition of cases in the Supreme Court. Beginning with April, 1933, its reports to the governor have been published quarterly in its BULLETIN, which is distributed to lawyers, judges, legislators, editors and others. The publication of these reports has brought out criticisms and suggestions from the bench, bar and public. Several of the articles in the BULLETIN have become almost textbooks for Kansas lawyers on such subjects as homesteads, eminent domain, and the like. Much of the editorial work of the BULLETIN is done by the chairman, Justice Thiele of the Supreme Court.

The Kansas Council has reviewed the procedure of the probate courts of the state and proposed a complete new code of substantive and procedural probate law which became effective in 1939. It has also made recommendations for statutory changes in many fields, such as pleading in divorce cases, various phases of criminal law, the jury system, civil process, judicial apportionment and real estate titles, many of which have been enacted into law. During the war it compiled a complete list of Kansas lawyers in the services, which was revised and printed from time to time in its BULLETIN.

All this service has cost the state of Kansas about $2,300 a year up to 1947. In 1948, the appropriation for the Council was $5,500, with an allowance to the state printer for its publications. The members of the Council serve without pay. Much of the research work necessarily has been, and is, done by them or their own employees.

At the moment this Council has under consideration county court procedure; redistricting of judicial districts; qualification of judges; selection of judges; one court for each county combining all departments, probate, civil and criminal; revision of the state's civil code which has been in operation for forty years; and procedure before administrative boards.

One justice of the Supreme Court, two judges of the District Court, four lawyers and the chairmen of the Senate and House Judiciary Committees of the legislature make up its membership. All except the legislative members are appointed by the Chief Justice for staggered four-year terms. It has issued more than sixty-five publications.

It would be heartening indeed to those discouraged over the present conditions to attend a meeting of one of these active councils. The New York Council meets in the courtroom of the Appellate Division of the Supreme Court, at Twenty-fifth street and Madison avenue, New York. The members sit at a long table, at the head of which is the Chief Judge of the Court of Appeals, the highest judicial officer of the state; on his right and left are the presiding justices of the four Appellate Divisions of the Supreme Court (the court of general jurisdiction), which are intermediate courts of appeal; and down the table are the chairman and ranking minority leaders of the committees in the House and Senate dealing with judicial problems, four lawyers representing the bar associations, and two lay members of the public. The Council contains also several judges who were members of the Council when they reached retirement age.

Thus, at this table, are represented the legislature, the bench, the bar and the public. It would be difficult, indeed, to overestimate the value to the citizens of the state of the frequent meetings, at which this group discusses the work of the courts.

The New York Council usually meets monthly during the court year. It has an executive secretary and six employees. It has never expended all of the appropriations granted to it by the legislature. Its average yearly expense has been $29,893.

Its duties are the usual ones: To collect, analyse and publish statistics of the work of the courts; to receive and investigate criticisms of them; to follow decisions relating to court procedure; to make recommendations regarding the work of the courts; to recommend changes; and to promulgate rules for keeping court records.

Suggestions received from bench, bar and public are studied; the resulting reports are distributed to the Council prior to its meetings and then discussed. Proposed rules of court, to be adopted, must first meet the approval of the judges present. It is rare that any recommendation is adopted except by unanimous vote of the entire Council.

The staff works in law libraries and in the field, consults with judges and clerks of court and with city officials, carries on correspondence with bar associations and collects data as to methods used in other states. The results are embodied in reports to the Council, most of which are printed in its annual report, which is sent to members of the legislature, the judiciary and other interested parties. The report (except for statistical tables) is published in the *New York Law Journal*. Most of the bar associations in the state have organized committees which co-operate with the Council.

The Council prepares bills embodying its recommendations for legislation, but never lobbies them or urges their passage. Frequent reports show the conditions of the calendars of the courts.

Its recommendation of a court, the sole function of which is to consider the removal and retirement of judges, has been adopted.

Several years ago it prepared and published proposed constitutional amendments to consolidate the courts of New York. Such measures are now (December, 1948) being actively considered by the courts and the bar.

It has formulated plans for administrative supervision of the courts; for pretrial; for a uniform statute for the city courts of the state; and for reduction of appeal records.

So valuable have its studies of court procedure proved to be that in 1948 the legislature appropriated $10,000 for reprinting, in book form, such of them as are contained in its first eight reports (1935 to 1943).

Prior to the creation of the Council the chief judges of the five appellate courts of the state had never met, so far as is known, as a group; and the leaders of the legislature in the judicial field had never met with these judges. That the courts of the state are steadied and their work improved by these men sitting down together at intervals in friendly discussion, in the meetings of the Council, cannot be doubted.

