to conclude that it is a freedom which is not subject to examination. The Report of the Commission asked whether the press ought to have the right to pervert the arts, to cause hatred and bigotry by spreading untruths, to confound the public. In short, the Commission asked whether the press should have the right to abuse its freedom. The author's answer to this important question is oblique. He ignores the possibility that such abuses may exist and argues that by the very nature of things freedom of the press can not be abused. "The founding fathers had only one intention, to keep the government from interfering with speech and press now and forevermore."[13] For all practical purposes, "individuals are free to print in the United States subject only to damage done wrongfully and so proved in a court of law, for which there are penalties. This is our accepted philosophy of press freedom."[14] To no group, other than the press, does such a philosophy accord a like freedom from responsibility. The treatment which would be meted out to the Jehovah's Witnesses with their loudspeakers and pamphleteers in Mr. Hughes' Republic is not difficult to imagine. The picture painted by the author portrays the institution of the press as the master of society, not as its servant. This picture is not a refutation of the Commission's allegation. It is proof of it.

ROBERT L. RANDALL†

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION. By Arthur T. Vanderbilt.* New York: New York University, 1949. Pp. xxxii, 752. $7.50.

"One of the strangest phenomena in the law is the general indifference of the legal profession to the technicalities, the anachronisms, and the delays in our procedural law. While our substantive law . . . has been developing, . . . our procedural law . . . has been relatively neglected."[1]

For ten years the National Conference of Judicial Councils compiled data on procedural practices in the several states. The valuable result of this work, *Minimum Standards of Judicial Administration,* edited by Chief Justice Arthur T. Vanderbilt of the Supreme Court of New Jersey, measures each state's practice against the minimum standard prescribed by the American Bar Association, in each of the following departments:

1. With Respect to the Selection, Conduct and Tenure of Judges
2. Managing the Business of the Courts
3. The Rule Making Power
4. The Selection and Service of Juries
5. Pre-Trial Conference
6. Trial Practice

13. P. 454.
14. P. 458.
† Assistant Professor of Law, Indiana University School of Law.
* Chief Justice, Supreme Court of New Jersey.
1. P. xvii.

7. The Law of Evidence
8. Appellate Practice
9. Courts of Limited Jurisdiction, such as traffic courts and justices of the peace

Accompanying each study is a map of the United States so drawn as to reveal at a glance the states' attitudes on the particular subject.

It seems quite appropriate that this book should be reviewed with respect to the progress or lack of it revealed in Indiana. It is the purpose of this paper to bring to the Bench and Bar, indeed to legislators as well, the "grading" of Indiana on some of the more important rules of procedure and practice.

Judicial Selection and Tenure

The American Bar Association has recommended that judges be appointed by the executive or other elective officials from a panel chosen by another agency, composed of high judicial officers and other non-political members, and that the judge periodically "run against his record."[2]

In some states, judges are so chosen; but in a vast majority, the selection is made by popular vote. See map No. 1. The two most progressive states are California and Missouri; indeed, the Missouri plan is being widely discussed. Under it, judges are appointed by the executive from a selected list compiled by the judicial commission. An appellate judge runs against his record at least once in twelve years; he does not face competing candidates nor does his name appear on a party ballot.

Indiana, on the other hand, still chooses its judges as regular political candidates. "This method has the inevitable effect of involving judges in partisan politics and to the extent that they are so involved their independence in thought and action is always subject to question."[3] Candidates are expected to make political contributions, speeches and otherwise promote the success of the party selecting them. Canon 28 of the Canon of Ethics, prohibiting judges from engaging in partisan politics, is not meticulously observed. But "in only two states, Georgia and Indiana, has it been reported that judges *customarily* engage in partisan politics."[4]

Since the independence of the judge as such has a distinct relation to his dependence upon a political organization, numerous proposals have been presented to the Indiana General Assembly to secure a method of selection stripped of "politics." But, to date, they have all failed.[5] The current trend toward extension of tenure—preferably for life on good behavior as in the

2. P. 3.
3. P. xxiii.
4. Italics added. P. 15.
5. It is often sagely observed that it is remarkable that the judges are as independent as they are.

