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## Review of Observations upon Civil Procedure in West Virginia

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REVIEW OF OBSERVATIONS UPON CIVIL  
PROCEDURE IN WEST VIRGINIA

LEO CARLIN\*

The following commentary is the result of a request from Dean Thurman W. Arnold that the writer discuss a paper entitled "OBSERVATIONS UPON CIVIL PROCEDURE IN WEST VIRGINIA," read by Mr. Kemble White at the recent annual meeting of the State Bar Association held in Wheeling.

Mr. White's paper begins with a review of various suggestions that have at different times come before past meetings of the Association with reference to proposed reforms of the procedure and the system of courts which prevail in this state. The chief burden of his own remarks, however, is concerned with defects of the jury system as a means of settling property rights and with the inefficiency of our inferior tribunals which are presided over by justices of the peace. In undertaking this discussion, the writer is going to assume the usual privilege accorded to, or assumed by, commentators in such a situation, liberty to wander away from the text. Mr. White's primary object, evidently, is merely to call attention to existing defects and evils, with the hope that the more difficult task, that of suggesting a definite remedy, will be aided by a stimulation of thought arising from his remarks. It is so easy to agree with the general trend of his criticism that any commentary limited closely to the matter discussed by him would merely lead to a repetition of views already clearly and forcibly expressed. Hence what is said in this article will largely be in the nature of collateral digressions which it is hoped will not be entirely foreign to the spirit of the occasion. The writer has made no specific investigation whatever in preparation for the task assigned to him. To those who are familiar with what has been said on the subject of legal reform in this state on various occasions in the past, the writer must apologize for whatever lack of originality he may display. Assuming that the greater evils in our legal system are those which have received attention heretofore,

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and conceding that most of them are still with us, one may perhaps be pardoned for an inclination, even at the expense of triteness, to contribute what he is able by way of supplement looking toward the accomplishment of an unfinished task, rather than to seek less important fields for the sake of originality.

One finds no difficulty in agreeing with the general commentary that the law of procedure in this state in many respects could profit by reform, although we may disagree as to the extent of the changes which should be made and as to the methods by which they should be accomplished. West Virginia is a common-law state. The common-law system of pleading and practice prevails as the fundamental basis of our remedial machinery. It is true that our statutes, principally as embodied in chapters 125 and 131 of the Code, have gone a long way in modifying or nullifying rules of the common law which tend to lead to technical results rather than to the accomplishment of justice. But when it is realized how many of these statutory changes are almost literally adopted from the English Hilary Term Rules of almost a century ago, how many more have been adopted from English statutes ranging back through the centuries to the statutes of Anne and Elizabeth, and how few fundamental changes have been dictated by any impulse arising during the last century, it can readily be surmised that, although we should still deem it advisable to retain the common-law system, there remains much room for reform by way of further statutory modification if we are to keep pace with the demands of civic and social development. It would be beyond the scope of this discussion to undertake to enumerate even the more patent possibilities of reform in this respect. As a lone example, however, may be cited what is believed to be the woeful state of the law in West Virginia with reference to joinder of parties in common-law actions, a matter which was dealt with so thoroughly, and seemingly expediently, in recent Virginia legislation, and which has received attention in the proposed revised code for this state.

Some would utterly abandon the common-law system and adopt a practice code. Others would retain the present system and further modify it by statute. Although the

writer must concede that his training and his contact with our common-law environment has perhaps prejudiced him in favor of the common-law system, he cannot escape a feeling that we should proceed with great caution toward any proposal contemplating adoption of an utterly new statutory system of procedure. The writer would be far from shouting calamity in the face of any such proposal, but looks upon the question simply as one of weighing expediencies, and is open to conviction. It is believed that practice codes have succeeded best in states where systems of jurisprudence were comparatively young when the codes were adopted. Adoption of a practice code in a common-law state must necessarily contemplate abandonment of the old system, and, along with it, of a great body of judicial precedents that act as guide posts along the way of procedure. Would it be well to abandon a system which, although imperfect, is defined in its details, has received concrete application to innumerable situations, and has inevitably permeated and colored features of our substantive law and its administration, for a skeleton system, however admirable in its concept, which must be filled in and vitalized through new generations of judicial precedents? Of course it has been the dream of the codifiers to produce a system so simple and so perfect that it would not call for judicial construction. This has been said to have been their greatest fallacy. No system of pleading will ever enable us to dispense with the necessity for skilled pleaders. Pleading, whatever its nature, will continue to be a science, the elements of which must be mastered by the successful practitioner. There is a limit beyond which attempts to eliminate difficulties from pleading will only succeed in transferring them to the trial of the case where they will arise spontaneously and add to the difficulties of other matters which often must be settled without proper deliberation. Difficulties, problems and unforeseen situations in procedure must inevitably arise independently of the system out of which they grow. A bad system, of course, will increase them, but the best system cannot eliminate them. Then there is a peculiar undesirable result which seems to follow when a practice code is adopted in a jurisdiction which has long been subject to the rules of the common law. There

