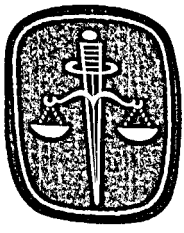
c. 2



NORTH CAROLINA
SUPREME COURT LIBRARY
RALEIGH

TOWARD IMPROVING THE ADMINISTRATION OF JUSTICE IN NORTH CAROLINA

An address prepared for delivery before the North Carolina Bar Association at Myrtle Beach, S. C., Thursday evening, June 12, 1958, by DR. ROSCOE POUND, Dean Emeritus of Harvard Law School.

TOWARD IMPROVING THE ADMINISTRATION OF JUSTICE IN NORTH CAROLINA

Much of what I have been saying elsewhere as to provision for an adequate administration of justice in our States has had to do with the radical change involved in the shift from a rural agricultural society with local commercial centers to a predominantly urban, industrial society with huge metropolitan cities, centers of manufacture and mechanical production as well as of commerce and finance.

My investigations have been made in Illinois, where I first made thorough studies of the subject, and my latest study has been directed to that state, with its problems of administration of justice in the second largest city of our land—a city of 3,600,000 people—with 14 cities of over 100,000 inhabitants; in Massachusetts where the cities retain their ancient boundaries, so that Boston, with some million and a half population in what may fairly be called its civic area, is first in a Commonwealth of some six cities of over 100,000; in Ohio where I made a survey for Cleveland, which is now a city of close to one million, and the state has four other cities of between 250,000 and 500,000 inhabitants; and to less extent in Michigan where Detroit, the center of manufacture of automobiles, has in its metropolitan area a population of at least two millions, and Grand Rapids, the furniture manufacturing center is one of over 175,000.

No such exaggerated conditions confront you here. But commercial problems are not the relatively local ones of 1868 when your organization was set up, and are creating multiplied questions transcending those with which the courts of our formative era were able to deal adequately. The advances of science, making the media of existence more abundant and more easily procurable, are bringing about a steady annual increase of population, which I perceive from the World Almanac has more than doubled in the last 50 years of the present century. You must expect the problems of the modern metropolitan city to come to you also, and it may be profitable to be prepared and adjust your administration of justice to this. At any rate, we are—indeed the world is—becoming so economically and in all its relations so generally unified, that the difficulties of the legal order are becoming the same everywhere. The task of making the local legal order in action the most effective for its purposes that it may be made is increasingly imperative.

Administration of justice has to be adapted to the changing situations of fact which threaten or disturb the social and moral order of the time and place. In comparison with 1868, the year your judicial organization was set up, what were the questions which came before your courts?

In comparison of the work of the Supreme Court of North Carolina shown in 61 and 62 North Carolina with its work of today over a like time in 244 and 245 North Carolina, what one notes at once is the number and significance of the new titles in the index. There are no less than 18. Consider them and what they mean: Associations (fraternal, religious, and labor), Architects, Automobiles, Chattel Mortgages and Sales (i.e. of Automobiles), Damages, Declaratory Judgments, Electricity (power wires etc.), Games and Exhibitions, Eminent Domain, Infants (not parent and child, but the manifold legislation as to control in the service state), Insurance, Kidnaping, Intoxicating Liquor, Master and Servant (i.e. employer's liability and workmen's compensation), Municipal Corporations (including zoning), Nuisance (pollution of air and running water), Patents, Physicians and Surgeons, Registration (i.e. recording), Sales (specially treated under recent legislation and now taking on new aspects in connection with automobiles), Sanitary Districts, Schools, and State Tax Claims Act. These new terms and great expansion of some of the old ones (e.g. negligence from one case ninety years ago to eighteen cases and twenty-four decided points of law today) show the altered conditions of litigation and new types of questions with which the courts must contend.

