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## WAIVER OF COURT COSTS AND APPOINTMENT OF COUNSEL FOR POOR PERSONS IN CIVIL CASES†

LEE SILVERSTEIN\*

The legislator who, on the plea of checking litigation, or on any other plea, exacts of a working man as a preliminary to his obtaining justice, what that working man is unable to pay, does refuse to him a hearing, does, in a word, refuse him justice, and that as effectually and completely as it is possible to refuse it.

—Jeremy Bentham, *A Protest Against Law Taxes* (1795).<sup>1</sup>

### I. THE PROBLEM

Denial of justice by reason of its expense is an ancient ailment of judicial systems that still infects American courts today. The Magna Charta itself provides that "To no one will we sell, to no one will we deny, or delay right or justice," (chapter 40), although one suspects that this clause at first applied only to the great barons and their friends and not to the common serfs and city dwellers. The first comprehensive English statute on proceedings in forma pauperis was enacted in 1495,<sup>2</sup> although individual courts had previously established procedures of this kind. Bentham addressed the problem in 1795, as quoted above. Herbert Spencer, writing in 1850, made his point by comparing criminal and civil procedure:

Let a man have his hat knocked over his eyes, and the law will zealously espouse his cause—will mulct his assailant in a fine and costs, and will do this without charge. But if, instead of having been bonneted, he has been wrongfully imprisoned, he is politely referred to a solicitor, with the information that the

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1. 2 J. BENTHAM, *WORKS* 573, 578 (Bowring ed. 1843). The essay was originally printed in 1793 but was not published until 1795.

2. 11 Hen. 7, c. 12 (1495), 2 *STAT. OF THE REALM* 578, quoted in Maguire, *Poverty and Civil Litigation*, 36 *HARV. L. REV.* 361, 373 (1923).

offence committed against him is actionable: which means, that if rich he may play double or quits with Fate; and that if poor he must go without even this chance of compensation. . . . Over such and such portions of a citizen's rights it [the state] mounts guard and cries—"Who goes there?" to every intruder; but upon the rest any one may trample without fear of being challenged by it.<sup>3</sup>

Spencer went on to urge that administration of justice in civil cases be without charge to the litigants.<sup>4</sup>

Writing in 1919, the late Reginald Heber Smith in his classic *Justice and the Poor* asserted that the three great defects in the administration of justice are delay, court costs and fees, and expense of counsel.<sup>5</sup> This statement seems as valid as ever despite the passage of nearly fifty years. True, the current expansion of legal services to the poor<sup>6</sup> marks progress, significant progress, in overcoming the third defect, expense of counsel. The first defect—delay—is still serious, especially in personal injury claims in large cities, but it too has been overcome, at least in part, by such reforms as assignment of claims below a certain amount to small claims courts, lawyer arbitration, and settlement by pretrial conference.

This leaves the second defect, court costs and fees. Unfortunately, progress in the half century since publication of *Justice and the Poor* has been dishearteningly slow. The American Bar Association's Committee on Legal Aid Work, led by Mr. Smith, drafted and publicized a model Poor Litigant's Statute in 1924-25,<sup>7</sup> which provided that a poor

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3. H. SPENCER, *SOCIAL STATICS* 281, 283 (2d American ed. 1880). Virtually the same passage appears in the "abridged and revised" edition of 1908, at 109.

4. *Id.* at 283-88.

5. R. H. SMITH, *JUSTICE AND THE POOR* 30 (1919).

6. As of April 15, 1967, the National Legal Aid and Defender Association (NLADA) reported 298 legal aid offices with paid staffs, 90 with volunteer staffs, and 98 volunteer committees. By September 15, 1967, the corresponding numbers for the first two classes were 399 and 88. As of March 30, 1966, NLADA reported 164 offices with paid staffs, 88 with volunteer staffs, and 127 volunteer committees. As of July 1, 1967, the Office of Economic Opportunity Legal Services Program reported for fiscal year 1967 that grants had been made under § 205 of the Economic Opportunity Act for legal service programs in 48 of the 50 states and 45 of the 50 largest cities. The American Bar Association Committee on Legal Aid and Indigent Defendants reported in August, 1967, that "140 new OEO programs representing a nearly 100% expansion have been approved and the annualized outlay has increased by approximately one-half." For details, see the A.B.A. Committee report and the testimony of Earl Johnson, Jr. and of bar association representatives before the House Committee on Education and Labor, June and July, 1967. The testimony on H.R. 8311 was published under the title "Economic Opportunity Act Amendments of 1967," 90th Cong., 1st Sess.

7. 49 A.B.A. REP. 386 (1924); 50 A.B.A. REP. 456 (1925). The 1924 draft was reprinted in R. H. SMITH & J. S. BRADWAY, *GROWTH OF LEGAL-AID WORK IN THE UNITED STATES* (1926). The 1925 draft was reprinted in the second edition (1936).

litigant would be excused from giving security for costs and from payment of any fees, that a "conducting attorney" would be appointed to represent him, and that the attorney would be paid a fee and reimbursed for expenses from a public appropriation. Apparently this statute has had little or no influence, and the few reforms achieved in the last four decades have come from other sources. In 1941 the problem was discussed at an open meeting on legal aid work held at a convention of the American Bar Association, and the Legal Aid Committee recommended that legislation be drafted to provide a fund for auxiliary charges of litigation such as witness fees and advertising costs.<sup>8</sup> At this meeting Judge Miller of the Court of Appeals for the District of Columbia renewed Spencer's proposal that fees and costs be abolished for all litigants. Miller likened the courts to the fire, police, and health departments and the public schools.

But why have we put the administration of justice by one of the three great coordinate branches of Government on a basis of pay-as-you-go? No one would ask the Executive Branch, or the Legislative Branch to justify itself as a self-liquidating institution. The people are perfectly content to pay for those services by way of taxes. Why should not the people be equally entitled to the services of the Judicial Branch of Government without being required to pay fees every time they turn around, or to take a pauper's oath in order to get into the courthouse . . . .<sup>9</sup>

It may be instructive to compare the system for allocating the costs of court proceedings with the system for administrative agencies. The two institutional systems are somewhat contradictory. The judicial system places on the parties a portion of the official charges and all the auxiliary charges and attorneys' fees and expenses; the administrative system absorbs all the official charges and sometimes provides auxiliary services, such as an official stenographer for hearings, and medical witnesses in workmen's compensation. A few states even provide attorneys for claimants in workmen's compensation proceedings or pay a private attorney from the accident fund.<sup>10</sup>

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8. A.B.A. COMMITTEE ON LEGAL AID WORK, ANNUAL REPORT AND TRANSCRIPT OF PROCEEDINGS OF FIFTH OPEN MEETING ON LEGAL AID WORK (1941). A copy is on file in the Cromwell Library of the American Bar Foundation. See *Committee Report*, 66 A.B.A. REP. 252, 253 (1941). The proposal was not mentioned in later reports of the Committee.