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seems under such circumstances to follow inevitably a hybrid system which is neither statutory nor common-law. This is understood to have been the result in New York, the original code state, where the present system is severely criticised by some and utterly condemned by others of those who must submit to its guidance. Wherefore the writer, even at the risk of being classed with the immortal procrastinator, who, in the famous soliloquy in which he speaks of the "law's delay," acknowledges that the fear of what may come hereafter is the thing "That makes calamity of so long life," is willing, at least for the present, to express a preference for statutory reformation of our existing system of procedure, in lieu of its utter abandonment.

As an alternative to the abolishment of common law pleading and the substitution of a practice code, the writer would make another suggestion. It may not have occurred to some members of the bar that we have now, in actual and practical operation in this state, an example of code pleading in its simplest form. The writer refers to the provisions of chapter 121 of the Code, in pursuance of which "any person entitled to recover money by action on any contract" may proceed to do so by mere motion before the court, after service upon the defendant of an informal notice which takes the place of both process and declaration in a common-law action. In this proceeding, all proceedings at rules are eliminated and all possible delay between inception of the case and its termination in a judgment has been eradicated. Judicial construction has limited the requisites of the notice, both as process and as a pleading, to only the most substantial and necessary requirements, and has further decided that the whole process of pleading subsequent to the notice-declaration may be informal to an extent that probably would not be tolerated by the average practice code. The provisions of this statute, as we have it now, have been construed so as not to permit a resort to it for the recovery of unliquidated damages arising from breach of a contract nor, of course, for the recovery of damages arising from a tort. Some time ago, in Virginia, the terms of the statute, originally the same as ours, were expanded so as to cover all contract actions, and still later, so as to cover all common-law actions. It will be noted that the practical

effect of this statute at the option of the party who elects to proceed under it, is at once to abolish the common-law forms of action, common-law pleading and largely the common-law system of procedure. Yet the common-law system is permitted to remain for those who desire to avail themselves of it. The statutory procedure must have proved practical in Virginia, or it would not have been expanded by the gradual and deliberate steps indicated. In lieu of adopting a complicated practice code and abolishing the common-law system, it is suggested that we expand this statute as the Virginians have done. A practice code certainly could not be simpler in its operation. And a further advantage would be that we are already sufficiently familiar with it, and it has received sufficient practical application and judicial construction in our own courts, so that we would be sure to have a sound nucleus upon which to build and would not subject ourselves to as many unforeseen events as might come through cutting loose from all precedent. If in future years the statutory procedure should become so popular as to indicate a decided preference for it, then no doubt we would all be in a better state of mind and habit of legal thought to cut loose entirely from the common law, whatever the substitute.

Partly as a supplement to proper statutory reform, and partly in lieu of it, the writer is heartily in favor of a statute permitting the Supreme Court of Appeals to prescribe comprehensive and uniform rules of procedure for the trial courts. There are reasons why such matters will not be adequately dealt with by a legislative body. The chief obstacle in the way of statutory regulation is, perhaps, legislative inertia. While the personnel of the legislature will likely at all times comprise a sufficient number of competent lawyers who are interested in procedural reform, still the fact remains that most members of the legislature who are not lawyers do not understand technical matters of procedure. Consequently, through lack of enthusiasm, or because of suspicion as to the judgment or motives of those who propose such reforms, there is a general tendency to "let well enough alone," and to concentrate legislative energy upon matters more generally understood and which have a more specific and concrete appeal to a

constituency. The writer does not share any fear with those who believe that our Supreme Court of Appeals could not be trusted with such matters. He is patriotic enough to believe that the personnel of our court has compared favorably with that of the courts of last resort in other states, and that it is now, and will continue to be, thoroughly competent to exercise any powers of regulation that may be conferred upon it by the legislature. To those who may have any fear of inconvenience arising from a radical or meddlesome exercise of such powers, it may be suggested that experience in other states indicates that perhaps the chief obstacle to the success of such a method of regulation is the fact that the courts have manifested the same tendency to inertia in this respect that has been charged to legislators. Those who might be inclined to fear a variation in the size of the "chancellor's foot" should remember that our court is composed of five members, fairly representative of different sections of the state, and that the composite foot will not likely at any time vary much from the standard size.