Many of the new titles mark the advent of the social service state in the present generation. For example, the heading "Administrative Law" has to do with a steadily growing body of law with respect to the relations between the courts and administrative agencies, the nature and limits of judicial review, and the application of the guarantees of the Bill of Rights. Taxation is a growing title, as compared with Tax Sales in the indexes in 1868 it shows the impact of the expense of state taking over of all manner of service in an increasingly crowded world. Like new titles are "infants," as distinguished from the old heading "Parent and Child," marking taking over by the law of much of what had been the domain of the household; "Schools," marking taking over by the state of what had been largely a private and household function; "Utilities Commission," marking new tasks of the courts in legal relations with the administrative boards and commissions charged with supervising continually increasing agencies of public utility; "Architects" and "Physicians and Surgeons," which, with the appendix of "Ethics Opinions of the Council of the North Carolina State Bar," mark the developing regulation of every sort of professional and quasi professional calling; and "Sanitary Districts," which bring public health in the range of judicial inquiry, along with public peace and safety.

Some of the older titles which have come to take up a larger part of the work of the courts, as well as some new titles, mark the accelerated transition from a rural, agricultural to an urban and increasingly industrial society. Criminal law, which called for decision of fourteen points of law in 1868-1869, called for decision of forty-six in 1956-1957. This is not attributable to the growth of population in the interval. The addition of new titles, "Intoxicating Liquor" and "Kidnaping" and significant changes in the weight of subtitles show that in North Carolina, as everywhere else, the growth of cities produces new types of crime.

Even more significant are new titles and old ones which have taken on increased weight which mark the outstanding advance in mechanical engineering and the mechanizing of every sort of human activity in the present century. Here the conspicuous new title is "Automobiles," listing twenty-five cases calling for decision of fifty-three points of law. But this is not all. The heading "Negligence," under which there was one case in 1868, now lists seventeen cases and twenty-four decided points of law. Most of the cases were of negligent operation of automobiles. "Trials," not in the reports of 1868, now lists sixteen cases deciding twenty-three points of law. Most of these cases were cases involving operation of automobiles. "Sales" is another heading not found in the reports in 1868. Now it has to do with eighteen cases and twenty-six points of law—not arising from the mercantile transactions of the past but from sale of automobiles. But the outstanding digest heading today is "Insurance," not in the index in 1868, covering twenty-eight points of law in cases of insurance of automobiles. "Electricity" is another new heading which is of much importance with the spread of high tension power wires over city and country alike.

Scarcely less significant is a group of cases to which the reporter gives the title of "Master and Servant," meaning, however, not the old law of the farmer and his "hired man" or the housewife and the cook, the tradesman and his clerk, or shop keeper and his salesman, but a newly arisen and growing law of employment relations, governing the conditions of employment and liability for injuries incurred in the mechanically operated industrial enterprises and activities of this time. Here we find cases on employer's liability, workmen's compensation, and encounter questions of the basis of liability, of the respective fields of federal and state legislation, vexed questions of legislation over contributory negligence, subrogation, contribution, and indemnity, and conflict of laws which are taxing the abilities and overloading the energies of the judges of our highest courts in every part of the land.

North Carolina is not alone in finding its organization of administering justice inadequate to the conditions with which

the courts must work today. Those conditions are not so serious here as they are in states in which urbanization and industrialization have gone far to make radical change in the character of society. So far as the substantive law goes you have shown yourselves abundantly able to develop experience by reason and test reason by further experience in the political, social, and economic changes that have gone on since you began to make a law of your own in the eighteenth century. One need have no doubt of the ability of a state which has given us such builders of law as Iredell and Ruffin and Pearson and Clark to maintain its position it has long held in American law. But administration of justice in the crowded, mechanically operated, economically unified world of today, in which carrying on of all the agencies of social control is taxed by increasing bigness of everything, calls for organization to conserve their energy and direct them effectively toward their purposes no less than for a well reasoned and scientific body of substantive law. The wisest and soundest system of law may fall short because of want of apparatus of application and enforcement. I have often compared the work of the lawyer to that of the engineer. His tools are no less important than his science. Practical means of attaining ideal ends are as much to be sought and studied as those ends.