MAP No. 1

SELECTION OF JUDGES—PRINCIPAL MODES
Appointment by executive subject to confirmation, some minor exceptions in some states
Modified appointment plans, applicable to appellate judiciary, others elected
Elected by popular vote, with minor exceptions
Trial judges appointed by executive, others selected by popular or legislative vote
Selection by legislature
WASHINGTON
OREGON
CALIFORNIA
IDAHO
NEVADA
MONTANA
WYOMING
UTAH
ARIZONA
COLORADO
NEW MEXICO
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
KANSAS
OKLAHOMA
TEXAS
MINNESOTA
IOWA
MISSOURI
ARKANSAS
LOUISIANA
WISCONSIN
ILLINOIS
MICHIGAN
INDIANA
OHIO
KENTUCKY
TENNESSEE
MISSISSIPPI
ALABAMA
GEORGIA
FLORIDA
SOUTH CAROLINA
NORTH CAROLINA
VIRGINIA
WEST VIRGINIA
PENNSYLVANIA
NEW YORK
MAINE
0 50 100 200 300 400 500 MILES

federal system—goes far to reduce political pressures; yet, Indiana judges have among the shortest terms found in any state.[6]

Managing the Business of the Courts

A unified judicial system with broad powers in one judge to assign judges and direct the work of the state judiciary[7] is strongly recommended by the Bar.[8] Better record-keeping would be compulsory.[9]

There are sixteen states that have some degree of unity and an equal number that have a minimum.[10] See Map No. 2. Indiana is one of eleven which have no semblance of unification; hence, there is much room for improvement. For example, the change of venue practice in the state is very loose and subject to great abuses. It is not unusual for a case to be finally heard 75 to 100 miles from the originating court. In an effort to gain some unification, the Indiana Judicial Council, in 1941, introduced a bill in the legislature providing for the division of the state into judicial districts with power in the Chief Justice to assign justices to assist where a local judge was overworked. It received scant consideration.

Also essential, if the work of the courts is to be improved, is the compiling of reliable statistics. Indiana by statute, has given this power to the Judicial Council. But due to sporadic legislative appropriation and inadequate cooperation on the part of county clerks, only about two-thirds of the counties turn in complete reports. Thirty-two states do better; some have complete and comprehensive statistics regularly compiled.[11] See map No. 3.

Rule Making

In 1937, the General Assembly conceded the rule making power to the Supreme Court of Indiana. (The word "conceded" is used advisedly. In the order establishing the rules, the Supreme Court said they were promulgated not only by authority of the General Assembly, but also by the "inherent rule making powers of this Court.") Indiana is thus one of fifteen states in which the highest court has complete authority in this respect; it was one of the

6. In two states judges are given life tenure while in 14 the term is ten years or more. See map, p. 18.

There is also a trend toward larger salaries, thus attracting more fit persons for judicial office. Indiana circuit judges receive from $5,400 to a maximum of $10,500. Judges of the Supreme and Appellate courts receive $11,000 per annum. There is a comprehensive salary schedule for special judges. See Ind. Stat. Ann. (Burns 1933) §§ 2-1416, 2-1516.

7. "(1) That provision should be made in each state for unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage." P. 29.

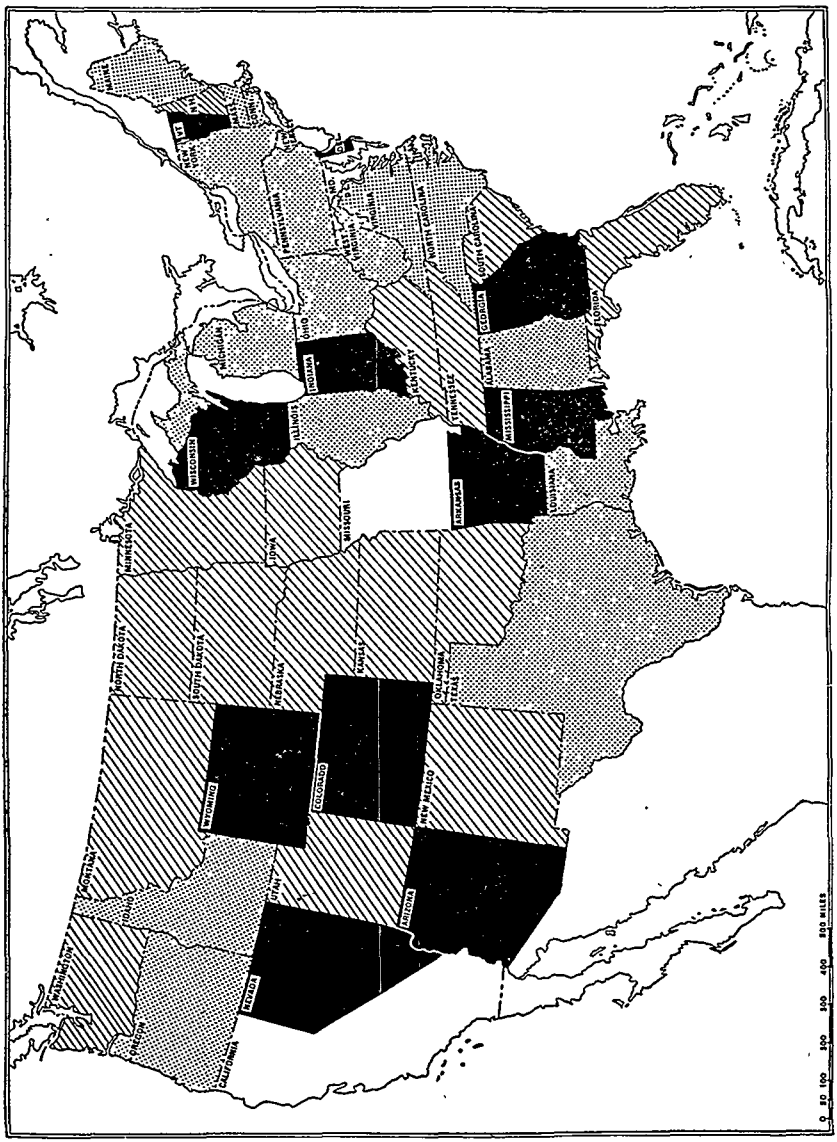
8. Throughout this review "the Bar" refers to the American Bar Association.

