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Editorials

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EDITORIALS

A JUDICIAL COUNCIL

In order to secure from members of the bar expressions of opinion as to the wisdom of establishing in Kentucky a judicial council, the Kentucky Law Journal desires to call attention to various plans in other states along this line. The purpose of the plan, whatever its form may be, is the creation of a permanent body composed of distinguished judges and lawyers who would study the problems of judicial administration and make suitable recommendations for the solution of these problems to the legislature or to the governor.

The need for such an agency has thus been stated by Justice Benjamin N. Cardozo of the Court of Appeals of New York: "The Attorney-General discovers that in the administration of the tax law or of the workmen's compensation law or in some other field within his province, changes are essential if justice is to be done. At once he is before the legislature with a bill for the correction of the evil. The legislature has confidence in the sincerity of his motives, and in the great majority of cases approves the bill which he submits. The difficulty is that there is no one to discharge a like duty, to fulfill a like function, in the great mass of controversies arising between man and man."
This gap in our legal machinery cannot be filled by any unofficial body. An individual lawyer who has been brought into direct and disastrous contact with some difficulty of procedure will occasionally urge a remedy before a state bar committee or before the legislature. But what is needed is an official council that will make a study of judicial administration from year to year, based not on isolated cases of hardship but on the effective or ineffective operation of the whole system.

The idea of a judicial council goes back to the Rules Committee in England, created in 1876. It now consists of two barristers, two solicitors and seven judges. In America, several states have judicial councils, including New Jersey (1915), Ohio (1923), Oregon (1923), North Carolina (1925), California (1926), and Massachusetts (1924). A somewhat similar agency is provided for in the federal courts through the annual conference of federal judges. The question thus presents itself to the lawyers of Kentucky whether such an administrative agency would be a helpful factor in the great task of making the processes of justice prompt, effective and businesslike. An expression of opinion from members of the bar and others would be welcomed by this journal.

THE REPORT OF THE LAW REFORM COMMITTEE

Owing to the fact that copy for the Kentucky Law Journal has to be in the hands of the state printing commission two or three months before the issue finally appears, it is impossible for the Journal to comment on the proceedings of the State Bar Association at its 1927 meeting in Louisville. These lines are written one month before that meeting was scheduled to be held. But in spite of the fact that the report of the Law Reform Committee concerning which this editorial is written has been acted upon before this issue is published, it seems worth while to emphasize the significant sections of that report.

The first five paragraphs and the eleventh are of very great importance; in these paragraphs the committee approved the following measures:

(1) The pending amendment to section 246 of the Constitution which will remove the limitation on the salaries of State officials. The amendment repeals section 246 and substitutes a
section providing that the General Assembly should fix the salaries of all public officers of the State or provide for the method of payment of such salaries. The committee recommends the appointment of a special campaign committee of the Bar Association to present the issue to the people in every county of the State.

(2) An act providing for the submission of a constitutional amendment to section 256, of the Constitution, which will remove the limit on the number of amendments that can be submitted at any one election.

(3) An act to amend the Kentucky Statutes, section 1645 so that the same shall read as follows: “In all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this commonwealth, the defendant on trial, on his own request, shall be allowed to testify in his own behalf, and his failure to exercise this right may be commented upon by the prosecuting attorney.”

(4) An act to amend section 203 of the criminal code so as to equalize the number of peremptory challenges in felony cases, allowing each side to have five.

(5) An act to create the office of Revisor of Statutes and provide for the duties of said office.

(11) That a standing committee of the Bar Association on Uniform Laws be created, consisting of the commissioners on Uniform Laws from this state, whose duty it shall be to report annually to this association the progress of uniform laws in the state and in the nation and to urge upon the state legislature the passage of such of the proposed uniform laws as have been approved by this association.

The first two proposals deal with the Constitution. There is no disagreement among intelligent citizens of Kentucky that the limitation of salaries to $5,000.00 is wholly unsuited to our times when the cost of living has doubled since the adoption of the Constitution in 1891. It is not fair to our present officials charged with important duties; it is manifestly unfair to the judges of the Court of Appeals. Furthermore, it practically disqualifies from public office a large number of the ablest citizens who have families to support and who are on that account unable to make the financial sacrifice involved in their seeking
state offices. The Kentucky Law Journal believes that the state should pay adequately for administrative and judicial services. In a democracy, the highest calling should be the public service, and it cannot have that rank unless the public servant is paid on a scale that compares favorably with the salaries paid the officers of private corporations with like responsibilities. Any other standard means an admission that the state will either accept inferior service or will not deal justly with its competent workers.

The proposal that would permit more than two amendments to the Constitution at an election offers a hopeful method of solving the present constitutional problems of the state. It seems unlikely that a constitutional convention is a political practicability in Kentucky for many years to come. Certain influential groups are determined not to risk such a convention. It therefore seems wise to permit the submission of several amendments at one time in order that the outgrown segments of the Constitution, concerning which there is little dispute, may be speedily removed or adjusted to modern conditions.