On the eve of the Revolution, Blackstone gave the founders of our polity a picture of a simple and reasoned system of courts and organization of judicial business which the complicated and unsystematic organization of courts in England of his time was far from warranting. We had his picture in mind from the beginning. But it could only serve us for our highest tribunals. After independence there was need of a somewhat rapid reshaping of the common law as received from England so as to give us a common law for America. But there was no central lawmaking body and no central tribunal for the whole country for the general substantive law. It seemed more important to find the law by the common-law method of adjudication than to decide particular controversies. Moreover, there was imperative need of decentralizing the administration of justice in the first instance and making it accessible under the conditions of a country of long distances in a time of slow communication and expensive modes of travel. In what but for a fringe of commercial development along the coast were pioneer rural communities, still contending with Indians and with the wilderness, the English system of central courts with local trials at circuit was not applicable. We developed a system of local courts of general jurisdiction at every man's door, each with full control over its own administration. The circumstances which led to this system have wholly changed in most of our jurisdictions. But it became well established and is not everywhere easy to change. One hundred and fifty years of social and economic progress and corresponding development of substantive law have led to a movement for reorganization on lines suited to a different type of economic conditions which has been gaining increasing momentum. But except in very few states our system which obtained in the nineteenth century needs to be remade. In England, too, the system of courts which was described in Coke's Fourth Institute and by Blackstone had to be made over in the transition from a primarily rural, agricultural to an increasingly urban industrial society. This transition was achieved in England before it was with us even in the oldest states. Consequently the English were before us in adapting the organization of courts to the change. The waste of judicial power as well as of time and money of litigants involved in unsystematic multiplication of courts, successive appeals and new trials, independent courts of first instance in every local community, concurrent jurisdictions raising unnecessary technical questions of jurisdiction, so that actions had to be thrown out instead of being transferred to a more convenient place, was noted by Lord Westbury a decade before the date of your constitution. But it was not until the pioneer work of Lord Selborne in his plan which resulted in the English Judicature Act of 1873, that the subject was adequately treated. He urged a single court, complete in itself, of which

local inferior courts in each community, organized in a unit should be a branch or department, the courts of general jurisdiction of first instance with a unified organization were to be another, and a unified court of final appeal was to be a third. The whole judicial power was to be lodged in this great court which was to work in branches and departments but under one responsible head. The Judicature Act as finally enacted did not carry out his plan fully. But he laid out the controlling principles of a modern organization, which we have approximated closely in the present organization of the federal judicial system—as closely as we can in view of the lines laid out in the federal constitution for the federal courts. A few states have been moving to or beyond the English organization.

Lord Selborne made clear the principles of a modern organization: Unification, flexibility, conservation of judicial power, and responsibility.

There should be unification in order to concentrate the machinery of justice upon its tasks. There should be flexibility in order to enable it to meet speedily and efficiently the continually varying demands made upon it. There should be conservation of judicial power in order to assure that the expensive machinery of the courts is applied to the true purposes of the law and not wasted on matters of inconsequence. There should be clear and full responsibility lodged somewhere in order that some one may always stand out as the official to be held responsible if the judicial organization does not function the most efficiently that the law and the nature of its tasks permit.

With these general propositions in mind, I turn to the Tentative Report of your Subcommittee on Court Structure and Jurisdiction. This report shows thorough comprehension of the problem, understanding both of an ideal system for a common-law jurisdiction in the United States, and of the political and practical obstacles in the way of putting such a system into immediate operation. An enlightened conservatism may well be advisable, and I commend your attention to the report as exceptionally well done. What is especially to be commended is the care taken not to foreclose further improvements by imposing requirements and limitations difficult to modify or remove while impairing the operation of the principles upon which the system should proceed. For a besetting sin of American law reformers in the nineteenth century was multiplication of detailed hard and fast rule of procedure, attempting, as Mr. Hornblower used to put it, to prescribe the minutest details of everything that was to go on in court from the time a judge entered the court house except to fix the exact peg on which he should hang his hat. They looked to exact development of traditional institutions instead of at how they functioned in practice and how they could be made to serve the purposes of the administration of justice. The functional rather than analytical legal science of today has been teaching us better.