9. P. 29.

10. P. 36.

11. Map, p. 75.

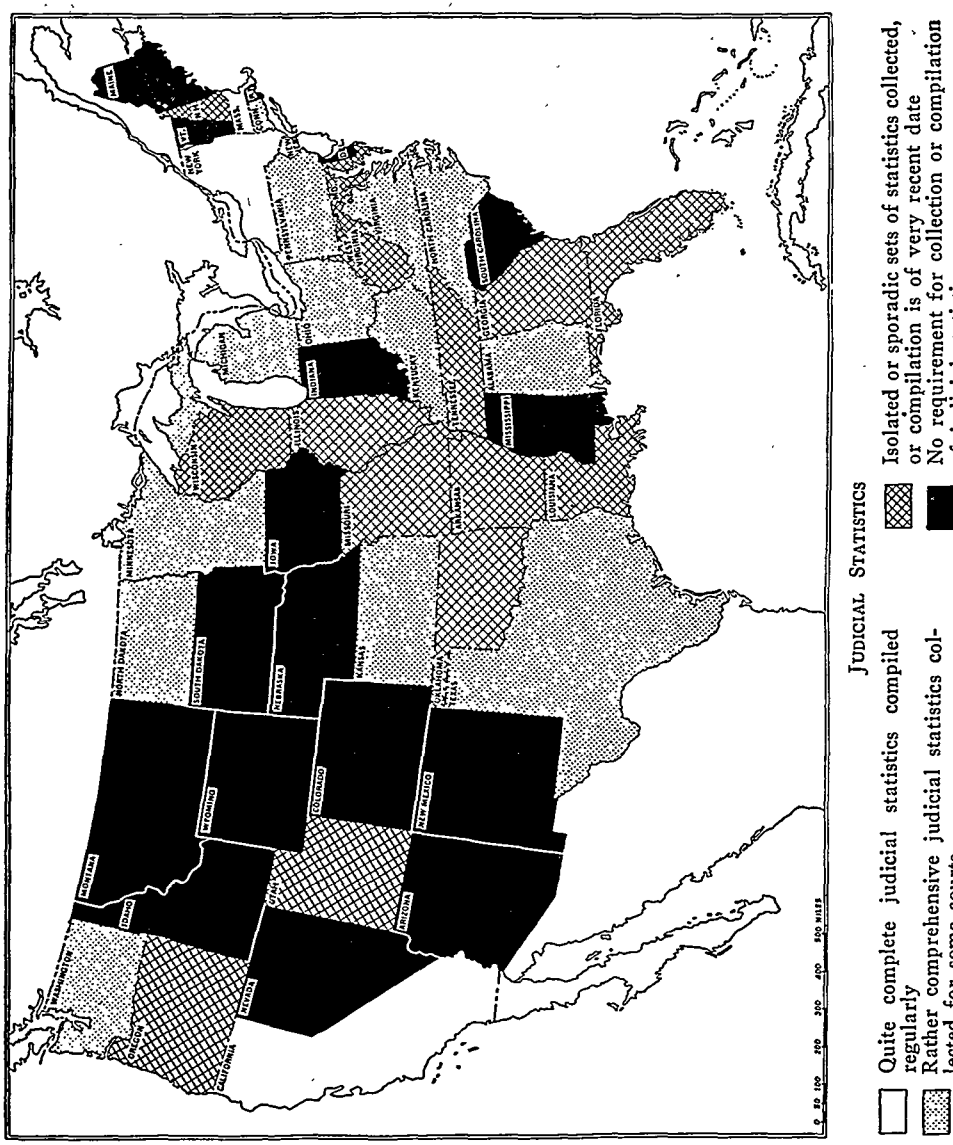
MAP No. 2



UNIFIED JUDICIAL SYSTEM

- Many elements of unity, a substantial degree of control is exercised over all or almost all courts
- Some effective control of one or more sets of courts, no real unity
- States having a minimum of elements of external control
- Substantially no measure of external control exercised over any part of judicial system

MAP No. 3


JUDICIAL STATISTICS
Quite complete judicial statistics compiled regularly
Rather comprehensive judicial statistics collected for some courts
Isolated or sporadic sets of statistics collected, or compilation is of very recent date
No requirement for collection or compilation of judicial statistics

first to meet, and in fact preceded, the Bar Committee's proposal that "practice and procedure be regulated by rules of court."[12] See map No. 4.

JURIES

In accordance with the Bar recommendation, Indiana jury panels are selected by jury commissioners.[13] As to the examination of jurors, there are three principal methods in use. In some states jurors are questioned only by the attorneys, in others by the judge alone and in the majority, including Indiana, by both the judge and the attorneys.[14] See map No. 5. The Bar urges the adoption of Federal Rule 47, permitting the court to conduct the examination of prospective jurors.[15] Since the Indiana system is not dissimilar to this, the present method is deemed acceptable. Also, Indiana follows the suggested procedure of authorizing the use of alternate jurors.[16]

