

NINTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK. Albany: Williams Press, Inc., 1943. Pp. 370.

TENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK. Albany: Williams Press, Inc., 1944. Pp. 375.

Since these are but two of an excellent series of reports, a review ought not so much stress these particular volumes as call attention to the general high standard of the entire series, a fact which appears to have been insufficiently appreciated by lawyers and scholars. Both these reports follow the model of earlier years. After the formal introduction, we have an account of the particular recommendations approved by the Council during the year, followed by the usual departments, including judicial statistics and the research studies on special projects. Each year there are usually some thirty or more subjects under consideration or recommended for adoption by the legislatures or the courts; and of these, half appear destined for immediate, and nearly all for ultimate, adoption. In the ten years of the Council's history, it has made some 235 recommendations, and has had the truly amazing success, perhaps unique in judicial council history, of witnessing the adoption of all but about 30. Of the recommendations not adopted, 15 are being resubmitted. With these eliminated, the record of success for the Council is, therefore, almost 95 per cent.

From their nature the reports should be of vital interest to lawyers, legislators and students. The research studies at the end are to be especially commended, for they are essays worthy of extensive citation on the subjects treated, as, indeed, the reviewer has often found. Thus, the first of these volumes contains complete monographs on the subjects of judicial notice of matters of law and service of process by publication, with recommendations for change thus thoroughly buttressed by substantial research; while the second takes up in detail subjects ranging from court rule-making power through a complete corrective revision of the judiciary law, a proposal for service of process on the personal representative of a deceased nonresident motorist, and a recommendation for a unification of requirements of notices of claims against municipal corporations, to a detailed consideration of supreme court motion practice.

Even so seemingly unpromising a subject as judicial statistics has much to tell us about court operations. The figures presented in these reports are surprisingly complete, in view of the limited machinery involved in their collection. They are obtained by reports from the court clerks, rather than by the more intricate system of individual case reports used by the Administrative Director of the United States Courts. The federal system of statistical reporting is comparatively new; it will be interesting as time goes on to compare the workings and product of these two systems, almost the only ones in this country regularly giving court data at all complete. Meanwhile these reports are to be recommended for careful study. I wonder how many lawyers realize the great proportion of cases settled or otherwise discontinued before trial (over 40 per cent in the state supreme court) or without any trial, even

a formal one (nearly 60 per cent of the total). Actual contested trials represent a small part (about 15 per cent) of the total civil business. The number of jury trials in the supreme court—averaging in the judicial year 1941-42 about 9 per cent in civil cases, as against some 6 per cent of nonjury trials, and in the last judicial year, about 8 per cent, as against 6½ per cent of nonjury trials—is larger than in the federal system or in states such as Connecticut, where the proportionate figures of jury and nonjury cases would be at least reversed. The large function of our courts as collecting, arbitrating, and compromising agencies is, I think, rarely thought about; but it is an important, perhaps in some ways the most important, feature of the judicial establishment. Incidentally one wonders whether the incidence of war and declining man power has had some influence in bringing about the decline in jury trials noted.

Many of the statistical details suggest interesting lines of inquiry. Thus, the reviewer has always been intrigued by the supposedly great prevalence of motions for bills of particulars in New York practice, as well as by the Council's remedy for the overuse of this motion, which was in effect an automatic granting of the motion except where the opponent of the moving party was able to persuade the court of the impropriety of the demand.<sup>1</sup> I must confess this seemed to suggest what is reputed to be the Keeley cure for drunkenness, i.e., more drinking. Now the figures demonstrate that love of this dilatory procedure is overwhelmingly greater in Brooklyn, than anywhere else. Thus, in the judicial year 1941-42, covered by the Ninth Report, the number of such motions in the supreme court there was 5,410, out of a state total of 8,853, and was about double the number in Manhattan, with the rest of the state almost unrepresented in the figures (e.g., only 22 appearing for the large Buffalo district). This is clearly not a temporary phenomenon, but a customary situation, as other reports have shown; indeed, the Tenth Report shows a slight increase for Brooklyn (nearly 64 per cent of the total, as against 61 per cent for the earlier year), while the Buffalo number has gone down to *four* such motions. The Council might be well advised to seek further the reason why this particular tree (or weed) grows so vigorously in Brooklyn; I suspect it may be found in some matter of calendar tactics, such as fruitful delay for the moving party, rather than in the sheer merit of the motion.<sup>2</sup> And if this is so, the Council may wish to re-examine its encouragement of this motion, particularly in the light of the opposed federal trend to discourage it for the more effective discovery remedies.

The diversity of views among practitioners of reform just noted suggests that a union of procedural reformers might well be formed in order that guild principles might be adopted, and even the semblance of

1. See the Council's SECOND ANNUAL REP. (1936) 137-159.

2. If investigation were extended to other courts, e.g., county, city, and municipal courts, it appears from the tables that particulars thrive decidedly less upstate than downstate. Do New York lawyers differ in kind, depending on their location, or are they simply realists, shaping their course with an eye on the state of business, and perhaps the judicial attitude, in a particular court, rather than with any desire of advancing the science of pleading or any real hope of obtaining substantial admissions from their opponents?

division among experts thus avoided. As another example, it may be observed that the Council here reiterates its rather determined support of a requirement of an oath to all pleadings, stating that this will prevent the institution of actions on baseless claims and the padding of claims generally. This recommendation was made just after the federal advisory rules committee had decided that verification was so far an empty formality—useless in itself, as well as depreciating the value of the oath for other purposes—that it should be superseded by the simple certificate of counsel as to his belief in the good ground for the pleading, as provided in Federal Rule 11.