This Council has accomplished a fairly complete recheck of the procedural codes of the state, eliminating duplications, clarifying blind spots and inconsistencies and, in general, making the codes and rules of courts more workable and effective.

It is now at work on a revision of the criminal code.

Among the subjects that have been acted on by the legislature or the courts, on the recommendation of the Council, are the following: Improvement of supplementary proceedings, thus facilitating the collection of judgments; recodification of the judiciary law; constitutional amendments relating to the jurisdiction of the Court of Appeals and to the compensation and age limitation of certain judges; examination before trial; dismissal of abandoned cases; revision of the jury system in New York City; clarification of rights of women to serve as jurors and amendments to judiciary law to permit women to serve as jurors with the privilege of exemption upon request; unified state law on the law-reporting system; facilitating opportunity of poor persons to appeal to Courts of Appeals; permitting the courts to take judicial notice of most matters of law; five-sixths jury verdict by constitutional amendment; abolition of struck and foreign juries; partial retrial on disagreement of a jury; revision of jury exemptions; joinder of all types of action in a single complaint; abolition of the *mandamus, certiorari* to review, and prohibition, replacing them with one much simplified proceeding; and civil remedies by which families abandoned by the husband might obtain support.

Prior to January 1, 1948, 258 of its recommendations had been put into effect.

In 1945, it prepared a uniform city court statute which has been largely adopted by several cities in the state. It recommended abolition of the magic word "exception," as not necessary to assure a review on appeal, and so removed one of the absurd customs of the courtroom.

Its statistics give a fairly complete picture of the work of the courts and aid the legislature and the judges in appraising the merits or lack of merit of various procedures. Its reports show, for instance, that use of the five-sixths jury verdict results in less disagreements than result where the unanimous verdict is used.

This Council does not consider questions of substantive law, for in the same year that the New York legislature created the Judicial Council [10] it created also a Law Revision Commission which has the duty of continuously examining the common law and statutes of the state and recommending changes to bring that law into harmony with modern conditions.[11]

Although few are aware of it, the reports of the councils constitute a veritable mine of information on the work of the courts. The first report of the Michigan Council, for instance, includes a discussion of the procedure for the condemnation of land, which is in constant demand by United States district attorneys. In its 1932 report is a study (87 pages) on discovery, which is a definite contribution to this controversial subject. In 1935 it published a most interesting report on the activities of an office of the Circuit Court in Detroit, known as the "Friend of the Court," who assists the court in dealing with the problems of the family, such as divorce, alimony, treatment of children, and the like. The 1946 report contains a study by Professor Edson R. Sunderland, secretary of the Council and one of our foremost students of procedure, which deals with replacing justices of the peace courts with courts of record—a live problem in many states.

It is unfortunate, indeed, that studies like these and others that have been published by the councils are not more available.

As long ago as 1942, Dean Pound said that "No one can be sure that he is in a position to speak with assurance upon or draft a statute or rule with respect to any important question until he has looked through the reports of the judicial councils." [12]

All the councils except three were organized to contain judges; three, to contain only judges; twenty-three, to contain both judges and lawyers; eighteen, to contain judges, lawyers and laymen. Six contain one or more professors of law; one (Texas) contains a journalist; one (Washington) contains a prosecuting attorney; and three contain only lawyers.

Thirteen states have never created judicial councils although several of these are considering doing so. Of those that have been authorized, some have never functioned; others have functioned for a time and lapsed into inactivity; others have been moderately active; others have been efficient and effective.

In 1922, Congress applied the judicial council principle when it authorized the Chief Justice of the United States to summon the Senior Circuit Judges of the ten Circuit Courts of Appeal (intermediate courts of appeal between the District Courts and the Supreme Court of the United States) to an annual conference to make a survey of the business of the courts of the United States, prepare plans for the assignment and transfer of judges, receive a report from the Attorney General of the United States, and consider and take other measures relating to the business of the United States courts.

Shortly afterwards there was established, in Washington, an Administrative Office of the United States Courts, which supervises the federal courts and published an annual report containing exhaustive statistics of their work.

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10. Laws of 1934, c. 128.
11. Laws of 1934, c. 597.
12. Address to Boston Bar Association, 13 Boston Bar Bul., p. 77.

The mere organization of a council does not create interest in those who do not care very much whether litigants wait two, three or four years to get a judgment; or, after these long waits, are "granted" (what a privilege!) a retrial and permission to go through the whole process again before they get relief; or whether they must struggle six to ten years, or even longer, as has sometimes happened, after receiving a judgment in their favor, to find out *how much* the defendant owes them.