Next to unification of the court system, but dependent upon it for effective remedy, is a no less conspicuous need of better organizing—indeed one might say of organizing the administrative work of the courts. For this very important feature of the practical administration of justice has been neglected in devotion of our major energies to reform of procedure and development of the substantive law. Moreover, an effective modern system of judicial administration was impossible under the prevailing multiplication of independent tribunals, concurrent and overlapping jurisdictions and waste of judicial power. This is but an item in a general regime of non-cooperation which has long been a settled feature of our polity and was a product of the pioneer conditions of the formative era of our institutions. It has been manifest in lack of cooperation of administrative officials with each other; in lack of cooperation among the independent detecting and investigating agencies in the same locality; in not infrequent lack of cooperation between local prosecutors and local courts, notably manifest a generation ago in our large cities under the prohibition regime; in friction between local courts and local adminis-

trative officials and in lack of cooperation of court with court or even of judge with judge in the same local court.

There is more than a tradition of independence of local administrative officers. In our political history they have been made responsible only to the local electorate in order to prevent centralization of authority. In our standard municipal polity, until bad experience has been leading us to experiment in a new direction, each important department, as it was found necessary was given an independent head, elected by popular vote and conducting his department as a separate entity. In our standard county organization there are independent elected officials of coordinate authority. In our standard state polity the heads of the several departments are elected along with the governor and are quite independent of him and of each other. Within his sphere each is a governor in petto. So, as our general administrative system grew up the several local administrative officials were independent of any central state control and independent of each other. They had no duty of working with other independent officials and had a traditional disinclination to do so. In what became the typical American state polity, each police or sheriff's office, coroner's office or public prosecutor's office was made independent and was characteristically disinclined to effective cooperation.

As to the features of general administration, as they existed when our state constitutions were framed, you have had excellent studies made in this state and much has been done throughout the country to bring about improvement. Mark Twain tells us that the explanation of the judgment of Solomon lies in the way Solomon was raised. Our regime of judicial administration was raised in an atmosphere of non-cooperation. In the beginning when local courts of general jurisdiction of first instance were set up in communities of substantially equal population and amount of judicial business there were no serious ill results. Moreover you in North Carolina seem to have so arranged your system of judicial districts as to avoid much of the unfortunate results of judges of coordinate authority potentially able to deal with one controversy in whole or in part at the same time subject to separate reviewing proceedings as to each item.

I remember well how, when some fifty-five years ago I was Commissioner of Appeals in the Supreme Court of Nebraska one of the judges of the District Court, the court of general jurisdiction at law and in equity for the chief city of the state, issued a peremptory writ of mandamus to require restitution of money paid upon a subscription to a public project which had been unsuccessful. The judgment awarding the writ was in due course reversed by the Supreme Court. But the writ had served its purpose of procuring repayment of the money, and thus brought about a series of appellate proceedings, proceedings for restitution, actions for money had and received, and further appeals which vexed the court for some years. When for special reasons, under extraordinary conditions, it is necessary to utilize the full power of the judicial system immediately and effectively, ability to avoid a slow moving process of going by successive steps from separate court to separate court from bottom to top of the judicial hierarchy becomes important.

Thus the first and second items in a program of modernizing the adminisration of justice to fit the needs of the social and economic order of today are intimately related. It is only by a thorough unification of the court system that we can bring about a needed flexibility in the assignment of judges and distribution of judicial business and better organization and superintendence of the administrative work of the courts. Judicial power is wasted by rigid territorial districts within which only certain judges are available, or by judges specially provided for special cases or purposes only, so that dockets may be congested in one place when judges are relatively idle in another.

Also in a unified court system it becomes possible to make full and effective use of the fundamental historical power of the common-law courts, substituting

rules of court, devised and formulated to the dictates of experience for legislative prescribing of details of procedure. In particular, unification makes it possible to develop the full possibilities of pre-trial and discovery procedure, which are doing so much to make it possible for the characteristic common-law trial to achieve just results with the complicated states of fact so often involving difficult questions of expert opinion so often confronting the courts of today.