It is believed that there are three principal reasons why the Supreme Court of Appeals is peculiarly competent to promulgate general rules of practice and procedure. First, all its members would be able to bring expert knowledge to bear upon the task; second, its membership, as compared with that of the legislature, is small and homogeneous; and third, the members of the court would be in a peculiarly advantageous position to observe the practical application of any given rule and to determine its efficacy and the desirability of a change. The limited personnel of the court would insure flexibility of action on the contingency of necessary or desirable changes as the occasion might arise. Any correlated system of regulation must necessarily grow by a process of gradual evolution. The foresight of man never has been, and never will be, sufficient to foretell the full and ultimate effects of new rules or regulations, whether prescribed by statute or otherwise. Such effects, and a determination of whether they are desirable or undesirable, can be fully determined only by the results of practical application, and an appellate tribunal would certainly be in a peculiarly advantageous position to observe the results of such an application. As has been suggested, legislative action in

such a field is slow. It is difficult to get original action changing an established rule of procedure, and it is just as difficult to obtain modification of any changes that may have been accomplished and found wanting. The process of evolution toward a system as nearly perfect as practicable certainly should be greatly accelerated through the medium of regulation exercised by the Supreme Court of Appeals.

When we come to a consideration of the jury system, we again will have no difficulty in agreeing that it has many and serious defects, but it is not so easy to suggest, with confidence, a remedy for these defects. Mr. White believes that the common-law jury should permanently be retained "as a political institution and in prosecution of crimes," where he believes that it "has a sure place," but objects to it as a means of settling property rights. Apparently, he would not contemplate utter abolishment of the jury even as a means of determining property rights, whether because he believes that it is advisable to retain it in a modified form or because he is convinced that utter abolishment would be difficult to accomplish. He quotes with approval the provisions of the present Virginia constitution, which recommend, but do not expressly require, a jury in the litigation of civil rights, and permit the legislative body to prescribe juries composed of less than the common-law number of twelve. This provision, of course, does not settle any difficulties, but merely passes them on to the legislative body. Presumably, it is not cited by Mr. White as prescribing any specific remedy, but merely as indicating the first step which we must take in order to open up the matter for legislative action, and, furthermore, perhaps, as setting an example which will serve to quiet any trepidation that we might have in undertaking such a step. If we had similar provisions in our constitution, we should still have to decide, as a matter of legislation, whether we should modify or abolish the jury as a means of deciding civil disputes, and, if so, what should be the nature of the modification or the substitute. The writer believes, and perhaps Mr. White would agree, that the chief criticism of the jury system is not that it is expensive (although that certainly is an objection), but that, at its best, it is inadequate and inefficient.



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If this be true, then a reduction in the number of jurors would seem to be a minor accomplishment in the way of reform. It is true that there should be less chance for disagreement and a hung jury when the jury is composed of only five or seven members, as the Virginia constitution would now permit, and there is this possibility of arriving at a verdict with a less number of trials. Thus the indefinite but somewhat popular insistence that there is a virtue in ending litigation, even arbitrarily and for the mere sake of ending it, might to a certain extent be appeased. Of course, nobody will argue that the law should encourage litigation. But when people must litigate, should the law prescribe a modification of methods the chief virtue of which is merely to end litigation without first considering whether it is ended expediently? Outside of the consideration of getting speedier results, as indicated, and saving expense, the writer is unable to see that much would be accomplished by reducing the number of jurors. If the chief objection to twelve men is that they are not competent to deal with their task, may it not be argued that with a jury of five or seven men the chance would be still less of having competent men on the jury? Mr. White does not mention majority verdicts. But may they not be subjected to the same criticism that, while by means of them there is more chance of arriving at a verdict and less likelihood of necessity for a new trial, and so litigation may be ended, still they are less likely to produce a sound decision of the facts? If it be conceded that jurors as a class are incompetent, then it must necessarily follow that, on the average, the majority of the men on any given jury are incompetent. Would it not follow that the average majority verdict would be rendered by the incompetent members of the jury? These arguments are presented, not because the writer would prophesy any pronounced evils from the possible changes noted, nor because he is unwilling to concede any benefits from them, but merely as considerations which may tend to counteract any undue optimism as to increased efficiency that might result from them.

If the jury is retained as a part of our judicial system, whether as a common-law jury or in some modified form, it is pertinent to inquire whether its efficiency may be in-

creased in any other manner than reduction in the number of jurors. It is conceivable that something might be done tending to raise the standard of its personnel. An educational test is perhaps the most obvious additional qualification that may be suggested. Honesty would be a more important qualification, but more difficult to apply as a general test. The same may be said for intelligence. The performance of civic duties, such as payment of taxes and diligent exercise of the electoral franchise, are tests that might be worthy of consideration. Whether any of these tests would be tolerated in a community which has so long boasted that "no person shall be deprived of life, liberty or property, without due process of law, *and the judgment of his peers,*" is another question to be answered.