9. A.B.A. COMMITTEE ON LEGAL AID WORK, *supra* note 8 at 38-39.

10. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 220, ATTORNEYS' FEES IN WORKMEN'S COMPENSATION 14-16 (1960).

The contrast between the administrative and judicial systems of cost allocation is most striking in the officially provided services. An applicant for workmen's compensation or unemployment benefits is not required to pay a filing fee, sheriff's fee, hearing fee, or any other fee. A proceeding before a state tax commission, insurance department, or public utility commission may take days of the hearing officer's time, and the stenographic transcript may cover hundreds of pages, but these costs are not charged to the parties. Similar policies prevail in federal administrative agencies. The legislative policy for most administrative agencies is thus to provide the "service" of administrative law as a general cost of government, whoever the litigants may be. The underlying theory may be that the public has a substantial interest in the matter, so that the state should pay all the costs of the official services, leaving the parties to pay only for their private attorneys and closely related services. An alternate or additional policy, applicable to compensation and insurance systems, is that the cost of administration should be spread over all employers who participate in the system, with a merit-rating formula to reduce the cost to employers whose employees make few or no claims against the fund. This is consistent with a policy of imposing costs on the group rather than the individual, although in this instance the group consists of all participating employers rather than the public at large.

The proposal that the court system be completely free to the litigants, being supported instead by general taxation and some fines, as explained below, is an appealing one. It accords with the principle of free public schools with free transportation and free textbooks. Other examples could be cited from the fields of public health and recreation. The proposal also has the virtue of eliminating a vast amount of book-keeping and the need for the handling of funds by an army of clerks. Moreover, it would put an end to the vestiges of the fee system of compensation for court officials, a system that has been widely criticized and gradually reformed in recent years. Finally, it would eliminate the myriad inequities that obtain under the present system among different cases and between the person who sues to establish a principle and others in the same situation who benefit from the court's decision.<sup>11</sup>

The proposal for publicly supported courts, however, has several practical and theoretical disadvantages. Probably the most serious is that in most states the courts are supported entirely or to a great extent by the county level of government. Filing fees and other court fees could not be abolished without providing an alternate source of revenue

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11. See Dayton, *Costs, Fees, and Expenses in Litigation*, 167 ANNALS 32 (1933).

to support the court system. Moreover, some officials are still compensated entirely from their fees, and if the fees were eliminated, tax funds would have to be found to pay them a salary. Thus, in most states elimination of fees would have to be accompanied by either an increase in local taxes, or a shifting to the state level of government of the financial support of the judicial system, or both. This could be a difficult but not insurmountable problem, especially if the new system were phased in over a period of several years. The current trend toward integration of state court systems fits in with the proposed reform. Moreover, a recent article demonstrates that the cost of the courts is a relatively slight percentage of the total costs of government,<sup>12</sup> and hence the change should not be burdensome.

A second practical disadvantage of the proposal is that merely eliminating court fees and costs would not be enough to make the courts accessible to the poor. Some system is needed to cover the auxiliary expenses of litigation, such as publication fees, bond premiums, fees of investigators and expert witnesses, and, in some jurisdictions, court stenographers. More important, the system must assure that an attorney is provided for the litigant. Further, even if all the financial requisites of litigation are either eliminated or subsidized, many good claims and defenses will go unasserted, especially by the poor. This is because the courts typically hold sessions Monday through Friday between 9 and 5 (or shorter hours) at courthouses in central business districts. The typical workingman or woman must forego at least half a day's pay to make use of the courts, and possibly more, depending on such factors as the type of work he does, how far he must travel, how long he has to wait for his case to be called, whether the case is continued, whether he has to appear once to file the case and another time for trial, etc. The literature of small claims courts has long pointed out the need for night and Saturday sessions, neighborhood branch courts, and simplified procedure.<sup>13</sup> An American Bar Foundation study found that a central

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12. Saari, *Open Doors to Justice—An Overview of Financing Justice in America*, 50 J. AM. JUD. Soc'y 296 (1967), to be published in enlarged form as a chapter in *ALLOCATION OF JUSTICE* (Klonoski & Mendelsohn eds. 1967). Saari reports that in a recent year the states spent less than 1% of their budgets for the courts, that county governments spent about 6% or less, and cities spent less than 3%.

13. INSTITUTE OF JUDICIAL ADMINISTRATION, *SMALL CLAIMS COURTS IN THE UNITED STATES* (1955, Supp. 1959); R. H. SMITH, *JUSTICE AND THE POOR*, ch. 8 (1919); R. H. SMITH & J. S. BRADWAY, *GROWTH OF LEGAL-AID WORK IN THE UNITED STATES* ch. 7 (2d ed. 1936); Cayton, *Small Claims and Conciliation Courts*, 205 ANNALS 57 (1939); Murphy, *Small Claims—The Forgotten Courts?* 25 LEGAL AID BRIEFCASE 167 (1967); Myers, *The Small Claims Court in the District of Columbia*, 287 ANNALS 21 (1953); Silverstein, *Small Claims Courts Versus Justices of the Peace*, 58 W. VA. L. REV. 241 (1956); Note, *Legislation—Uniform Small Claims Court Acts*, 1950 WIS. L. REV. 363.

Illinois county with a population of 200,000 had only a single court handling small claims and that it held sessions only during the usual 9 to 5 hours Monday through Friday. Not surprisingly, the court was used mainly for unlawful detainer actions, municipal tax claims, and collection of small debts by merchants, hospitals, doctors, and dentists. Most of the claims went by default. The total volume was surprisingly small for a population of 200,000. Finally, even with an ideal court system, the poor probably need education in how and when to make use of it.<sup>14</sup>

Two theoretical objections also stand in the way of the proposal for elimination of all fees for the use of the courts. One is the maxim that he who uses a service ought to pay for it, by analogy to a turnpike toll, a recording fee for a deed, or an admission charge to a publicly owned museum. Bentham answered this argument by pointing out that those who do not need to go to court benefit far more from the general security of society than those who do go to court.<sup>15</sup> A further answer is that the principle of free access has been recognized in modern times in administrative agencies, as discussed above. Finally, it may be said that since the revenues presently collected through the fee system do not usually cover the full cost of operating the courts, the public is already supporting the court system to some extent. Hence the proposal would not introduce a new object of public support but merely enlarge an existing one. Nevertheless, if the present system of charging the litigants a part of the cost is continued, then justice requires that the fee schedules be modified to be more nearly proportionate to the use made of the court system.<sup>16</sup>

The second theoretical objection is that the present fee system discourages captious or frivolous litigation. Indeed, it has been urged that the fees be increased as a further discouragement.<sup>17</sup> Bentham proposed that in such cases costs be imposed on the party or parties at fault at the end of the litigation, the amount to be in the form of a fine

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14. Current thinking about legal services for the poor recognizes this need. See, e.g., U.S. OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS 24-25 (1966); Note, *Neighborhood Law Offices*, 80 HARV. L. REV. 805, 820-22 (1967).