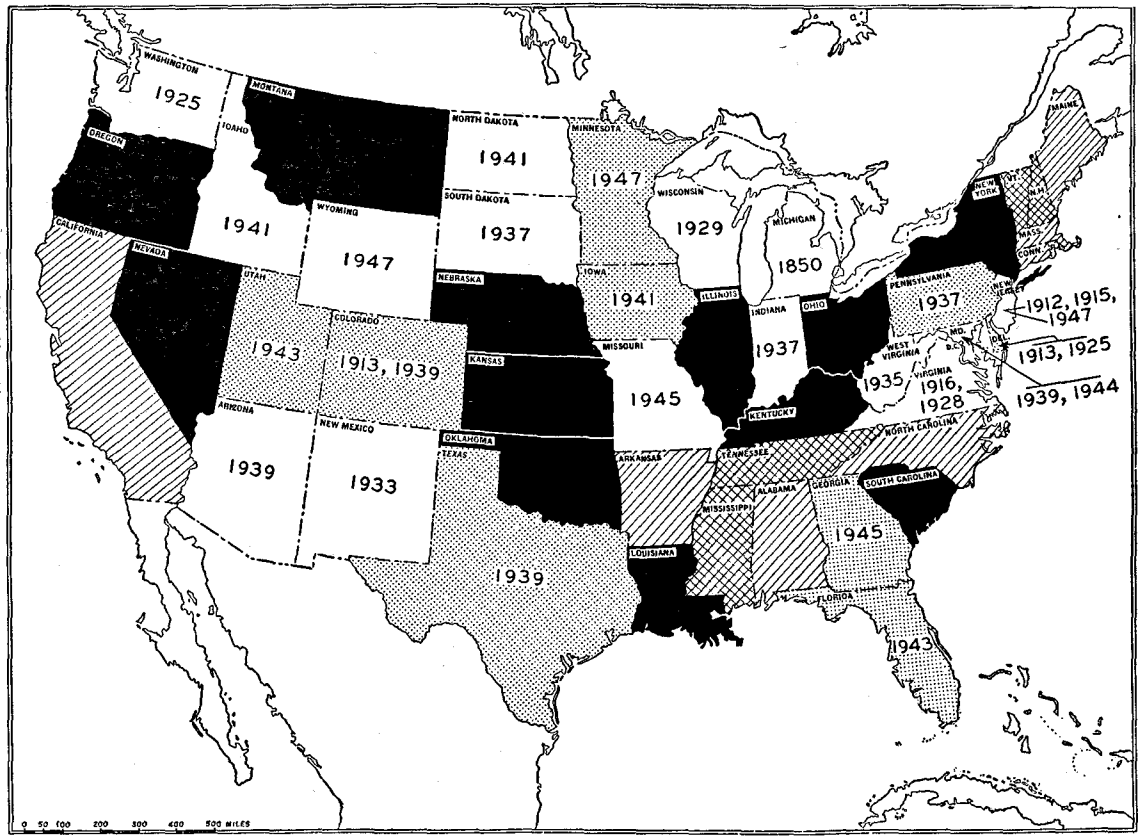
PRE-TRIAL CONFERENCES

At the time the Bar committee endorsed the use of pre-trial conferences not one state had adopted the practice. It came into almost immediate favor; Indiana is among the states which have adopted it.[17] Despite this evidence of enlightenment, one may wonder whether Indiana is using pre-trial conferences properly and to the full extent to which they are available. Certain judges and lawyers seem to prefer the old sporting chance of fighting it out in court, more or less in ambush. Attorneys are not required to "reveal their hands" until they are actually in trial. With further replacement in the legal profession, more frequent use of pre-trial conferences can be expected; they have demonstrated that they "result not only in great efficiency in the judicial processes, but in great economies in time and money for the courts, the litigants, and the public."[18]

TRIAL PRACTICE

Trial Practice is described by the Bar committee as chiefly concerning the proper function and authority of the trial judge.[19] Should the judge be

12. P. 91.
13. P. 146.
14. P. 146; IND. STAT. ANN. (Burns 1933) § 4-3301.
15. Federal Rule 47 states:
"The Court may permit parties or their attorneys to conduct the examination of prospective jurors or may of itself conduct the examination. In the latter event, the Court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."
16. P. 146.
17. Map, p. 209.
18. Report of the Judicial Conference of the United States 36 (1949).
19. The Bar Association recommends that "the common-law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom." P. 221.