It is also conceivable that the efficiency of the jury might be increased by changing the method of its deliberations and the nature of its findings. As a matter of theory, it is fundamental law that the court decides the law and the jury decides the facts. Yet every jury is required, through the medium of instructions from the court, to apply the law to the evidentiary facts. Two principal objections to this process may be mentioned. The trial court may furnish the jury with law which the appellate court decides is bad, thus causing a reversal; and the jury may misapply good law in such a way as to reach a verdict through wrong conclusions, and yet the verdict must stand because there are no means of detecting the misapplication. A remedy would be to compel the jury, through interrogatories submitted, to return a special verdict only, instead of using answers to interrogatories, as they are now used, merely to test the sufficiency of a general verdict. This suggestion was made by Mr. Thomas H. S. Curd in an interesting note recently appearing in this publication. It is believed that Mr. Curd's observations deserve serious consideration by those who would seek a practical method for reform of the jury system. A resort to special verdicts, as he suggests, by eliminating instructions as to the law, would certainly do away with a most fruitful source of reversals. It is believed that two possible objections to such a scheme of procedure should be considered. First, would the trial courts, in the hurry incident to trials, exercise sufficient precision in framing the

interrogatories, so that the answers to the interrogatories would contain all the elements of a good special verdict? Lack of such precision, of course, would lead to reversal just as surely as in a case where the verdict is tainted with error in ruling on instructions. Second, would the jurors, in the process of deliberation, be able to deal efficiently with the interrogatories? As to the ability of the court to frame proper interrogatories, it may be replied that the court must sift and analyze the issues of the case in order to give proper instructions for the return of a general verdict, and that the framing of the interrogatories would only require a more definite and precise assumption of this task in lieu of passing a part of it on to the jury. As to the capacity of the jury to deal with the interrogatories, it may be suggested that the jury, in arriving at answers to the interrogatories, would be confronted with no task which it should not conscientiously be required to assume in arriving at a general verdict, the only difference being that the interrogatories would prevent an evasion of the task. In brief, would the extent of any difficulties that might arise be only a measure of the inefficiency that now exists? It will be realized, of course, that special verdicts are not unknown to the common law. They were formerly extensively used in England by the judges on circuit in order to reserve questions of law for decision of the judges in banc. They have also been resorted to in this country by juries, at their option, when they were unable intelligently to apply the law to the facts. The writer would suggest a study of what has been done in other states in this respect by way of statutory enactment. It may also be possible to draw some helpful conclusions from common-law experience with special verdicts. For example, it would be instructive to discover what proportion of special verdicts at common law have been abortive through the lack of proper elements.

When we come to a consideration of abandonment of the jury as an agency for settling civil disputes, we are primarily confronted with two questions. First, what are the possible substitutes? Second, what would be their relative efficiency and desirability?

Perhaps the most obvious substitute, suggested by the civil law and the chancery practice, is the trial judge.

Possibly Mr. White may be understood as suggesting such a substitute in his allusion to the French practice. It may be surmised that such a proposal would prove rather startling to the average citizen and the average legislator. We have so long been taught to revere the jury method of trial as the "palladium of our liberties" and as the shining accomplishment of Anglo-Saxon independence, that we are inclined to look upon any curtailment of it as a departure from fundamentals of our legal and civic traditions. However, if we were able to look upon the proposal from a purely legal view-point, entirely dissociated from the halo which surrounds the jury system as a political institution, the proposal might not be so startling. First of all, the halo may be somewhat dimmed by the assertion of modern scholars that the jury system is not an Anglo-Saxon institution at all, but a Norman-French innovation which superseded the older Anglo-Saxon methods of trial. It might help to remember that in days of old, before the scope of equity jurisdiction was clearly defined, suitors frequently, with fervent prayer, sought the aid of equity, and were entertained by equity, on the sole ground that they were unable adequately to cope with the wealth, power or influence of their adversaries in the legal forum. Then again, if the citizen of today fully realized how many of his valuable property rights are absolutely and exclusively settled in a court of equity where the judge of the law court sits as a chancellor without the aid (or should we say impediment?) of a jury, he might not be averse to letting the same judge as a common-law court settle some more of his rights without the interposition of a jury. To the lawyer who has observed the spectacle of a jury struggling with the evidence in the average ejection suit, or with the evidence and issues in a complicated contract action, the proposal of the court as a substitute should appeal as something far from being radical. The lawyer should be further aided by his knowledge of the infinite variety of circumstances, often very slight and wholly unappreciated by the layman, such as the possession of realty in a suit to remove cloud from title, which may cause a shifting of the trial of rights, normally purely legal, from the legal to the equitable forum, where a jury is dispensed with and the chancellor is the trier of

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facts. There may, however, be some legitimate objections to answer, whatever may be their weight.