15. J. BENTHAM, *supra* note 1, at 576: "The persons on whom the whole of the burthen is cast, are precisely those who have the least enjoyment of the benefit: the security which other people enjoy for nothing, without interruption, and every moment of their lives, they who are so unfortunate as to be obliged to go to law for it, are forced to purchase at an expense of time and trouble, in addition to what pecuniary expense may be naturally unavoidable. Meantime, which is of most value?—which most worth paying for?—a possession thus cruelly disturbed, or the same possession free from all disturbance? . . ."

16. Dayton, *supra* note 11, at 41, 44-45.

17. *Report of Committee on Costs and Expenses of Litigation*, PROCEEDINGS OF ILLINOIS STATE BAR ASSOCIATION 175 (1921).

for public use rather than a payment to the parties or their attorneys.<sup>18</sup> Likewise, Judge Miller urged that fees be charged only when a non-meritorious case has been filed or a frivolous appeal taken.<sup>19</sup> Probably the courts have the inherent power to impose such a fine or fee, as they have the power to punish for other abuses of the judicial system.<sup>20</sup>

But what about the poor as a class of plaintiffs? Would they be deterred by the possibility of a fine if they could not afford to pay it anyway? For answer, it may be said that the list of inconveniences noted above would discourage litigation quite apart from the monetary threat. Finally, the potential litigant's attorney—and the proposed regime would provide one—could be expected to discourage a nuisance suit.

On balance, the arguments in favor of complete elimination of court fees seem more persuasive than those against. This is a desirable reform to work for, but because of practical difficulties it will probably take a long time to accomplish. Meanwhile, let us consider what has been done and what could be done to make the courts available to the poor without charge. It seems appropriate to begin by tracing the historical development of our present system of court charges and reviewing previous efforts to eliminate them for poor litigants.

## II. HISTORICAL PERSPECTIVE

Our modern American system of court fees developed from the English system as it operated at the time of the American Revolution. All the clerks, sheriffs, and other functionaries of the English courts were paid chiefly, if not exclusively, by fees collected for their services. Even the judges, who were on a salary, also received fees from the litigants. Indeed, the limited data available indicates that the fees were the greater part of judges' income. In 1826, when the English judges were finally forbidden to receive fees, their salaries were raised from £2,400 a year to £5,500.<sup>21</sup>

By the time of the American Revolution the English fee system had grown immensely complicated. To put it in today's terms, a plaintiff would pay a fee to the judge, the judge's secretary, the chief clerk, several deputy clerks, the bailiff, the court crier, the sheriff and several deputies, the witnesses (varying according to their station in life),

18. J. BENTHAM, *supra* note 1, at 579.

19. Miller, *supra* note 7, at 39.

20. This is a part of the contempt power. See R. GOLDFARB, *THE CONTEMPT POWER* (1963).

21. See 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 252-55 (7th ed. 1956).



and the chief janitor of the courthouse. A separate charge was made for each entry in a judicial record, and for each function performed in court. A book published in 1828 required 48 pages to list the fees customarily charged in the Court of King's Bench.<sup>22</sup>

In the American colonies before the Revolution, the judges were also compensated by fees. However, the new state constitutions provided that judges, other than justices of the peace, should receive fixed salaries.<sup>23</sup> Clerks of court continued to be compensated by a fee system, at least in part, until well into the nineteenth century. Not until 1841 were the clerks in the federal courts put on a salary basis.<sup>24</sup>

In the states a variety of fee systems developed. In Pennsylvania, according to a statute of 1810, the prothonotary (clerk of the court of common pleas) was allowed to keep the first \$1,500 of the fees he collected and 50 percent of the excess, the balance being paid to the state;<sup>25</sup> Maine had a similar system.<sup>26</sup> The fee system in Pennsylvania was abolished in the constitution of 1876. In Iowa a statute of 1873 fixed a maximum salary for clerks of court, depending on county population, but if the clerk's actual receipts from fees should be less than this amount, the county board of supervisors could in its discretion appropriate to the clerk an additional sum so that his total compensation would reach the statutory limit.<sup>27</sup> In Indiana the fee system of compensation was not abolished until 1891.<sup>28</sup> In Kentucky the circuit clerks were compensated solely from fees until 1918, when clerks in counties with a population of 75,000 or more were put on a salary basis.<sup>29</sup> In Idaho the constitution of 1891 provided that the compensation of the county clerk should be not less than \$500 nor more than \$3,000, depending on fees collected, with any deficit being made up by the county and any surplus paid to the county. This provision was amended in 1898 to provide for compensation on a salary basis. In Arkansas, even today, some assistant prosecutors are compensated only by fees. In the federal courts, referees in bankruptcy were not put on a salary basis until 1947,<sup>30</sup> and the referee's salary and retirement fund is still supported exclusively from fees collected.

These examples from the federal and state court systems illustrate the prevalence and persistence of the fee system of justice in the nineteenth

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22. R. GUDE, *CROWN PRACTICE OF THE COURT OF KING'S BENCH* (1828).

23. R. POUND, *ORGANIZATION OF COURTS* 156 (1940).

24. *See United States v. Mason*, 218 U.S. 517, 522 (1910).

25. *See Cohen v. Commonwealth*, 6 Pa. 111 (1847).

26. *Harris v. Dinsmore*, 11 Me. 365 (1834).

27. *Poweshiek County v. Patton*, 89 Iowa 308, 56 N.W. 444 (1893), applying IOWA CODE § 84 (1873).

28. Ind. Acts, [1891] ch. 194; 3 IND. STAT. ANN. ch. 64 (Burns, 1894).

29. Ky. Acts, [1918] ch. 108. *See KY. STATS.* ch. 47 (Carroll, 1899).

30. 2 COLLIER, *BANKRUPTCY* ¶ 40.01 (14th ed. Moore & Oglebay 1962).

century and into the twentieth. Perhaps this explains why most state legislatures omitted to provide for proceedings in forma pauperis, and why the statutes that were enacted often had severe restrictions: the legislators did not want to saddle the courthouse officials with too much complimentary work. Nor, of course, would the officials have wanted it.