Indeed this use of the rule-making power and concentrating it in the highest court with carefully worked out provisions for expert advice and assistance in framing the rules is an item of paramount importance. Substitution of rules of court for detailed codes of procedure, which remade pleading and practice in England in 1873 has abundantly proved itself in the Federal Rules, in New Jersey, Michigan, Pennsylvania and Illinois and is steadily making its way in the United States as it has done elsewhere in the common-law world. The recommendations in the Tentative Report of your Subcommittee on Practice and Procedure are very well made and deserve to be put in effect. The objection formerly urged that committing this power to the courts infringes the doctrine of separation of powers was answered long ago by Chief Justice Marshall in pointing out that the lines between the legislative, the executive, and the judicial powers were not to be drawn as severely analytical but were to a large extent historical and that it was a proper legislative function to assign a power of doubtful classification to an appropriate department of government. Regulation of practice in the courts by rules of court had been exercised by the King's Courts at Westminster since the fourteenth century. In Tidd's Practice, the standard English text at the time our institutions were formative, there were such rules then in force which had been promulgated by the Court of Common Pleas in the 1300s, and many promulgated by the King's Bench and Common Pleas which were received as common law in this country. There can be no reasonable doubt of the validity of legislative committing of this power to the courts. But it is wise to put the power in a unified court by Constitutional provision, as has been done in New Jersey and thus put a stop to unsystematic tinkering with details here and there by legislation which has been the bane of codes of civil procedure in more than one state.

Likewise establishment of a unified integrated court makes it possible to provide for a centralized administrative office under a responsible head of the judicial system. What this means is well brought out by the Administrative Office of the United States Courts. According to work to be done for the time being it assures efficient assignment of judges to the places where there is need for the time being. Thus it enables full and intelligent use to be made of the personnel of the bench and effective redistribution of its load of work as occasion demands. Not the least advantage is that the administrative office can provide for intelligent use of a reliable, well gathered and well arranged body of statistics as to the volume of work of the court as a whole and of its several branches and divisions, of how it is disposed of, and where congestion and delays occur, and thus make possible judicious exercise of the superintending function.

This is a matter which deserves more attention than it generally receives. What is proposed on page 7 of the Tentative Report of the Subcommittee on Court Administration is very well taken. Adequate provision of statistics by reliable officials in a position to and under a duty of gathering and putting them in usable form is very much needed.

In 1931, in connection with the work of the National Commission on Law Observance and Enforcement, I had occasion to make a thorough study of official statistics of enforcement of the prohibition laws in the federal courts, and as an aid to that study use of such judicial statistics as were available in the states. I found them worthless for any assured conclusion. There was no superintending authority to devise a plan or require thorough execution of it. As a result, they gave point to Bill Nye's gibe that figures won't

lie but liars will figure. For example, the official figures of persons prosecuted, persons convicted and sentenced, and persons imprisoned year by year, as provided by enforcement agencies, court officials and prison authorities could not be made to agree. The main purpose seemed to be not to furnish data for assured judgment as to the working of the law but to make as good a case as possible for appropriations for the activity providing the statistics. The office for the federal courts has set a pattern which is beginning to be followed in the states. But it will only bring about worth while results in a modern, unified, integrated system of courts.

In the thorough study of congestion and delay in the Superior Courts recently published by the Institute of Government of the University of North Carolina, there is a noteworthy discussion of the way in which the clerks carry out the statutory provisions as to dockets and files for civil matters. Not the least advantage of unification of the system of courts and so better organization of its administrative operation is the opportunity it may afford of fitting the clerical and executive officials into a plan of over all efficient operation. Here the characteristic antipathy to cooperation has been conspicuously manifest. In Illinois, when I was teaching in Chicago, a clerk of the Supreme Court, who held under popular election and, as he explained, was responsible to the people of Illinois, not to the Court, refused to attend a specially called July term of the Court to dispose of accumulated business because he had already arranged to take a vacation in Europe. This is an extreme case. But the situation of which it was a symptom is characteristic. Administration of justice is in one aspect a business operation—and on that side it is a huge business. No other business of at all comparable magnitude could be carried on with so loose an organization.