It is not at all necessary to seek among those who lack intelligence in order to find people who believe that a jury is more competent than a court to decide issues of fact. Whether because of the psychology which is said to impair the efficiency of lawyers as witnesses, or for some other reason, some believe that jurors are more trustworthy than a judge in determining the truth and veracity of witnesses and in weighing the value of the finer shades of evidence. Then there remains the inquiry whether the people would find abiding satisfaction in the court as a substitute for the jury, a question which must be answered independently of the merits of the proposed substitute. Litigants who lose generally are dissatisfied. Even lawyers, when they lose a case and cannot hold a jury responsible for the disaster, as a last resort, have been known to "blame it on the court." Every practitioner knows how frequently his client comes into court with the feeling that the court "is against him." There are perhaps few bars in the state where more than one practitioner may not be found who conscientiously feels that the court is prejudiced against him. A litigant has a hand in selecting a jury to try the facts of his case, but he would ordinarily have to accept the judge which the electorate had provided for him. In submitting his case to a judge as a trier of facts, he would utterly abandon his peremptory challenges, and presumably his challenges for cause would be limited. It may be suggested that there are no more reasons why a judge sitting as a common-law court should be distrusted than if he were sitting as a chancellor. Conceding that this should be true, would it be true? Many of the affairs of a court of equity are quasi-administrative in character and are not so obviously of a litigious nature as matters which are commonly tried by a jury in a common-law court. Then, independently of the nature of the litigation, the effect of increasing the number of instances in which the judge would come under scrutiny as a trier of facts should be considered.

The results of litigation, even under the most ideal conditions, can never be perfect nor wholly satisfactory. Such perfection cannot be expected, and it is injurious to arouse

false hopes in this respect, especially in those who are not equipped to temper their zeal for reform with a proper consideration for collateral consequence. It is of supreme importance, however, that the people should have confidence in the integrity and impartiality of their tribunals. If it should come to a matter of choosing, the writer would not hesitate to say that mitigation of expense and precision in results, if necessary, should in a large measure be sacrificed to a proper degree of confidence by the people in the honesty and impartiality, if not in the entire efficiency, of their courts. One may perhaps be permitted, without the accusation of surrendering to sentiment or an undue regard for political traditions, to suggest that the jury method of trial is one which is peculiarly adapted to the genius of our race. Whether we admit it as a fault or accept it as a compliment, we perhaps must concede the fact that we are not nearly so prone as the continental races, nor even as the English from whom we derive our traditions, to submit to arbitrary authority, however beneficent in its effects. To the extent that, through the medium of the jury system, we personally participate in the administration of justice, we are permitted to feel that the courts are our courts, and we are willing to tolerate unavoidable deficiencies, which must always exist and might otherwise be charged to an intelligent minority.

No doubt something could be done to mitigate the objections, if such they are, which the writer has attempted to suggest. An increase in the number of judges, so that more than one judge could preside at a trial, would aid. The writer has heard able lawyers express the opinion that no additional responsibilities should be placed upon our trial judges until conditions have changed so as to attract the ablest legal talent to the bench. This may be said with all due respect to the many able lawyers who now occupy the bench in this state. In connection with the latter suggestion, the matter of compensation should be considered, and the question whether the office of judge should be elective. The prospective terrors of a political campaign have doubtless prevented many an able lawyer of ideal temperament from offering his judicial services to the people. Furthermore, many an able and honest lawyer who has been elect-

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ed to the bench must, on occasions, have found no small measure of embarrassment in the fact that he possessed a constituency.

If the jury is to be abandoned as the trier of facts and the court is not to be substituted for the jury, then it is necessary to seek some other substitute. An ideal substitute, free from the possible objections that have heretofore been enumerated, would seem to be some intelligent deliberative body, with a personnel less numerous than that of the common-law jury, selected by the litigants for the particular occasion, and relatively as skilled in the trial of issues of fact as the court is skilled in the trial of issues of law. The only substitute of which the writer can conceive which might approximately possess such qualifications would be some adaptation of the principle of arbitration.