Two vestiges of the fee system of justice still remain. One is that in many states sheriffs, justices of the peace, constables, and probate judges or commissioners are compensated, in part at least, by fees. On the criminal side, United States commissioners are still paid from fees up to a statutory maximum of \$10,500. The other vestige is that court fees are still charged to litigants for services rendered by clerks and other officials. Thus, as previously mentioned, the litigants pay a share of the cost of operating the courts, although in general the fees charged are much too low to cover the actual costs involved, for example, for a jury trial of any duration.<sup>31</sup>

Imposing fees to use the courts would obviously discourage the poor from resorting to court, whether the fees were paid directly to public officials or into the general treasury. To overcome this problem the English courts at an early date began allowing paupers to obtain their writs without payment of the usual fees. This practice was finally written into a statute making the procedure uniform for all common-law courts of record. This statute, enacted in 1495 in the reign of Henry VII, became the model for many later statutes. The statute provided, *inter alia*, that "every pouer persone" might obtain "writtes originall and writtes of Subpena . . . therefore nothing paieng to youre Highnes for the seales of the same. . . ." Another provision authorized assignment of "lerned Cuncell and attorneyes" to serve "without any rewarde." The historical development in England has been admirably recounted by Professor Maguire,<sup>32</sup> and thus further details can be omitted here.

In the American colonies the English legislation was copied in Massachusetts and South Carolina.<sup>33</sup> But the Massachusetts statute was repealed after the American Revolution, and the South Carolina statute fell into disuse, if indeed it was regarded as still in effect after the Revolution. Some of the newly independent states, however, did enact in forma pauperis statutes based on the statute of Henry VII. The

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31. See Brand, *The Impact of the Increased Cost of Litigation*, 35 J. AM. JUD. SOC'Y 102 (1951).

32. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 363-79 (1923).

33. Maguire says that Massachusetts adopted a statute in 1642. *Id.* at 381. Volume 2, S. CAR. STAT. AT LARGE 456, 462 (1837), indicates that South Carolina adopted the statute of Henry VII in 1712.

earliest enactments were in Virginia (1786),<sup>34</sup> Kentucky (1798),<sup>35</sup> New Jersey (1799),<sup>36</sup> New York (1801),<sup>37</sup> and Louisiana Territory (1807).<sup>38</sup> North Carolina in 1813 recognized the statute of Henry VII as a part of the common law of England in force in the state.<sup>39</sup> Other jurisdictions that enacted statutes early in their history and before 1850 were Indiana Territory (1813),<sup>40</sup> Tennessee (1821),<sup>41</sup> Mississippi (1822),<sup>42</sup> Illinois (1827),<sup>43</sup> Arkansas (1838),<sup>44</sup> and Texas (1848).<sup>45</sup> Several other states and territories adopted statutes in the latter half of the nineteenth century. Since 1900 legislative activity has been moderate, the most important new enactments being in the District of Columbia (1910), Louisiana (1912), Puerto Rico (1915), Florida (1937, extended in 1955 and 1957), Georgia (1955) and Nevada (1967).

American courts, at least until recent years, have been unsympathetic in applying in forma pauperis statutes. For example, the United States Supreme Court construed the federal statute, enacted in 1892, as applying only to the trial court and not to appeals.<sup>46</sup> An early Georgia case held that an attorney had no authority to sign a pauper's affidavit on behalf of his client. The court said:

There is nothing in the statute authorizing it, and it must receive a strict construction. The words are quite liberal enough without extending them to cases not provided for in the act.<sup>47</sup>

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34. Va. Acts, ch. 65 (1786); 12 STATS. AT LARGE 356 (Hening 1823). The preamble to this statute provided: "Where it is intended that indifferent justice shall be had and administered to all the citizens of this commonwealth, as well to the poor as to the rich, which poor citizens be not of ability, or power, to sue according to the laws of this land for redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance as other causes."

35. 2 Litt. (Ky. Acts) 39 (1798); 1 DIGEST OF STAT. LAWS 327 (Morehead & Mason 1834).

36. Pat. (N.J. Acts) 339 (1799); Rev. Laws 393 (1821).

37. N.Y. Laws, ch. 90, § 21 (1801); 1 LAWS OF NEW YORK 357 (Kent & Radcliff eds. 1802).

38. Laws of La. Terr., part 1, p. 112 (1807), reprinted in DIGEST OF LAWS OF MO. TERR. 244-45 (Geyer 1818). The Louisiana Purchase of 1803 was at first divided into two territories: Orleans, which later became the state of Louisiana; and Louisiana, which comprised the rest of the Purchase.

39. M'Clenahan v. Thomas, 6 N.C. 198 (1813).

40. Terr. Laws 1813, ch. 4, reprinted in 20 INDIANA HISTORICAL COLLECTIONS 303-05 (Ewbank & Riker 1934).

41. Acts of 1821, ch. 22; Acts of 1822, ch. 42; 1 TENN. STAT. LAWS 264, 304 (Haywood & Cobbs 1831).

42. Acts of 1822, ch. 13, § 165; MISS. REV. CODE 143 (Poindexter 1824).

43. Act of Jan. 10, 1827, § 2; ILL. REV. CODE 102, 103 (1827).

44. Act of March 3, 1838; 1 DIGEST OF STATS., ch. 40, §§ 11-16 (Gould 1858).

45. Act of March 20, 1848, § 23; DIGEST OF LAWS art. 1379 (Hartley 1850). Cf. art. 1738 (Act of March 20, 1841, § 51) permitting waiver of fees in justices' courts.

46. Bradford v. Southern Ry. Co., 195 U.S. 243 (1904). The opinion cites several state cases in accord.

47. Elder v. Whitehead, 25 Ga. 262, 264 (1857).

Moreover, in the absence of a statute, most courts refused to recognize a right to sue in forma pauperis. For example, the Supreme Court of Wisconsin declared:

We have no statute which authorizes a person to sue *in forma pauperis*. It seems almost like a hardship that a poor person should not be able to litigate. But this is a matter for the legislature to regulate and not the justice. If the suit of the plaintiff should prove groundless, unless security is given, the officers of court could get no pay for their services. The opposite party would likewise be unable to get his costs.<sup>48</sup>

The authority on the other side was limited to an early North Carolina decision based on a theory of reception of the statute of Henry VII;<sup>49</sup> a Rhode Island case finding the right in a state constitutional provision comparable to the Magna Charta;<sup>50</sup> a dictum in a Texas decision;<sup>51</sup> and a California case tracing the right to the common law of England, including statutes, in effect when the state was formed in 1850.<sup>52</sup> Only the Texas case stated that the courts had an inherent right to permit a litigant to proceed in forma pauperis, and that statement was mere dictum because Texas had a statute. Similarly, Reginald Heber Smith asserted that trial courts had inherent power to assign counsel, although the practice had fallen into disuse.<sup>53</sup>