These observations become perhaps still more pertinent in the light of the Council's lengthy study in its latest volume of state motion practice, with suggestions for revision of the separate compartmentalized motions authorized under the New York Rules of Civil Practice. The suggestions all seem individually valuable, as in general tending to do away with the old formal motion on the face of the pleadings, i.e., the ancient demurrer, and to authorize further the use of affidavits or other means of directly ascertaining the merits of the dispute. But the necessity of using a formally different motion in situations only slightly differing is still maintained; the thoroughgoing practice of a single motion is not attempted. Under the Federal Civil Rules the number of motions was sharply cut down and provision was made for a consolidated motion. Even that has proved inadequate; and in practice the federal courts have pretty thoroughly established both the desirability and the workability of what has been termed the "speaking motion," so much so, indeed, that some of the committee are now recommending a formal integration of the motion to dismiss and the motion for summary judgment. Though the Council's recommendations thus recognize a desirable trend, one wonders whether New York practice would not profit in the long run by rejection of these partial reforms now in the hope of more thorough reform later.

Thinking such thoughts and having in mind the outstanding record of success that the Council has achieved, one is led to wonder whether the time has not now arrived when the Council should lend its prestige to more drastic reforms which are in line with the earlier traditions of the Empire State. For in 1848, with its Field Code and the union of law and equity, New York led the way for all English-speaking countries in procedural reform. Code tinkering and press of judicial business so debased the practice, however, that by the dawn of the twentieth century, New York procedure was a fearful, if not a wonderful, thing. Again an opportunity for leadership arose with the report of the Board of Statutory Consolidation in 1915, under the chairmanship of Justice Rodenbeck, recommending court rule-making power and the Rodenbeck rules—a fine system worthy of comparison with the most modern codes or rules.<sup>3</sup> But with the rejection of this outstanding report for the dubious Civil Practice Act, which Governor Smith finally signed

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3. REP. BOARD OF STAT. CONSOL., N. Y. (1915); GROSS, *New York's Proposed Simplified Practice Act* (1916) 25 YALE L. J. 369; CLARK, CODE PLEADING (1928) 25-27.

on its approval, most reluctantly given, by the State Bar Association,<sup>4</sup> the opportunity was lost. Later events suggest that a veto might have been the more effective course in the long run; at any rate, pleading and procedure in New York remained at a low ebb, indeed, until the Council was established in 1934. The Council undertook the job of correcting many obvious deficiencies of the Civil Practice Act, including the elimination of the old and barren restrictions on joinder of causes of action and of counterclaims. These specific tasks it has now completed; and broader fields of accomplishment should now lie before it.

After all, many things have happened since the setback of 1919-20; for one thing the successful reform of federal procedure has made simplified pleading respectable, and has stimulated many of the states to renewed ventures. With its prestige of achievement against the background of the modern trend towards procedural simplicity, the Council is, it seems to this reviewer, now in a position finally to make inapplicable the reproach which the late Senator Walsh always visited on New York procedure in justifying his opposition to a uniform federal procedure as the foiling of a metropolitan scheme to substitute Eastern confusion for Western simplicity. The time is ripe, it would seem, for the proposal of something as fine and as forwardlooking at least as the Rodenbeck plan of 1915. Of course, the necessary first step is the passage of an act giving the courts real rule-making power along the lines of the federal system. It is an encouraging sign that in its latest report herewith the Council returns to a subject which it had tentatively approached in its Fifth Report, namely, the grant of real rule-making power to the courts; and though it has not yet come to the point of definite recommendation, its careful research into the situation in other jurisdictions, together with its objective noting of the all too frequent gap between promise and performance in this field, leads us confidently to expect that it will soon step forward boldly in support of a complete grant of authority to the courts and its full use thereafter by the courts. Let us hope that this encouraging trend presages an all-out forward movement in New York in the field of procedural reform under the stimulus of Council leadership.

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PRISONERS OF WAR. By WILLIAM E. S. FLORY.<sup>1</sup> Introduction by NORMAN H. DAVIS. Washington, D. C.: American Council on Public Affairs, 1942. Pp. 179. \$3.25.

Dr. Flory put a great deal of work into writing this book. He is entitled to the satisfaction of knowing that it is one that every student of international law should have in his library. The wealth of references in the footnotes and the Selective Bibliography at the end of his treatise

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4. See reports of the Association from 1916 to 1921, particularly 44 N.Y.S. BAR ASS'N REP. 421-545 (1921); CLARK, *loc. cit. supra* note 3; Medina, *Some Phases of the New York Civil Practice Act and Rules* (1921) 21 COLUMBIA L. REV. 113; Comment (1920) 29 YALE L. J. 904, 906.

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1. Bureau of the Budget.