There are various plans under which such a scheme might be put into operation. Even under our present practice, by virtue of the provisions of chapters 50 and 108 of the Code, the parties to pending litigation may, by agreement, substitute arbitration for a trial by jury, but this can be done only by agreement and is so seldom resorted to that it is believed that the average practitioner is not familiar with the procedure. The first essential step, of course, in undertaking to substitute effectively any plan of arbitration for trial by jury, would be to make it in some manner and to some degree compulsory. As a compromise, it might be provided generally that the court should be substituted for the jury in the trial of all cases involving certain rights, giving either party, in certain instances, for example where the amount in controversy exceeded a stated amount, an election to have arbitrators substituted for the court. This possibility of election would serve to shield the courts from the criticism that litigants were compelled to submit their controversies to partial tribunals. The arbitrators could be selected in the usual manner, and the number to be selected by each side, and the method of selecting an umpire, would be matters of policy to be determined in working out the general plan. If either party refused to participate in the selection, the court could be given power to make a selection for him. The method of proceeding before the arbitrators, the manner of deliberation and the number who should

concur in the award, would be further details to be worked out. If it should be deemed inadvisable to cut loose from the technical rules of evidence and procedure, to the extent that such is done in ordinary proceedings before arbitrators, it could be provided that all the evidence should be introduced and all the proceedings should take place in the presence of the court, with the arbitrators merely sitting in lieu of a jury. There is no reason why, under such a scheme, the parties should not be permitted to avail themselves of all the ordinary features of procedure pertaining to a jury trial. For instance, there could be opening statements, introduction of evidence in the usual order and subject to the supervision of the court, instructions as to the law and arguments by counsel, the award taking the place of the verdict. No reason is perceived why it would not be proper to entertain motions peremptorily to direct an award in favor of a party and demurrers to the evidence, as in ordinary cases. Advantages of such a method of procedure that may be suggested are the small number of the arbitrators as compared with the common-law jury; the fact that arbitrators could be selected who would be peculiarly competent to try the matters in issue; and the fact that the peculiar competency of the arbitrators would make it safe to rely upon a majority decision. In brief, we would thus have in effect a jury, not only decreased in numbers, as contemplated by the Virginia Constitution, but at the same time augmented in efficiency.

In order to forestall the accusation that the writer is visionary in making these suggestions, he desires to make the reservation that they are wholly tentative and that he has not given sufficient study and thought to the matters involved to reach a conclusion that such a scheme would be practicable, even if it were possible to put it into operation. It is not difficult to formulate objections. Advantages to be derived from peculiar technical or skilled knowledge of the arbitrators, so often urged in favor of arbitration, would not be so pronounced in a jurisdiction predominantly rural in its aspects, where the subject matter of litigation has not become so diversified and specialized as in centers of greater industrial activity. There would no doubt be difficulty in securing men properly qualified to serve as ar-



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bitrators who would assume the responsibilities and give their time willingly and for a reasonable compensation. The mechanics of selecting the arbitrators and securing their attendance in court at proper times without delaying or interfering with the regular dispatch of business would not be without difficulties. Any serious consideration of such a proposal, it is believed, should begin with a study of the various arbitration acts in the different states, and particularly with the modern statutes in those states where arbitration is made compulsory when it is stipulated for in the terms of a contract. It would also be instructive to discover what proportion of awards have been set aside in equity or otherwise on the ground of fraud or mistake or because of some other defect.

Passing to a consideration of defects in the constitution and organization of our courts, it must be admitted that there is room for improvement; in some respects, very much room. It has been said that we have no real probate system in this state. Probate affairs, as if by accident, have, without any logical division, been distributed between county courts and circuit courts. The county court's probate jurisdiction, an antiquated survival from earlier days when county courts exercised general judicial powers, is one of the few instances in which these now primarily administrative bodies exercise judicial functions. The need for a change has been so generally recognized that perhaps relief in some form would have come ere now, if the necessary legislative action had not been hampered by constitutional limitations. The writer is convinced that the Constitution should be amended so as to permit all probate matters to be turned over to the circuit courts, or, in populous counties, to special probate courts presided over by competent judges trained in the law. Such a concentration of jurisdiction in a single tribunal capable of dealing intelligently with legal problems should bring unity and competency out of a situation which now leads to confusion, inefficiency, delay and duplication of functions. Any constitutional changes, of course, would have to be supplemented by a thorough revision of the statutes in harmony with such changes.

It is believed that we should abolish all courts of record, as now constituted, which exercise a so called "limited" or

“inferior” jurisdiction. The Constitution presumably intended, and special acts creating them apparently have designed, that they should serve the primary purpose of relieving overburdened circuit courts in the field of their original jurisdiction. This object is largely defeated by the fact that the Constitution requires all writs of error and appeals from such inferior tribunals to be taken to the circuit courts, instead of directly to the Supreme Court of Appeals. Although the writer has had no personal experience in jurisdictions where these inferior tribunals prevail, he surmises that they largely perform functions which would identify them as coordinate branches of the circuit courts rather than as inferior tribunals, and that litigants appeal from them to the circuit courts almost solely as a matter of form looking toward final relief in the Supreme Court of Appeals. This, of course, leads to duplication of effort on the part of the courts and to extra expense and delay on the part of litigants. It is believed that greater efficiency would result if these inferior courts were abolished and the excessive burden of litigation, where necessary, were distributed between coordinate branches of the circuit courts or additional judges of a single circuit court.