The legal profession has paid scant attention to the need for in forma pauperis proceedings. This parallels the profession's modest record with respect to organized legal aid programs.<sup>54</sup> In 1924-25, the American Bar Association's Standing Committee on Legal Aid Work did promulgate a model poor litigant's statute, as mentioned previously, and the matter was discussed at a legal aid meeting at an ABA convention in 1941.<sup>55</sup> Apparently nothing else happened until 1964, when the Committee recommended that a new study be made.<sup>56</sup> Among the state bar associations the record is similar, except perhaps in New York where the in forma pauperis statute was liberalized in 1935.<sup>57</sup>

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48. *Campbell v. Chicago & N.W. Ry.*, 23 Wis. 490 (1868).

49. *M'Clenahan v. Thomas*, 6 N.C. 198 (1813).

50. *Spaulding v. Bainbridge*, 12 R.I. 244 (1879).

51. *Hickey v. Rhine*, 16 Texas 576 (1856).

52. *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (1917).

53. R. H. SMITH, *JUSTICE AND THE POOR* 100-02 (1919).

54. See Silverstein, *Thoughts on the Legal Aid Movement*, 40 SOC. SERV. REV. 135 (1966).

55. See text accompanying note 7 *supra*.

56. 89 A.B.A. REP. 506, 508 (1964).

57. The reform effort came at least in part from the Legal Aid Society. H. TWEED, *THE LEGAL AID SOCIETY NEW YORK CITY 1876-1951* at 41 (1954).

Although little new legislation on *in forma pauperis* procedures has been added to the statutes enacted in the nineteenth century, much activity has occurred in three related fields. The most widely adopted reform is the Uniform Reciprocal Enforcement of Support Act (URESA). The Commissioners on Uniform State Laws, by amendment added in 1952 to the original 1950 version of the act, provided that a court acting under the act could in its discretion waive all fees for filing, service of process, seizure of property, and stenographic service.<sup>58</sup> In 1958 the Commissioners promulgated a revised version of URESA eliminating all filing fees and other costs for the obligee but permitting them to be charged to the obligor.<sup>59</sup> Nearly every state has adopted either the 1952 or the 1958 version of URESA.<sup>60</sup> According to a mail survey among judges in selected states conducted by the American Bar Foundation, the URESA fee-waiver provisions are rather extensively used, especially where a state welfare department requires that a mother, as a condition of receiving benefits for dependent children, pursue legal remedies against the father for non-support.

The second field of legislative activity is wage collection laws, which are now in effect in 25 states,<sup>61</sup> the District of Columbia, and Puerto Rico. By these statutes a department of labor or comparable agency is authorized to assist any employee in collecting unpaid wages. Most of the statutes authorize the labor commissioner to take an assignment of wage claims that he believes are valid and enforceable. If necessary, the commissioner brings suit on the claim at no cost to the worker. Some of the state statutes have maximum limits on eligible wage claims, ranging from \$200 to \$2,500. Wage collection statutes, to the extent they are available, largely satisfy one of the significant legal needs of the poor. In New York, enactment of a wage collection law in 1937 was an important factor in reducing the number of wage claims handled by the Legal Aid Society.<sup>62</sup>

The third subject of significant legislation is small claims procedures. The first small claims courts were established in 1913 in Kansas, and

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58. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 14.

59. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 15.

60. The states are listed in 9C UNIFORM LAWS ANN. (1957, 1966 Supp.).

61. Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Washington, Wisconsin. See generally U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 203, WAGE PAYMENT AND WAGE COLLECTION (1959) and FACT SHEET No. 4-B, BRIEF SUMMARY OF STATE WAGE PAYMENT AND WAGE COLLECTION LAWS (1964).

62. H. TWEED, THE LEGAL AID SOCIETY NEW YORK CITY 1876-1951 at 41, 106-07 (1954). Experience in Chicago has been similar.

the idea gradually spread to other states.<sup>63</sup> Since procedures are simplified and court costs are usually low, an effective small claims procedure can do much to meet the needs of the poor litigant. Some form of small claims procedure is found in 31 states,<sup>64</sup> the District of Columbia, and Puerto Rico.

It seems fair to conclude that these three kinds of legislation have helped the poor considerably in certain jurisdictions. None of these reforms has been enacted in all jurisdictions, however, and for most kinds of actions court fees must still be paid in most states. Further, the already considerable disparities among the several states respecting litigation of the poor have grown even larger as a result of these limited reforms.

With this historical review as a background we are ready to consider in detail the present statutory provisions for proceedings in *forma pauperis*.

### III. CURRENT PROVISIONS FOR SUIT IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL<sup>65</sup>

#### *Suit in forma pauperis*

##### 1. The statutory provisions.

About half the states and the federal government have enacted some form of waiver of filing fees or waiver of security deposit for poor litigants. The provisions, whether by statute or rule of court, are full of exceptions and qualifications. For that reason it is easier to describe the provisions in terms of their exclusions than in terms of their coverage.

The kinds of limitations vary widely. One type of statute goes no further than to excuse the poor litigant from putting up a cash deposit or other security for costs, but still requires him to pay the usual fees to clerk, sheriff, and other officials.<sup>66</sup> Another limitation found in eight

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63. See references in note 13, *supra*.

64. Alaska, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming. See generally INSTITUTE OF JUDICIAL ADMINISTRATION, SMALL CLAIMS COURTS IN THE UNITED STATES (1955, 1959 Supp.). The American Bar Foundation has available a current statutory summary on small claims courts on request.

65. For a detailed summary of the state statutes with citations, write to the American Bar Foundation, 1155 E. 60th St., Chicago, Ill. 60637. A copy is available on request.