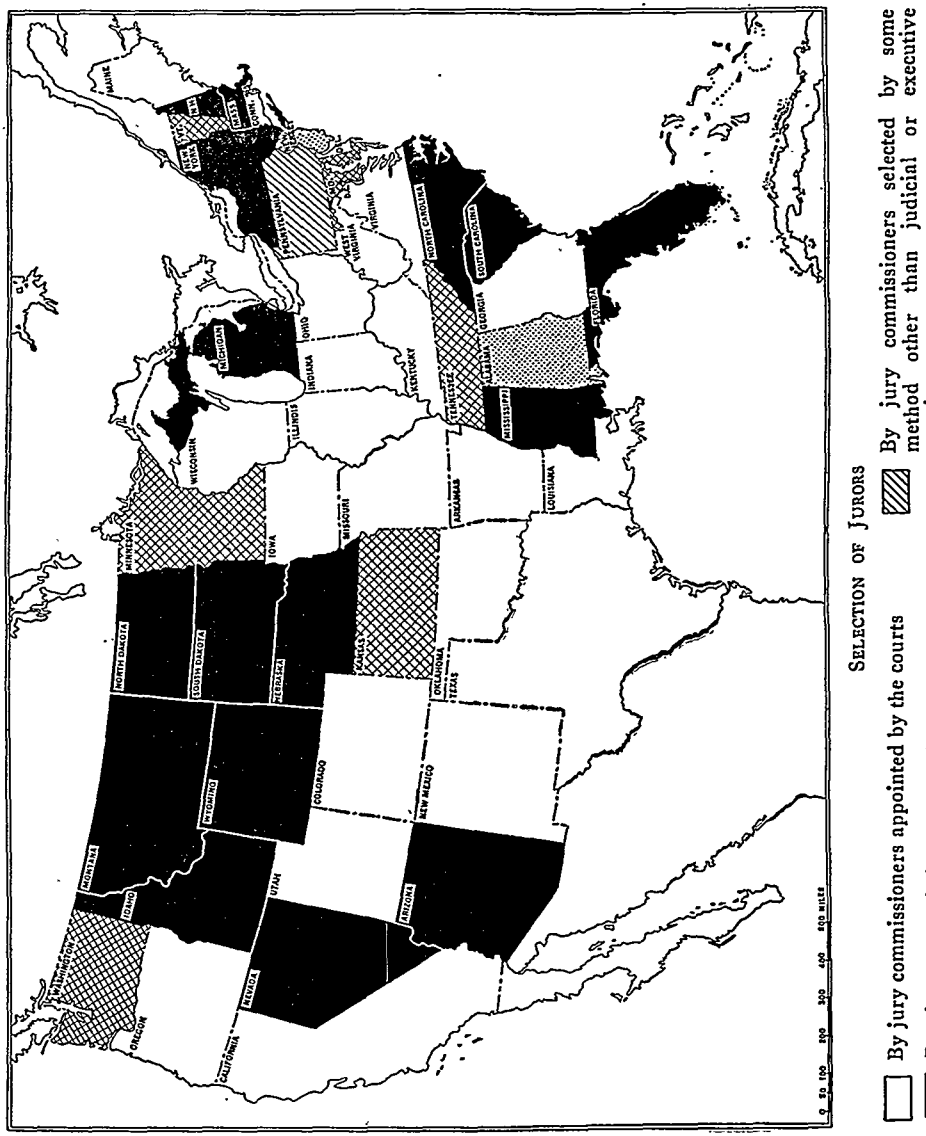


MAP No. 4

STATES AUTHORIZING JUDICIAL REGULATION OF PROCEDURE

- Complete supervisory rule-making power entrusted to court of last resort
- Complete rule-making power in civil proceedings entrusted to court of last resort
- Limited grants of rule-making power as to certain proceedings, etc., or to particular courts, or to a judicial body other than a named court, statutory regulation as to remainder of procedure
- Statutes predominate in regulation of procedure, some court rule-making
- Procedure regulated almost completely by statute

MAP No. 5


SELECTION OF JURORS
By jury commissioners appointed by the courts
By jury commissioners appointed by the governor
By jury commissioners selected by some method other than judicial or executive appointment
By judges or courts, counties having certain population
0 50 100 200 300 400 600 MILES

only "a fair umpire" or should he have the right to be of definite aid to the jury in resolving difficult questions, even questions of fact? The Bar recommends that the trial judge be allowed to summarize the evidence, since partisan lawyers are not likely to do so impartially.[20] Some years ago when Dean Wigmore classified the states with respect to judicial esteem, only Illinois, among the first nine (Indiana not being among them), did not permit the judge to sum up the evidence. The Indiana trial judge is not given this power, nor is he permitted to comment upon the weight and credibility of the evidence, although the Bar also includes this as one of his proper functions.[21]

The practice in Indiana of requiring the submission of interrogatories to the jury upon the request of either party, the equivalent of Federal Rule 49, is in harmony with the position of the Bar.[22] The suggestion that the trial judge be allowed to grant a partial new trial is not followed,[23] although the severity of this rule is somewhat mitigated by the court's power to order a remittitur as to the amount of the verdict. But in many respects, the general observation—"the basic common-law concept of the judge as the governor of the trial has not been restored in many of the states in which such judicial power was restricted as a result of the fear and distrust of its arbitrary use engendered by the impact of Jacksonian democracy"—is applicable to Indiana.[24]