We know now that, to be successful, a council must have enough funds to enable it to have a secretary who gives at least part of his time to its work. It should have also some facilities for research, for those who make up the council cannot be expected (since they work without compensation) to do the drudgery involved; and it must be able to inform the legislature, the courts and the bar as to the significance of any statistics it collects, of the results of the studies it makes, and the recommendations it offers.

Experience of the past twenty-five years seems to show further that most councils should not attempt to do much more than to function as a "caretaker" for the courts (to use Judge Cardozo's word) and in that capacity to furnish the judges and the legislature with helpful information, to study and report on methods of handling court business in use in other jurisdictions, and to receive and study complaints and suggestions received from the public and the bar. In short, in the public interest, to do what neither the judges, legislatures nor any other public agencies in this field are in a position to do effectively, that is, to make a continuous study of the administration of justice and suggest improvements in it.

The councils have not solved the problem of finding an effective method for improving the administration of justice, but their experience, together with that of the Supreme Court of the United States in its revision of the rules of the Federal District Courts, has suggested a new approach to it.

A reappraisal of the value of rule-making power in the high court of each state is under way. In a good many states, courts have had such power for some time. In some of them it has produced results; in others there has been little if any use of it.

It is no secret that the average legislature is not enthusiastic about relinquishing its control of court procedure, which it has exercised in some states for more than a hundred years. Nor is it any secret, generally speaking, that judges do not usually seek rule-making power; nor that, in various instances, they have not used it very much when it has been thrust upon them.

Another plan under discussion is that of so-called "judicial conferences," namely, gatherings of some or all of the judges of a state, including perhaps bar association presidents, prosecutors and law professors, to study the work of the courts and to suggest improvements in it.

A third plan, of course, is to create a judicial council in each state and implement them with funds sufficient to enable them to operate successfully.

The outstanding use that the United States Supreme Court made, in 1938, of its rule-making power when it delegated to a committee of distinguished lawyers the task of revising the rules of the United States District Court and the experience of the successful judicial councils are suggestive.

On the basis of these examples, a good case can be made for a set-up in any state which would include rule-making power in the highest court of the state,

with a judicial council to make a continuous study of the courts and to suggest to the rule-making court and to the legislature necessary changes.

We know now that it is not enough to vest rule-making power in a court or to create or implement a judicial council or to use conferences. None of these methods can be effective unless there are leaders who are convinced that the present service which the courts give to litigants can be improved and that the public and the bar will benefit by improvement.

The possibilities of such leadership have been demonstrated clearly enough by men like Judge Frederick E. Crane and Judge Irving Lehman during their terms as chairman of the New York Council and is being demonstrated there now by the present chairman, Judge John T. Loughran. It has been shown for many years by Judge Frank J. Donahue in Massachusetts; it was shown in California by Justice William H. Waste during his lifetime, and is now being demonstrated there by Justice Phil S. Gibson; it is being shown in Kansas by Justice Walter G. Thiele.

The problems of justice in Kansas are not those of New York; nor are those of Massachusetts the same as those of California; yet, in each of these states, due to the quiet, unassuming efforts of the councils, the public now enjoys a definitely better service from the courts than before they began their work.

The concept of justice is being examined today as perhaps never before. Probably it is impossible to define it in terms of the complexities of modern life, but, as Carlyle is said to have exclaimed, "Justice is, whether I can define it or not."

It is not the function of the judicial councils to define justice, but it is their function to study, continuously, our machinery for rendering to every man his due. Will we not do well to implement them with able men and reasonable resources? Never perhaps were they needed more than they are today.

Book Review

By JAMES E. TAYLOR, Sharon Springs, Kansas

"O wad some power the giftie gie us
To see oursels as ithers see us!
It wad frae monie a blunder frae us,
An' foolish Notion."

written by Robert Burns might be the theme as one reads, "Conduct of Judges and Lawyers," by Orie L. Phillips, Chief Justice of the United States Circuit Court of Appeals for the Tenth Circuit, and Philbrick McCoy, Judge of the Superior Court of California.

Discussed in very clear, concise language are found the conclusions of reviews of questionnaires on the Survey of the Legal Profession sponsored by the American Bar Association.

The bench and bar of the United States are viewed in chapters headed, Code of Ethics, Inculcation of Professional Standards, Character Requirements, Observance of Stated Standards, Disciplinary Procedures, Judicial Selection and Conduct, Challenge of the Press and Layman's View of Lawyers. The entire book is liberally footnoted with references to many publications. The questionnaires used in the research are shown in the Appendix.