66. Arizona, Kansas, Michigan, Minnesota (wage claims), Missouri (magistrate's court), New Hampshire, North Carolina (defendant in action for recovery or possession of real property), Ohio, Oklahoma, Rhode Island (judicial decision rather than statute), Wisconsin. The Michigan and Wisconsin statutes include appellate court bonds; the others do not.

states, probably deriving from the statute of Henry VII, is that fees may be waived only for plaintiffs and not defendants.<sup>67</sup> A related limitation, probably stemming from the English case law, is a monetary standard based on the applicant's net worth. The most restrictive provision is in the Arkansas statute, which defines a poor person as one who is not worth \$10 over and above necessary wearing apparel for himself and his family and excepting the subject matter of the action. A circuit judge from Kentucky reported to the American Bar Foundation that the courts there follow the old English rule requiring an applicant to show that he does not have more than £5 worth of property exempt from execution. By these narrow standards many persons on the relief rolls would be ineligible, and in fact the *in forma pauperis* procedure is rarely used in Arkansas and Kentucky. Similar statutory provisions for certain types of actions are found in two other states,<sup>68</sup> and the courts have imposed such requirements in a few other jurisdictions.<sup>69</sup> For example, the Puerto Rico Supreme Court requires a statement of ownership of property and a detailed listing of "earnings, expenses, assets, and other means."<sup>70</sup>

A few jurisdictions limit eligibility to residents<sup>71</sup> or citizens<sup>72</sup> or to citizens of the United States.<sup>73</sup> Whether such statutes would stand up if challenged under the privileges and immunities clause is doubtful.<sup>74</sup> As to a foreign national, if he is from a country that permits an alien to sue *in forma pauperis* in its courts,<sup>75</sup> and if the United States has a treaty of commerce and friendship with that country, then the federal government or any state would have to allow the foreign national to sue *in forma pauperis* on the same basis as its own citizens.<sup>76</sup>

Several states have special provisions for domestic relations cases.

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67. Arkansas, Florida, Mississippi, Montana, New Mexico (except for trial fee), North Carolina, Oregon, Tennessee.

68. In Massachusetts under the Uniform Reciprocal Enforcement of Support Act the plaintiff can sue without payment of the fee for service of process by alleging, *inter alia*, that her total assets do not exceed \$100 exclusive of clothes, household goods, and tools of trade. MASS. ANN. LAWS, ch. 273A, § 15A (1966). In North Carolina, in actions for recovery or possession of real estate, a defendant may be excused from giving the usual \$200 bond if he alleges, *inter alia*, that he is not worth \$200 "in any property whatsoever." N.C. GEN. STATS. § 1-112 (1965).

69. See text accompanying notes 124-29 *infra*.

70. *Camacho v. District Court*, 67 P.R.R. 751 (1947).

71. Kentucky, Puerto Rico.

72. Mississippi.

73. District of Columbia. The Virgin Islands statute has a similar provision. The federal statute also had such a provision until 1959, when it was repealed.

74. See *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907); *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934). The clause applies only to the states.

75. Some countries do; see LEAGUE OF NATIONS, *LEGAL AID FOR THE POOR* (1927).

76. *Ware v. Hylton*, 3 Dall. (1 U.S.) 199 (1796).

In Georgia and Louisiana the *in forma pauperis* proceeding is not available in suits for divorce, and in Tennessee it is limited to bed-and-board suits, except that female plaintiffs suing for absolute divorce may proceed if they deposit \$10 for fees. In New Jersey counsel is appointed only in matrimonial actions, but he "shall not be required" to spend his own funds in prosecuting the case. Delaware has a special statute on appeals from orders relating to child custody, and South Dakota has a statute on habeas corpus proceedings. We have already referred to the Uniform Reciprocal Enforcement of Support Act,<sup>77</sup> which may be viewed as having a special *in forma pauperis* provision in the field of domestic relations.

The *in forma pauperis* statutes vary widely among the states as to which levels of courts are covered. Appellate court fees may be waived in nine states,<sup>78</sup> also in the federal courts. Courts of general jurisdiction are subject to the statutes in 24 states,<sup>79</sup> the federal jurisdictions, and Puerto Rico. In inferior courts the fees may be waived in at least some kinds of cases in 14 states,<sup>80</sup> the District of Columbia, and Puerto Rico. In 14 states<sup>81</sup> court costs may be waived in courts of general jurisdiction but not in the inferior courts, although the latter is where the poor are most likely to have their cases. The reverse situation obtains in four states.<sup>82</sup> On the whole, *in forma pauperis* provisions are not well articulated with small claims procedures.

Except for appellate court provisions, the statutes are rather uniform as to which fees may be waived. A common provision for courts of general jurisdiction uses a term such as "officers of the court," which would include clerks, sheriffs, and possibly the court reporter. Another type of provision refers specifically to filing or entry fees, fees for service of process, and other usual fees. New Mexico and Oregon have statutes applying to trial fees, the Oregon statute being limited to such

77. See text accompanying notes 58-60 *supra*.

78. Illinois, Louisiana, Missouri, New Jersey, New York, Oregon, Pennsylvania. In West Virginia costs may be waived for a legal aid society client. North Carolina has a separate statute for pauper appeals.

79. Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia.

80. California (*See Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (1918)), Florida, Georgia, Hawaii (up to \$25), Illinois, Massachusetts, Minnesota (all cases in conciliation courts and wage cases in all courts), Missouri, Nevada, New Jersey, New York (wage claims only), Rhode Island (legal aid society cases at least), South Dakota, Texas.

81. Arkansas, Colorado, Indiana, Kentucky, Louisiana, Mississippi, Montana, New Mexico, North Carolina, Oregon, Tennessee, Utah, Virginia, West Virginia. The same is true to a limited extent in New York and Rhode Island.

82. Hawaii, Massachusetts, Minnesota, South Dakota.



fees. In statutes applying to courts of limited jurisdiction, the waiver provisions are similar. Virtually all the statutes provide that if the poor litigant prevails, the usual bill of costs shall be taxed against the other party.

Most of the appellate court provisions apply only to clerks' fees in the trial and appellate courts. The statutes do not include provisions for waiver of the supersedeas or stay bond usually required of an appellant. Only Louisiana, Michigan, and Wisconsin provide for appeal without bond, but in Michigan and Wisconsin the appellant must still pay court fees. According to American Bar Foundation survey responses from legal aid offices, reported in detail below, the lack of a bond-waiver provision frustrates many indigent appeals. This fact may help account for the paucity of test cases on the substantive law as it affects the poor,<sup>83</sup> at least until recently.<sup>84</sup>

None of the statutes makes any provision for auxiliary charges, such as advertising expenses, as distinguished from official charges.<sup>85</sup> Such a provision would require a public appropriation, which goes beyond the typical fee-waiver requirement. The need for such a provision was recognized in the American Bar Committee's Model Poor Litigant's Statute of 1924-25<sup>86</sup> and the same Committee's recommendation in 1941 for a limited act to meet this need.<sup>87</sup>

The matter of appointment of counsel, in which many of the statutes are deficient, seems sufficiently important to deserve a separate discussion.<sup>88</sup>

2. How the statutes work in practice: the experience of legal aid offices.

To understand better the actual operation of the statutes and to obtain information from jurisdictions that do not have any, the American Bar Foundation circulated questionnaires to selected legal aid offices. A second questionnaire was sent to judges in states with in forma

83. See generally Willcox, Karlen & Roemer, *Justice Lost . . . by What Appellate Papers Cost*, 43 J. AM. JUD. SOC'Y 6 (1959), 33 N.Y.U.L. REV. 934 (1958). Cf. Note, *The Right to Appeal*, 44 J. URBAN L. 505 (1967).