EVIDENCE

Proposed reforms in the law of evidence are quite numerous. But firmly embedded tradition and practices strongly resist innovation and reform. In some instances, Indiana rules do measure up to the approved standard. A new trial will not be granted because of the admission or rejection of evidence unless it appears that prejudicial error has resulted.[25] Since 1940, it is no longer necessary to take exceptions on the record for the review of error on appeal.[26] Certified copies of court records are admissible. Judicial notice is taken of foreign law.[27] The state is definitely committed to the non-use of

20. Map, p. 227. "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial. . . . His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguard against abuses." Mr. Chief Justice Hughes in Quercia v. United States, 289 U. S. 466, 470 (1933).

21. "After . . . counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury." P. 221.

22. P. 239.

23. P. 243.

24. P. 262.

25. This is the rule recommended by the Bar Association.

26. The abolition of this useless requirement indicates wholesome progress in Indiana. See p. 332.

27. IND. STAT. ANN. (Burns 1933) § 2-4801.

the scintilla rule. And Federal Rule 46(b), which has liberalized the procedure for interrogation of witnesses, is followed.[28]

In other important rules, Indiana falls short of the minimum necessary for sound judicial administration. Survivor's testimony is admitted only on consent or waiver by the personal representative;[29] declarations of deceased or insane persons are admitted only under recognized exceptions to the hearsay rule.[30] Privileged communications between patient and physician are fully protected unless the privilege is waived.[31] Unfortunately the privilege has been extended to other confidential relationships.[32] The admission of expert testimony is governed by common law rules in spite of the sound operation of the Model Act which has been in effect in South Dakota since 1942. (Under that act experts may be appointed by the court upon the request of either party or upon its own motion. Any expert appointed by the judge may be treated as though called by the adverse party.)