We come finally to a consideration of those tribunals which are presided over by justices of the peace. Here is one instance where calamity has been of so long life, that most enthusiasts would perhaps be willing to end all “with a bare bodkin,” and seek a substitute afterwards. As an institution, the justice’s court has come down to us from the days when, through necessity, laymen were called upon to perform judicial functions. As Mr. White suggests, it is typically the poor man’s court. Whether for this or some other reason, it has not kept pace in development with the rich man’s court of record. It is inefficient for the obvious reason that it is generally presided over by one who is not properly trained to exercise judicial functions. Furthermore, it is bad because of its organization. It is the one tribunal in this state—and that the poor man’s—which is financially maintained by fees and costs collected from litigants. Judges who preside over courts of record are paid by the general public; but justices of the peace receive their com-

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pensation from the litigants. It is bad enough that the poor man should have to assume the sole financial burden of supporting his own court, while at the same time he pays taxes to help the wealthy man support his courts, but this is not the worst evil of the fee system. It creates a situation which places the conscientious justice in an embarrassing position, and offers temptations to the one who is unscrupulous. It is well understood how the force of circumstances tends to compel the justice to act as counsel for the plaintiff in the inception of his action. Such a tendency is undesirable because it may lead to at least a tentative prejudgment which the evidence cannot entirely obliterate. But the situation is aggravated by the fact that the justice's livelihood depends upon the entertainment of litigation. It is interesting to note that we have here all the elements of an evil which was charged to the early Norman kings of England, the temptation to "sell justice" through the medium of issuing an empty writ, the justice sitting as a chancellor for the purpose of issuing the writ and as a common-law court for the purpose of executing its mandates. Most of us have heard of the chronic litigant who peddles his empty complaint about from justice to justice until he finds one who will "give him a writ." All praise to that noble justice of the peace, who, within the writer's knowledge, out of his own pocket paid the plaintiff's claim for a lone dollar, rather than entertain his suit! But of such is the kingdom of heaven, for he died not long since. Although the justice's writ cannot create new law with the same efficacy as did the writs of King John's time, it can create trouble and expense, and, since the justice's court is the court of last resort for many a poor litigant, it can practically create law for him. For him, the law of the case is practically going to be the law of the land. It is the writer's belief, however, that the justice himself should not be held primarily and morally responsible for the evils which have colored the reputation of the tribunal over which he presides. The abiding evil is in the inherent nature of the tribunal itself, and not in any abnormal lack of integrity or conscientiousness in those who direct its functions.

The writer, however, could not share the enthusiasm of those who would abolish the justice's court without first

having found a thoroughly practicable substitute. It is believed that conditions are such that it would not be practicable to shift all petty litigation into the circuit courts. Perhaps nobody would contemplate such a solution of the difficulty. A principal complaint now is that so much of the time of the circuit courts is consumed in the trial of inconsequential appeal cases. Yet such matters of litigation must be disposed of and they cannot be disposed of without some sort of tribunal. Such a tribunal, in order adequately to serve its purpose, should be readily accessible for purposes of litigation, both physically and by way of legal approach. At the same time it should be so constituted as to carry a reasonable assurance that its judgments could be relied upon with a degree of confidence approximating that reposed in ordinary courts of record. Perhaps it should be a court of record and should have the assistance of a clerk. Its jurisdictional limitation should perhaps be placed beyond that now prescribed for justices of the peace, but should not approach that which has usually been prescribed for inferior courts of record created by special acts. Care should be taken not to make it a competitor for the circuit court's legitimate original jurisdiction. Whether appeals should be allowed from it to the circuit court as a matter of right or upon writs of error, or whether a compromise should be made in this respect depending upon the amount in controversy, are questions that should be considered. Obvious requirements would be that the judge presiding over the proposed tribunal should be adequately trained in the law and should depend solely upon a salary for his compensation.