84. The Office of Economic Opportunity Legal Services Program encourages test cases. Johnson, "Impact of OEO's Legal Services Program" (address), NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, SUMMARY OF CONFERENCE PROCEEDINGS 105 (1966).

85. A few in forma pauperis statutes authorize fee officers to bill the county for their services or mileage or both in a pauper case. Similarly the 1958 version of URESA, *supra* note 59, provides that a court may direct that fees for filing, service of process, seizure of property, and stenographic service be paid by the county or other political subdivision. The New Jersey rule for matrimonial cases provides that an appointed attorney shall not be required to spend his own funds. N.J.R. 4: 98-2.

86. See note 7 *supra*.

87. 66 A.B.A. REP. 252, 253 (1941)

88. See text accompanying notes 141-44 *infra*.

pauperis proceedings. The legal aid responses are described in this section, the judge responses in the next section.

The legal aid questionnaire went to 54 legal aid offices located in 38 states, the District of Columbia, and Puerto Rico.<sup>89</sup> Replies were received from 35 offices<sup>90</sup> in 29 states and in Puerto Rico. The questionnaire asked about local fees and expenses of litigation, the amount spent by the office for such fees and expenses, and the office's practice concerning in forma pauperis proceedings, if any were available.

It is helpful to consider the responses in the light of the National Legal Aid and Defender Association's (NLADA) recommended standards, with which its member offices are expected to comply. Since 1933, these standards have included a provision as to court costs.<sup>91</sup> The current version of this standard, adopted in November, 1965, provides:

6. Provision should be made by the agency for the payment of costs and essential expenses in cases in which the client cannot pay them.<sup>92</sup>

In *Legal Aid in the United States*, published in 1951 as a part of the survey of the legal profession, Emery A. Brownell reported:

A number of the organizations acknowledge that they have no provision whatever for the advancement of court costs. Despite their assertion that no clients were actually denied their day in court because of this, no doubt some applicants, too proud to press the matter and others unknown to the organization, were not able to pay their way into the courthouse. This conclusion is substantiated by the admission of several organizations that their own provisions are inadequate and that a substantial num-

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89. A copy of the questionnaire can be obtained from the American Bar Foundation, 1155 E. 60th St., Chicago, Ill. 60637. The questionnaire was circulated in February, 1966; it was 8 pages long.

90. Birmingham, Phoenix, Little Rock, Los Angeles, San Diego, Denver, Hartford, Atlanta, Honolulu, Chicago, Peoria, Des Moines, Kansas City (Kan.), Louisville, New Orleans, Baltimore, Detroit, Grand Rapids, Minneapolis, Kansas City (Mo.), Newark, Omaha, Albuquerque, New York City, Cincinnati, Cleveland, Oklahoma City, Philadelphia (not complete), Providence, Knoxville, Dallas, San Antonio, Seattle, Milwaukee. The Puerto Rico reply was from Rio Piedras.

91. The standard was originally developed by the Committee on Standards of the National Association of Legal Aid Organizations from 1930 to 1933. In its 1933 form the language read: "Every Legal Aid Society should . . . 16. Maintain a fund or provide a means whereby legal expenses may be available when necessary." NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATION, REPORTS OF COMMITTEES 68, 69 (1933-34). For the standard as it stood in 1948, see E. BROWNELL, *LEGAL AID IN THE UNITED STATES* 156, 158 (1951).

92. 24 *LEGAL AID BRIEF CASE* 61, 62 (1965).

ber of poor persons are in fact denied an opportunity to bring their cases to court for lack of costs.<sup>93</sup>

Responses to the Bar Foundation questionnaire show that the situation described by Brownell has changed very little since 1951. Since, as we have seen, none of the *in forma pauperis* statutes covers all the actual fees and costs incident to litigation, and many states have no statute whatever, we should expect that every legal aid organization would need funds to assist litigants for such expenses. The questionnaire asked, "Approximately how much does your office spend per year for the foregoing costs and expenses of litigation for poor persons?" Of 32 offices replying, 14 reported that they had no funds whatever,<sup>94</sup> and another nine said they spent \$100 or less.<sup>95</sup> Some indication of the gross lack of funds for this purpose can be seen from the Kansas City, Kansas, response, which said that no funds were available at present, but \$1100 had been included in the budget submitted to the Office of Economic Opportunity (OEO) in an application for funding. Similarly, the Little Rock office reported an item of \$2700 in its new budget. The only other offices reporting substantial amounts were Chicago, \$3500; New York, \$1000; and New Orleans, \$500, including the criminal division. Other evidence of the need can be found in applications to OEO<sup>96</sup> and in data collected annually by the NLADA.<sup>97</sup>

Among offices that do have funds available, restrictive rules have been adopted as to when the funds can be used.<sup>98</sup> These rules are comparable to rules of subject-matter eligibility, particularly for divorce

93. Brownell, *supra* note 91 at 189; *see generally* *Id.* at 189-92. In 1932 the Committee on Standards, *supra* note 91, reported that 15 legal aid organizations provided a fund for costs and 17 did not. NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS, REPORTS OF COMMITTEES 86 (1931-32).

94. Denver, Honolulu, Kansas City (Kan.), Louisville, Grand Rapids, Kansas City (Mo.), Newark, Albuquerque, Oklahoma City, Philadelphia, Providence, Knoxville, Milwaukee, Puerto Rico.

95. Birmingham, San Diego, Hartford, Baltimore, Minneapolis, Omaha, Cincinnati, San Antonio, Seattle.

96. For example, the application for Waterbury, Conn., included over \$3000 for court costs in a total budget of \$104,000. The Chester, Pa., proposal allocated \$4800 from a total budget of \$135,000. The grant to Rural Legal Assistance, Inc., for ten offices in California included \$20,000 for filing fees and court costs out of a total budget of \$1,276,000.

97. In its 1965 "Summary of Data" for legal aid offices serving a population of 100,000 or more, NLADA reported that of 87 offices replying, 33 had funds for court costs and 54 had none. For 1966 the comparable figures were 52 and 35, a considerable improvement.