The Association Committee is also of the view that any rule of evidence need not be enforced and its violation is not reversible error if the trial judge finds there is no bona fide dispute as to the existence of the facts which the offered evidence tends to prove. Neither Indiana nor any other jurisdiction has adopted it.

Appellate Practice

". . . [A]ppeals from inferior courts by way of full retrial in a higher court should be avoided as far as possible, by improving the quality of the inferior courts . . ., the abolition of the justice of peace courts should be seriously considered. . . ."[33] Generally in Indiana appeals from trial courts of *limited* trial jurisdiction are taken to a court of *general* trial jurisdiction as a matter or right, except that judgments by confession are not appealable.[34] On appeal from a justice of the peace court and most city courts there is a trial de novo; on appeal from certain Marion County Municipal courts, the review is only on questions of law. Appeals from certain city courts in Lake County go directly to the Circuit or Superior Court and are tried on the record. Further appeals may be taken from trial courts of general jurisdiction as a matter of right.

In Indiana there is a pecuniary limit upon the right of appeal except in cases of particular significance; this accords with the Bar recommendation.[35]

28. Map, p. 369.
29. The Bar recommends that the declaration of deceased persons be not disqualified if the trial judge finds they were made in good faith. P. 334.
30. The Bar would make the declarations admissible. P. 338.
31. The recommendation is that the North Carolina practice of permitting the trial judge to compel disclosure in the interests of justice be adopted. P. 342.
32. Ind. Acts 1949, c. 204 (journalists and radio stations).
33. P. 389.
34. Ind. Stat. Ann. (Burns 1933) §§ 5-902, 5-1001.
35. Ind. Stat. Ann. (Burns 1933) §§ 2-3201, 4-214.

Indiana also is one of the few states where the amount of the supersedeas bond is fixed by the court. This is a real advancement over the arbitrary requirement followed in many states that the appeal bond equal twice the amount of the judgment and is consistent with the suggestion of the Bar that the "supersedeas bonds should be fixed by the court at such an amount only as will adequately secure to the appellee the full benefit of his judgment . . ."[36]

Assignments of error should be made prior to making up the record on appeal only if omissions are intended. In other cases assignments should appear in the briefs only in the form of points.[37] Yet in Indiana the assignment must be prepared, attached to and filed with the transcript of the record.[38] The Indiana Supreme Court has said that the case is in a sense a new one in the appellate tribunal and that the assignments of error are the complaint of the appellant.[39] Limiting the scope of the review, by this theory, to assignments of error is illogical and anamalous.[40]

Only ten states, Indiana among them, require all pertinent matter relied on in the record to be set out in the brief. The recommended practice, followed by thirty states and the Federal Rules, is that no "assignments of error other than the statement of points in the brief should be required when the record on appeal includes the entire trial proceeding."[41] This majority rule begets shorter and better briefs.

The proposed rule that the court on appeal have power to make an order authorizing an amendment to correct errors or defects in the record is followed by thirty-four states.[42] Indiana appellate courts may dismiss the appeal when the appellate record is defective. But "the defeat of an appeal because of technical defects or omissions is unjust and reflects poorly on the mode of the administration of justice."[43]

As to the duty of weighing the evidence on appeal, the Bar has split on whether a distinction should be drawn between jury and non jury cases. The Bar does take the position that "nothing can be said in favor of a rule under which the review would depend on whether the case technically falls within the field of equity or the field of law."[44]

The Indiana statute requires that in all cases not triable by jury a court of appeals shall, if requested by the assignments of error, weigh the evidence.[45]

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36. P. 406.
37. P. 411.
38. P. 413. Every assignment must be complete in itself. It may be joint or several and may be amended on terms.
39. Rockey v. Hershman, 193 Ind. 168, 138 N. E. 339 (1923).
40. P. 415.
41. P. 411.
42. Pp. 429-431; *cf.* FED. R. CIV. P. 75(h).
43. P. 430.
44. P. 446.
45. IND. STAT. ANN. (Burns 1933) § 2-3229.