This is a very important item in any plan for giving a modern organization to the administration of justice. It is competently considered and provided for in the Tentative Report of the Subcommittee on Court Administration.

Also the recommendation in that Report as to abolishing terms of court urges something that ought to have been done everywhere long ago. There is no place for the term system among a busy people in a busy age.

Next to modernizing of the court system in a majority of the states there is clear need of simplifying procedure and adapting it to its purposes in the administration of justice in the social and economic order of today. In 1868, volume 68 of the North Carolina Reports discloses 58 cases decided upon points of pleading and practice. This was by far the leading title in the index to the volume, the next being criminal law with 43 cases, evidence with 30 and wills with 20. In 1957, in 245 North Carolina, criminal law leads, but pleading and practice is a close second with 34, insurance third with 23, and negligence fourth with 17. This hypertrophy of procedure is abating but still persists in a majority of the states although put an end to in the federal courts and in a steadily increasing number of states since 1915. Even more than in the formative era the courts are being confronted with new and difficult questions of substantive law to which the judges ought to be able to devote their undivided attention. That a court should have to give over sixteen per cent of its time and attention to hearing arguments upon and deciding points of civil procedure is a gross and inexcusable waste of judicial power.

But we know today that the path of improvement is in developing of the historical rule-making power of the courts and giving up elaborate and over detailed codes of procedure.

Perhaps the most difficult problem in connection with organization of courts is that of small cause tribunals. I shall take this up primarily with respect to civil cases. But small causes jurisdiction in this country grew up historically in connection with jurisdiction over petty offenses and preliminary examination in prosecutions for felony. What we have to consider is how to fit small debts and claims, petty prosecutions, now a

serious category in a time of traffic courts, and issuing of warrants and preliminary examination of accused persons conveniently into a unified judicial organization. However, the problem did not become acute in the United States generally until conditions in metropolitan cities and in the present century the taking over of the highways by motor vehicles made the old type of magistrate's jurisdiction intolerable. Traffic prosecutions have called for a special treatise in the Judicial Administration Series published under the auspices of the National Conference of Judicial Councils. They have come in many places to assume such proportions that many are unwilling to commit them to ordinary tribunals part of the general judicial system. Traffic Prosecutions are an item in the program of many who are urging bureau justice. I am no believer in administrative as compared with judicial justice. I cannot believe that we should give up any part of what has been fundamental in the Anglo-American polity from the beginning, namely, faith in a judiciary rather than a magistracy. I submit that our job is to commit every part of what is, as our polity has always understood it, administration of justice to an integrated organization in which branches and divisions may take care of different types of controversy without raising jurisdictional questions which cannot be settled speedily and inexpensively within the organization itself, where competent judges may be assured to small as well as to great, and where adequate supervision may be assured without the abuse of expensive retrials and successive appeals.

Although there was great diversity of what are called inferior courts in the different states, the one point on which there is likely to be agreement is that they are inferior in every respect. A few states, North Carolina among them, took the forward step of conferring probate jurisdiction upon the general tribunal of first instance. But in general down to the Civil War the typical organization of courts provided for all cases other than actions at law involving more than a fixed jurisdictional amount and suits in equity with appeal to the court of general jurisdiction of first instance for trial *de novo* and appeal from that court to the court of general reviewing jurisdiction on questions of law. In a growing number of states in recent years a set of intermediate reviewing courts has been provided in order to relieve the congested dockets of the highest court. In North Carolina you have been spared this affliction and I am rejoiced to see that it does not seem to be threatened. A modern court organization ought to have sufficient confidence in the judges to make one appeal suffice. Successive appeals are an abuse.