The book reminds one constantly of the high ideals of the legal profession, which guide us towards the fulfillment of administration of justice done fairly, competently, impartially and equally under the law; perhaps the lawyer has strayed too far from the ideals of a pure profession to that of trade or business.

The book marshals the assets of our profession, examines our liabilities and is written with the motive of improving the science of jurisprudence and the administration of justice. The legal profession is reminded of Justice Stone's address before the University of Michigan law school where he said in part: "I have no thought that men are made moral by the mere formulation of rules of conduct."

The history of the lawyer's oath, originally found about 1275 under the First Statute of Westminster, the Canons of Professional Ethics promulgated in 1908, the Canons of Judicial Ethics of 1924, the recommendations that time and change in our way of life appear to make necessary are discussed at length. The authors are clearly of the opinion that an integrated bar causes lawyers to hew closer to the line of demarcation between right and wrong. It is suggested that the canons be called Rules of Professional Conduct, and that public interest in the standards be pushed by more publicity.

The authors remind each individual lawyer of his own responsibility to his profession; that the public in each community judges the entire legal group by the acts of that individual; that there is a continuing responsibility for each to maintain and enforce high professional standards in the public interest.

Yet the thought keeps recurring as one reads, "Can individuals be made good or moral through law alone?" Each lawyer and judge is charged with the obligation to maintain high quality of service, and to prevent the common purpose being frustrated through the undue influence of motive for pecuniary gain based upon the necessities or cupidity of the individual.

Inculcation of ethics is shown in three classes, the law school, the bar examiners and the use of preceptors. The law schools have raised the intellectual standards and proficiency has been attained, yet it would appear have neglected inculcating social responsibility that rests upon the profession.

The Board of Bar Examiners is discussed from the viewpoint that they stand between the student having completed the course of study and his final entrance into the profession. It is indicated too little attention is paid to determination of moral fitness for the practice; that by the granting of license to practice, the courts make an implied warranty the individual is morally honest, upright and qualified.

The use of preceptors, a practice analogous to internships of medicine is discussed and recommended. The legal profession has the responsibility to bridge the gap between the acquisition of the law degree and the practical competency to serve authentic clients. The young lawyers by their answers to the questionnaire indicated they had received insufficient education and guidance in ethics, although it is disclosed there is an abundance of materials to teach the subject, although methods and aims vary. It clearly appears from reading this book that a lawyer before he can discharge his duty and obligation must have a keen sense of right and wrong, a clear perception of morals and ethics and a sincere desire to adhere to them.

Bar examinations as they relate to ethics are discussed. Should determination of moral fitness be determined when he signifies his intention to study

law; or when application for admittance, or afterwards? It would seem the authors believe that a determination should be made when he has signified his intention to study law, then place the applicant under a preceptorship for guidance and instruction during his law school days, advising him of the nobility of a great profession, with proof of good morals and fitness at the beginning and again when he applies for final admittance, with personal appearance and examination before the Board of Bar Examiners in the end.

Space will not permit a full discussion of the chapters on the several canons, other than to say the authors condemn, and rightfully it would seem to this reviewer, the attitude of many prominent lawyers to refuse to defend indigent defendants, or to accept employment for individuals unable to pay who have good causes, because they will lose financially thereby; and that they do not expend the energy they would otherwise if the fee was large.

The authors indicate rather clearly that the prosecutors honor canon 5, prosecution of those accused of crime in the breach rather than in the enforcement. Note is made that changing conditions as to industrial advancement and social changes require the modification of canons 2, 10, 12, 27 and 35 at least in part.

Unfortunately in the field of professional ethics, as it appears in other fields of life, emphasis is placed upon the violations; the good is never brought out and publicized. Many temptations are placed before a lawyer, yet a strict adherence to high ethical standards is maintained in all but a few instances, percentagewise. It is unfortunate that the bar has not seen fit to advertise and place before the public its many accomplishments on a positive forward looking plane rather than with a negative approach.

The authors seek to bring out a matter which can best be put in the words of Justice Vanderbilt, while Chairman of the National Conference of Judicial Councils, discussing Minimum Standards of Judicial Administration, viz.: "One of the strangest phenomena in the law is the general indifference of the legal profession to the technicalities, the anachronisms and the delays of procedural law. While our substantive law dealing with legal rights has been developing from year to year, gradually adopting itself to the changing needs of the times . . . our procedural law dealing with the means of enforcing our legal rights has been relatively neglected." This attitude forms the basis of many complaints against the bench and bar.