The difficulties in the way of establishing such tribunals as absolute substitutes for justices' courts would be troublesome. Seemingly the chief difficulty would be to make them readily accessible for litigants from all parts of a county without establishing a burdensome number of them. Although more than one of them could be established in the more populous counties without the aggregate of salaries paid to the judges exceeding the fees now paid by litigants to justices of the peace, it is obvious that they could not be made as numerous as the prevailing number of justices of the peace. The improvements in transportation brought

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about by modern conditions would materially aid the situation. A scheme might be devised in pursuance of which the judge would travel on circuits within a county, but some method for instituting and maturing cases in the absence of the judge would be necessary, and the delay incident to such a plan of procedure would be an objection. Perhaps the most troublesome matters to deal with would be attachments, distrains and other remedies calling for quick relief. If the justice of the peace should be retained as a factor in the administration of the criminal law and for other special purposes, he might be availed of for the purpose of issuing attachment writs, distress warrants and orders of arrest in civil cases, making the writ returnable in each case to the new tribunal. The increased expense incident to administration of such a system might be more apparent than actual, since the present method of disposing of petty litigation is such that the average citizen does not realize its cost in the aggregate. But if a practical and efficient system can be devised and put into operation, it is believed that we should not quibble over any reasonable increase in the cost of administering it.

Practically all the suggestions made by Mr. White, as well as the suggestion made in this article, would require more or less radical amendments to the Constitution and somewhat complicated statutory enactments. But there is one important reform which seemingly could be accomplished as a simple matter of legislation. Even though the justice's court is retained, what excuse is there for the present method of providing for the justice's compensation? The perniciousness of the fee system of compensation was long ago recognized and it was abolished to the extent that it applied to most county and state offices. Why permit it to remain in this instance where its potentialities for evil have a peculiarly sinister aspect?

The writer cannot conclude this commentary, already too long, without joining in the complaint made by Mr. White "that neither the legislature nor the electorate will look with favor upon any recommendations made by the bar." As has been suggested, such lack of interest, when technical matters of procedure are involved, may be charged to the natural force of circumstances, rather than

to any spirit of perversity. However, such a concession by the profession to the layman could be made with a much more genuine feeling of tolerant generosity, if it were not for the fact that the lay press, and even the legal press, is continually taking the profession to task for failure to assume the responsibility of setting its own house in order.

Certainly, as suggested by Mr. White, it will be a long time, if ever, before even the most obvious and insistent demands for legal reform will have been satisfied, unless some radical change takes place in the spirit and attitude of those who must be called upon to lend their sanction. His suggestion of bringing this change about through some process of education may be accepted as the only solution of the problem. It would seem, however, to be a difficult, if not impossible, task to undertake to educate the electorate, or even the legislative body, to an understanding of those elements of the problem which only a lawyer can be expected to comprehend. It would seem, therefore, that such educational efforts, in order to offer any great promise of accomplishing results, must be primarily concentrated upon a selected minority, largely confined to the legal profession, with the object of developing an active and trusted leadership in each community. This leadership must become active in the community itself. The people, and the legislators who represent them, cannot be blamed for a failure to respond to issues that have not been raised and properly presented to them. They may be fully cognizant of the evils through daily contact with them, but the remedy is not so familiar. This they must be taught to recognize, or persuaded to accept from those whom they trust. Past experience has taught that reading papers before assemblies of lawyers, writing articles such as this, and proposing measures of legal reform in the first instance to the legislature, without more, can accomplish little. Wherefore, may not the members of the profession seriously ask themselves the question whether they are not to blame after all? To blame, not for a lack of enthusiasm, but for a failure to recognize the magnitude of their task? The writer has not undertaken to define this task unaware of the obstacles in the way of its accomplishment, the most difficult of which would be to induce the electorate and the

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legislative body to resist the allurements of more colorful matters of reform and, for the time being, submit to the leadership of a minority. But, when we consider the degree of political organization and the amount of propaganda that other minorities have found necessary in order to accomplish results in fields where the evil and the remedy have had an equally popular appeal, can the members of the profession say that they have put forth their final effort when they have ended largely by talking among themselves?

What has been said in the last paragraph will suggest the writer's answer to Mr. White's query as to whether, if the task is undertaken by the bar, "it should be done, not partially, but completely." If it is difficult to get the ear of the electorate and of the legislature, prudence would advise that we make the most of it when we get it. The first thing to decide is precisely what we want to do. The next thing is to work out a precise and comprehensive plan, which, of course, should involve intensive study and investigation. This plan should then be vitalized by drafting in full all constitutional and statutory amendments necessary to carry it into effect, instead of relying, as largely heretofore, on making general suggestions with the hope that the legislature will carry them into effect. Finally, should come the campaign of education, which should begin with an organization providing, first of all, an influential and trusted leadership in each community. This campaign should be conducted simply as a political campaign, because that is what the people are accustomed to and what they will respond to. Any suggestion that the members of the bar will not be willing to lend their efforts in a measure sufficient to accomplish all these things, assuming that they would be effective, is simply a confession that they are not willing to assume their task.