The abuse is especially flagrant in small causes. But it is not wholly due to mistaken zeal to relieve congested dockets of the highest reviewing courts. Before the days of radio, television, and automobiles bringing urban amusement facilities within easy reach, the pioneer American farmer found in litigation a species of amusement. I came to the bar in 1890, long before the days of radio and television, and long before the days of the automobile, and was born and brought up on the prairie on what was at most the edge of pioneerdom. The farmer of that time sought to protract a law suit to the bitter end and believed in appealing every judgment to the furthest of the judicial hierarchy. I have heard it argued in country-store discussions that every defeated litigant, if he wishes, ought to be allowed to take his case to the Supreme Court at Washington. I remember a case in which I had to write an opinion as Commissioner of Appeals in the Supreme Court of Nebraska where there was an appeal in the nature of error to that court as a matter of right under the constitution. The case involved twenty-eight cents. It had been tried twice before a Justice of the Peace. Had been once to the court of general jurisdiction of the first instance on error and once more to that court on appeal for trial *de novo*. After judgment of affirmance in the Supreme Court that court had still to consider an application for rehearing.

I submit that what is required is to commit small causes to a branch of the unified and integrated court of justice so

that they may be disposed of by competent judges with adequate supervision of the administrative work and adequate review unless in exceptional cases by a reviewing division in the small-cause branch itself.

Also the cost of review proceedings in small-cause litigation may be reduced in a wholly unified court organization in which the records and files of each branch, division, and local tribunal are records and files of the court as a whole so that a simple system of lodging a receipt in the ordinary place of keeping of a record, file, or document and taking the original to the reviewing tribunal, to be returned to its ordinary place of keeping and the receipt taken up when the reviewing tribunal is through with it, will obviate expensive copying and certification required by the system of separate courts.

Good hints as to how small causes may be provided for in a modern judicial organization may be found in the English county court system. The county courts are now governed by the Administration of Justice Act, 1956, and the County Courts Act, 1955. They were originally set up under the County Courts Act of 1846, in the general legislative law reform movement that led to the New York Code of Civil Procedure in 1848. But the name County Courts is misleading to an American. It is historical only, having been taken from the meeting of the free men of the county, the ordinary tribunal of the Anglo-Saxon polity, which hung on as a gradually disappearing institution for centuries and is described by Blackstone. They are "County" courts only in name, not in any way associated with county organization or affected by county boundaries. They provide a court in every considerable center of population with provision for easy access in every locality to means of bringing proceedings and having them determined. The judges are exclusively experienced lawyers, quite the equal of those who sit in the Superior Court of First Instance; their procedure is simple and modern, formulated in rules of court framed and under constant review by a standing committee of judges and practitioners. Their administration is centrally organized so as to give the maximum efficiency compatible with full judicial independence and the diversity of local conditions.

I recommend to you study of the English County Court System as you will find it fully set forth in "The County Court Practice, 1958." Perhaps under our separation of federal from state functions we could not make the village post office a clerk's office for the purposes of a system of small cause justice. But the simplicity and yet orderly effectiveness of the English system deserve our thoughtful attention.

Where, however, I venture to think we can improve upon the English system is by utilizing our American experience of uniting civil and criminal jurisdiction all along the line of our organization of the administration of justice.

No tribunals can be too good for the unfortunate litigants and accused persons at the bottom of the legal scale. But in practice I fear nothing has been thought too bad for them. In New Jersey, where the judicial system has been thoroughly reorganized, complaint is now made that the traffic courts have become too thorough. It seems that the traffic police are now able to secure 96.4 per cent of convictions. In view of the enormous toll of life and limb taken year by year by the motor car, one would not have supposed that the measure of accomplishment of traffic courts was to be a high percentage of acquittals. Those of us whose fate it is to be of necessity pedestrians can realize the soundness of the Japanese student's pronouncement that if one tries to cross the street "he must expect to get killed once in a while," and will not be alarmed at increased power of traffic officers to enforce the law. But if policing of the highways is carried too far the remedy is not in inefficient and badly administered traffic tribunals but in more effective administrative supervision of the police.