The third and fourth proposals deal with the administration of criminal justice. Many of the rules protecting the accused against the prosecutor were devised in the-days of tyranny and oppression. They were the safeguards of men guilty of no crime save some political offence against a monarch. They protected the common people against tyrants. But since the transference of sovereignty from the monarch to the people, we now find these same protections being used by criminals against the people. There seems to be no sound reason why persons accused of a felony should have three times the number of peremptory challenges exercisable by the state. The accused in a misdemeanor case has no such advantage. Furthermore, the defendant, has an unlimited number of challenges for cause. The Law Reform Committee wisely proposes that the state and the accused be placed on an equal footing as regards peremptory challenges in felony as well as in misdemeanor cases, and that each side shall have five.

The present rule forbidding any comment on the failure of the defendant to take the stand is a relic of the time when the defendant was denied the right to testify. Up to the Revolution of 1688, a defendant in England was required to submit to an
inquiry and might be tortured in order to elicit information. But in 1688, this was changed by forbidding torture and by adopting in the criminal law the then existing civil law rule that a party could not testify at all. As a necessary consequence, it followed that the defendant's failure to do what he could not do must not be commented on before the jury. But with the reason for the rule destroyed by the fact that the defendant has the option of testifying, there seems to be no reason why his failure to take the stand should not be called to the attention of the jurymen. The argument that a nervous defendant at the mercy of an able prosecutor would convict himself seems to overlook the presence of the judge who would check any unfair questioning and the presence of the prisoner's counsel who by proper objections could protect the accused. In *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651 (1898) affirmed in 62 N. J. L. 801, 45 Atl. 1092 (1900) the court held that the failure of the defendant to offer himself as a witness could be commented upon when the statute creating his right to become a witness did not expressly forbid such comment. "His silence would justify a strong inference that he could not deny the charges," and the court draws an analogy with the rule that evidence may be admitted against an accused establishing the fact that declarations or charges of his guilt were made to him and he made no reply. It would seem, therefore, that no constitutional objections of self-incrimination could be raised if the legislature adopted the proposed statute expressly authorizing comment when the defendant in a criminal case fails to take the stand.

These two provisions have the hearty support of the Commonwealth's Attorneys Association and in the opinion of many experienced lawyers would largely correct the scales of justice which now incline rather decidedly in favor of the defendant.

The fifth provision creating the office of "Revisor of Statutes" is a measure designed to bring some order out of the chaotic arrangement of our statutes. The duty of the revisor is to "formulate and prepare a definite plan for the order, classification, arrangement, printing and binding of the session laws" and "to present to the proper committee of each house in such bill or bills as may be thought best, such consolidation, revision and other matters relating to the statutes." The effectiveness
of this plan will depend upon the man chosen by the Court of Appeals to fill the office, and the Kentucky Law Journal is confident that the court will appoint to the office, a man specially qualified to undertake the important tasks of revision and consolidation. It is to be noted that the revisor's duties are not legislative, but merely to correlate and make more readily accessible the enactments of prior legislatures. Every lawyer who has rambled through the index to the present set of Kentucky statutes can testify to the need and cherish the hope of a scientific revision of our statute law.

The eleventh provision deals with the Uniform State Laws, a matter sadly neglected by this state. Kentucky has adopted the Negotiable Instruments Act, the Child Labor Act and the Pure Food Act, and there it has rested. One of the distinguished commissioners on uniform laws for this state has written to the editor this illuminating comment: "If a sympathetic hearing could be secured, I have no doubt that many of the acts as proposed by the Conference on Uniform Laws would be made a part of the written law of this state. But before a legislature that discredits your labors and misconstrues your motives, missionary work promises nothing except the prospect of being eaten alive by the cannibals. Personally I have no taste for such fare." This indifference and even hostility on the part of the legislature must be corrected, and the burden of effecting that change rests squarely on the lawyers. Among the uniform laws which ought to be speedily adopted in Kentucky are the Uniform Motor Vehicle Code, the Uniform Criminal Extradition Act, the Uniform Firearms Act and the Uniform Chattel Mortgage Act, all of which were approved by the American Bar Association in 1926, as well as the Sales Act, the Bill of Lading Act, the Warehouse Receipts Act, the Partnership Act and numerous others that represent the best judgment of the lawyers and judges of the nation.

The State Bar Association by constituting the Commissioners on Uniform Laws a standing committee of the larger body manifests a commendable interest in the task of the commissioners and adds the weight of its influence to those uniform laws which it may subsequently approve.

The Report of the Law Reform Committee will be followed from year to year by the Kentucky Law Journal with the great-
est interest in the hope that the suggestions of that committee will lead to the gradual and orderly working out of those difficulties that are inherent in every system of government by law. Inevitably, life moves faster than the courts. Through inadvertance, through indifference, through an exaggerated conservatism, a judicial system sometimes lags too far behind prevalent ideas of justice and of right. It is far better to have such discrepancies corrected by men trained in the law than to subject them to the well-meant but inexpert attentions of the amateur reformer or the impatient radical. Lawyers must properly attend to the business of law reform. The lawyers of Kentucky have done so at the recent meeting of the Bar Association at Frankfort, and the present report of the Law Reform Committee ought to receive from the legislature the careful attention that its significant proposals deserve.