It is further provided that if the decision appears not fairly supported by or clearly against the weight of the evidence, the court shall award judgment accordingly. The appellate courts of the state have not literally obeyed this statute. Since the trial judge and the jury are materially aided by the appearance and demeanor of witnesses in determining what credit or weight to give the testimony, the courts have exercised considerable wisdom in avoiding this task.[46]

The Bar Committee considers memorandum opinions appropriate where no new principle or novel application of law is involved and the decision is fully and clearly controlled by statutes or cases.[47] This suggestion could not be adopted in Indiana without violating the constitutional provision that requires the Supreme Court to give its opinions in writing.[48]

> The principal criticisms voiced by the reporters from the various jurisdictions were directed at the existence of the many technicalities of the rules of procedure hampering appellate practice; it was felt that the continued persistence of such technicalities made most difficult the attainment of the goal of achieving prompt, effective, and inexpensive service for the public. In few instances, moreover, were there any reports of action taken in the period since 1938 to remedy many of the glaring defects burdening appellate practice in the several states.[49]

In the exercise of its rule-making power the Indiana Supreme Court has simplified the practice; it has eliminated many of the technical pitfalls which hamper effective appeal. But, unfortunately, there are still weaknesses in Indiana appellate procedure.

CONCLUSION

Judge Vanderbilt's work in preparing this book is a notable contribution to the improvement of the administration of justice and should prove valuable to those conscious of the needs for reform.

It is impossible to make an over-all appraisement of procedure in Indiana. The adoption and use of the rule-making power, provision for pretrial conferences and the establishment of a judicial council are definitely on the credit side. Our appellate practice is being constantly simplified to enable

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46. Where the evidence is entirely documentary, the court will weigh it on review. If the decision below could have been based even in part on oral testimony, it will not be disturbed even though the evidence is principally documentary. Ashman v. Studebaker, 115 Ind. App. 73, 56 N. E.2d 674 (1944). It will not weigh the evidence where there is no conflict and there is evidence sufficient to sustain the holding. Flying Squadron v. Crippen, 201 Ind. 482, 164 N. E. 626 (1930). In State Life Ins. Co. v. Cast, 214 Ind. 17, 13 N. E.2d 705 (1938), the Supreme Court said that it is not authorized to weigh conflicting evidence even in equitable actions where there is oral testimony.

47. P. 443.

48. IND. CONST. ART. 5, § 5 (1851).

49. P. 453.

a litigant to receive a hearing on the merits of a case without a cluttered record. On the other hand, Indiana still lacks co-ordination of the judicial system. Some of the rules of evidence are bad. Higher quality judges could be obtained by a different method of selection.

The administration of justice in Indiana can and should be much improved. The Judicial Council is now making a study of a bill to establish an administrator for the courts and a bill to provide for roving judges. If these two proposals receive legislative approval, it will give encouragement to those who are striving for improvement. "The task . . . can only be achieved state by state, and in each state by the people of that state. The battle against inertia or ignorance or misguided self-interest must be fought locally, . . . it is futile and against general experience to expect early and easy victories in this field, unless, of course, the bench, the bar and the public unite to promote judicial and procedural reform as a professional or patriotic duty."[50]

LOUDEN L. BOMBERGER†

LIVING LAW OF DEMOCRATIC SOCIETY. By Jerome Hall.* Indianapolis: Bobbs-Merrill Co., 1949. Pp. 146.

This deceptively slim volume contains packed very tight the mature thought of a serious student of legal philosophy. As such it makes quite formidable the task of a reviewer who would do more than report the contents of the book. The volume had its source in a series of lectures given by Professor Hall at Pacific University on the Isaac Hillman Lectureship in March, 1947. The lectures, three in number, comprise the book. They cover the most important issues in jurisprudence. The first is entitled Law and Legal Method; the second Law as Valuation; the third Law as Cultural Fact. The division of the subject matter thus is traditional. It corresponds to familiar relations of law to science, to ethics, and to society. Permeating the whole and forming its fundamental value system is the ethics of democracy.

The lecture on Law and Legal Method examines once again the question of the formal nature of law. Is the law might or right? Or rather, what is the relation of reason to force in the law? After disposing of the nominalists, for whom legal method is a mere study of words, Professor Hall takes exception to certain of Pound's discussions of the nature of positive law as confusing. Pound has written endlessly on the nature of law and a great deal of it is confusing (as is everyone else's writing on the nature of law including

50. P. xxx.

† Attorney at Law, Hammond, Indiana. A.B. 1900, LL.D. 1942, Valparaiso Law School. Member of the Judicial Council of Indiana since 1939; Director of the American Judicature Society since 1938; past president of the Indiana Bar Association. Author of *A Simplified Code of Appellate Procedure*, 9 IND. L. J. 551 (1934).

* Professor of Law, Indiana University School of Law.