I repeat what I suggested above. What must be regarded as the ideal plan of organization was projected by Lord Selborne who was responsible for the English Judicature Act of 1873. It was

his idea to unify the administration of justice in one great court, to sit in branches and divisions under one responsible head, so as to unify the administrative work, preclude waste of judicial power, assure the maximum efficiency of application of the resources of the court to the dispatch of its work, do away with concurrent jurisdictions and resulting possibilities of conflict if not seeking advantage by striving to acquire or avoid particular controversies, and put an end to the splitting up of controversies and requiring them to be determined in fragments in different courts and with successive appeals. It was not carried out fully. He did not succeed in putting through the whole plan. The Supreme Court of Judicature, which was established by the Judicature Act of 1873 did not include a branch or department for small causes in the unified system it set up. Judges cannot be taken from High Court or County Court, one to and from the other, in case of administrative need of temporarily reinforcing one or the other. Also, although it abolished the appellate jurisdiction of the House of Lords, that jurisdiction was restored in spite of Lord Selborne's opposition in 1876. Thus the result fell short of the ideal in two respects. It did not make the whole judicial force available whenever and wherever congested calendars require concentration of judicial power for the time being and it restored the unfortunate system of successive appeals. Likewise it did not deal thoroughly with small-cause jurisdiction. But the latter is now well taken care of by the County Court Acts. As it is, the Judicature Act and the County Court Acts have given England a modern judicial organization which is more and more regarded as a model in the common-law world.

After all, the ideal is seldom to be attained at a jump. Great improvement of our organization of courts is to be had by gradual remoulding of our present system toward the ideal plan. Complete unification of the Superior Courts of Common Law in England was not had until 1880. The gradual but sure and steady approach to the ideal which the reports of your subcommittees advocate is eminently indicated.

Moreover, in North Carolina you are not constrained to look abroad in order to fit your machinery of justice to its tasks in the world of today and tomorrow. The studies published by the Institute of Government of your State University and the excellent reports of the subcommittees of your State Bar Association point the way toward what is to be done and how to do it. In particular, the reports of the subcommittees are in the right line of progress in looking to judicial rule-making by properly constituted bodies rather than to codes and legislative tinkering of details.

Fifty years ago, the report of the special committee of the American Bar Association on Delay and Expense in the Administration of Justice urged unification of the courts, organizing of the administrative work of the courts, and use of the rule-making power of the courts instead of detailed codes of procedure. The progress made along these lines since 1915 amply justifies what was then said and you are simply falling into line in the progress that has been going on. Indeed, there is nothing revolutionary in these propositions. They follow established lines of common-law development. What was revolutionary was rather the expectation of the legislative law reformers of 1848 and thereafter to make everything over by minutely detailed codes. For a time this was thought to be required by the constitutional separation of powers. At one time a severely analytical version of this doctrine was carried so far that the New York Court of Appeals would not allow a court of equity to carry out a charitable trust *cy pres* because that power, if historically judicial, was not considered to be such analytically.

John Marshall long ago pointed out that our constitutional distinction had its roots in history, not in analysis, and that there were powers of doubtful classification which might well be referred to either of two departments so that it was a legitimate legislative function to refer it to either. Your committee chooses a

wise course in proposing to intrench the power in the constitution.

In a time when man has divided the indivisible in splitting the atom, has harnessed new sources of power and new means of overcoming distance, has found how to add satellites to the planet, has begun to explore space and is threatening to bombard or even to pay friendly visits to the moon—in short in an era of bigness of all things—justice, the great interest of man on earth, must expand its institutions likewise to the measure of the greater tasks of a great age. There are signs that we may be moving toward an era of law of the world. At any rate, we are learning how to develop our institutions of justice to their fullest possibilities in state, in nation, and in the world. That you are striving to do your part in this advance of civilization and are setting about it so wisely and well is fully brought out by the materials with which you supplied me in preparation for this address. I am rejoiced to see you going on in the footsteps of the great lawyers who have shaped and applied the law in this state from the beginning.

PROPERTY OF THE
NORTH CAROLINA
SUPREME COURT LIBRARY
RALEIGH

DATE ACQUIRED MAY 1987
BY THE LIBRARY:
ACQUIRED FROM:
N.C. Bar Association