Trial by newspaper is thoroughly discussed in the lengthy chapter, "The Challenge of the Press." The American Judicature Society is credited with the following, "Except for the sob artists, there is very little offense chargeable against the press in which it is not led or abetted by lawyers, judges and other public officers." Particularly attention is called to canons 5 and 20 of the Professional Ethics, and 2, 11 and 34 of Judicial Ethics as being a means to control Trial by Newspaper. Governmental lawyers (meaning local, state and federal) come in for considerable condemnation for using the newspapers to try their cases, and their deprivation thereby of due process of law.

It is apparent that the press and the legal profession agree "that it is *not* in the public interest that lawyers should make or that newspapers should publish statements relating to pending or anticipated litigation including criminal cases that would be calculated to create a public demand for a particular judgment in such a case." Also "judgment should be that which the

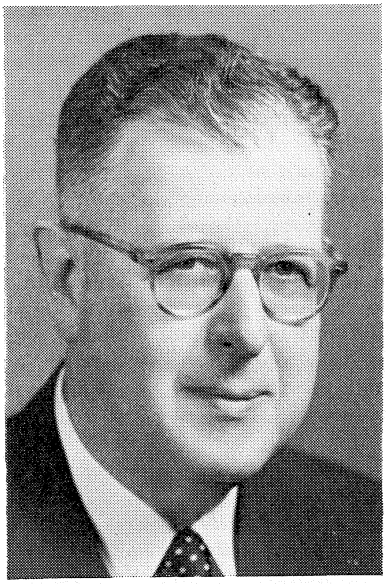
law and the evidence demands and not what the public may demand." A conclusion can be drawn that perhaps present conditions stem from the low standards of those in high places—those who believe and publicly state that any conduct is permissible so long as it is not contrary to some express law.

Finally what does the layman think of the lawyer? Generally he thinks well but the shocking thing would appear to be that a too large number thinks ill. Consensus is that lawyers in their dealings with their clients are loyal, and trustworthy. However, the serious charge is that too many lawyers rate only fair or poor in ability. There also is a prevalent feeling that lawyers too often win their cases through shrewdnes or chicanery rather than on the merits of a case ably presented. Another serious charge is too much procrastination, and dilatory procedure in court; too much of a negative attitude, not positive forward looking action.

In the words of the book, "the best test of the worthiness and character of the legal profession is the power of those who compose it both individually and collectively to enhance the standing and reputation of the profession as a public servant necessary to the administration of justice."

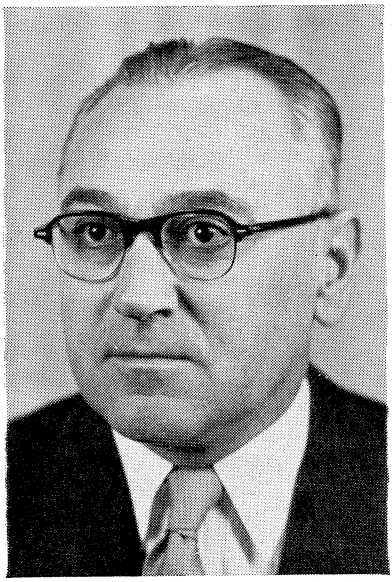
Members of the Judicial Council

On the following page we print the pictures of four of the members of the Judicial Council: J. Willard Haynes, John H. Murray, Judge Joseph J. Dawes, and William M. Mills, Jr. Among the present members, the portrait of Justice Walter G. Thiele was printed on the cover of the December, 1937, BULLETIN, James E. Taylor on the cover of the December, 1949, BULLETIN, George Templar in the April, 1939, BULLETIN, and Robert H. Cobean in the October, 1947, BULLETIN.

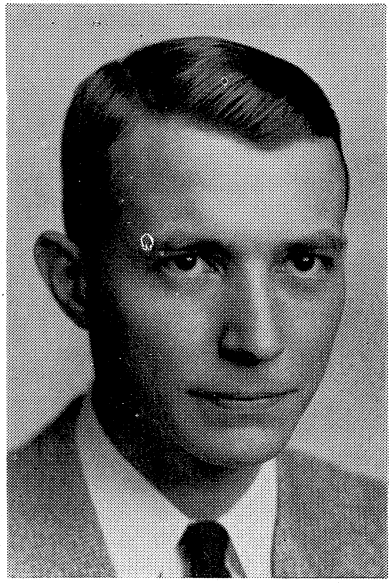


J. Willard Haynes

John H. Murray



Judge Joseph J. Dawes



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