98. This paragraph is based on answers to question 6: "If *your office* pays the necessary fees and expenses of litigation in certain types of cases or certain situations, but not others, what are the practical or policy bases for your deciding whether to pay the fees and expenses?"

cases.<sup>99</sup> Several offices reported that they advance costs from a revolving fund but expect the client to repay the fund. The following restrictive policies are illustrative:

Costs are paid only when client has no income. (Birmingham)

Our office pays on behalf of all clients who do not qualify to proceed in forma pauperis the basic court costs and expenses incident to litigation on the rationale that lack of money on the part of an indigent person to pay court costs and other litigation expenses is just as much of a deterrent to the use of the courts as is the inability to pay an attorney's fee. By basic court costs and expenses is meant such things as clerk's fees, sheriff's fees, recording fees, newspaper charges for legal notices and attorney ad litem fees. (Little Rock) [The Arkansas in forma pauperis statute is very restricted.]

Procedure is used when matter is urgent or necessary or when delay would jeopardize rights. (Los Angeles)

Cases of severe gravity or extreme cases. (Hartford, New Orleans, Baltimore)

Only when client appears to be a real pauper and it would be difficult to get official to okay pauper's affidavit. (Atlanta)

Only in domestic cases to protect welfare of minor children. (Detroit)

Only if party cannot pay and situation demands immediate court action. (Omaha)

Pay nothing except occasionally "out of pocket" transportation to outlying courts, etc. (Albuquerque)

Where case could not be concluded otherwise. (Cincinnati)

Emergency only. (Oklahoma City)

Financial ineligibility of client [for in forma pauperis proceeding] or in *defense* of actions. (Chicago)

Another question put to the legal aid offices dealt with payment of fees and expenses by the welfare department or other outside source. If such funds were available, they could made up for the lack of funds in the legal aid treasury. Of 20 offices replying to this question, 10 said that

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99. See Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 J. URBAN L. 549 (1967).

the welfare department has no funds available.<sup>100</sup> Two offices reported that the welfare department has no funds, but a private family agency sometimes pays expenses.<sup>101</sup> The eight welfare departments that do pay expenses have a variety of policies. The most liberal policy is in Detroit, where the department "frequently" pays expenses. The Little Rock department has no subject-matter restriction, but limits its funds to "special cases." Six additional offices have funds for at least some kinds of domestic cases, but five are limited in some way: Birmingham, Cincinnati, and Baltimore<sup>102</sup> have funds only for guardianships; Chicago, only for adoptions; and Louisville, for divorce, annulment, and adoption.<sup>103</sup> Two welfare offices will advance funds for a petition in bankruptcy: Providence and Honolulu.

It seems fair to conclude that state welfare departments cannot be counted on to provide the fees and expenses of litigation. Moreover, such funds as are available are applied very unevenly among various classes of litigants, depending on local welfare administrators' concepts on need and priority. Finally, the availability of funds for at least some welfare recipients has the unintended effect of discriminating against individuals who are equally poor but not on the welfare rolls.

The questionnaire replies included the amount of the filing or entry fee required to commence a civil action in the court of record in most jurisdictions.<sup>104</sup> Some jurisdictions require a cash deposit or bond to cover anticipated costs. A few jurisdictions require some combination of fee, cash deposit, and bond.<sup>105</sup> Filing fees range from \$2.00 in Baltimore to \$35.00 in Newark, the median being \$15.00. For divorce cases, ten offices reported that the filing fees are different from other cases; the highest being \$50.00 to \$60.00 in Newark and \$35.00 in Cincinnati. The next expense that a plaintiff must pay is for service of process. This fee ranges from \$.75 in Des Moines to \$10.00 in Hartford, plus a mileage fee ranging from nothing in Hartford to \$.35 a mile in Phoenix and Los Angeles, figured for one way only. The most typical figure is \$.10 a mile for each way. If service is by publication, costs of printing vary quite widely in different cities, the lowest

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100. Phoenix, Hartford, Atlanta, Kansas City (Kan.), Kansas City (Mo.), Albuquerque, New York City, Oklahoma City, Philadelphia, Seattle.

101. New Orleans, Omaha.

102. The Baltimore welfare department also administers a non-governmental fund for costs in divorce cases.

103. The sixth office is Honolulu.

104. For a brief description of the myriad fee system in the several states see R. H. SMITH, *JUSTICE AND THE POOR* 22-26 (1919). See also Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923).

105. A detailed report on the questionnaire responses is available from the American Bar Foundation, 1155 E. 60th St., Chicago, Ill. 60637.

being \$10.00 or less in Phoenix, Little Rock, and Knoxville and the highest \$100.00 in Hartford and \$150.00 in New York City. Other sizable amounts are \$35.00 in Cleveland and \$25.00 to \$50.00 in Newark. The median is about \$20.00. In many jurisdictions the fee for personal service can be waived, but in the others the fee must usually be paid by the litigant. Only five questionnaires reported that the legal aid office or a welfare agency sometimes paid this fee. The fee for service by publication can be waived in only one state, Ohio. In all other states reporting, the litigant must pay the fee, except in five cities where the litigant, the legal aid office, or a welfare agency pays it.

The other fees incident to a trial defy brief description. Most of the cities reported either a jury fee or a trial fee or both. The lowest charges reported are \$.65 a day in Birmingham and \$3.00 a day in Denver, Baltimore, and Minneapolis. The highest charges are in Chicago (\$50.00 for jury trial plus \$10.00 a day), Little Rock (\$7.50 per juror per day), and Hartford (\$25.00 trial fee plus \$50.00 a day for jury of 12 or \$20.00 for jury of six). Besides the jury or trial fee, mileage for each juror is chargeable at rates varying from \$.05 a mile in Little Rock to \$.15 in California cities. The fee for a witness ranges from a low of \$.50 a day in Newark and \$1.00 in Louisville to \$8.00 a day in Grand Rapids and \$10.00 in Chicago. Some offices reported a subpoena fee of \$.20 to \$.50 per subpoena. Mileage fees are similar to those for jurors. Another typical fee reported by several offices is the judgment fee. The amount ranges from \$1.00 or less in several cities to an average of \$40.00 in Hartford. For issuance of an execution of judgment the fees range from \$.50 in Kansas City, Kansas, to \$10.00 in Newark.

The fees for court reporters also vary quite widely from one city to another. In most cities the reporter is paid a salary by the state, but he charges the party for a transcript. The lowest charges reported were \$.10 a page in New York City, \$.20 in Newark, and \$.30 in Detroit. The highest was Minneapolis at \$1.25 a page. In several cities the court reporter charges a fee of \$25.00 a day, which is apparently in lieu of a salary. In Seattle the reporter charges \$15.00 for the first hour and \$3.75 for each additional hour.

In most jurisdictions the defendant must pay an appearance fee to be entitled to participate in the court proceeding. This fee ranges from as low as \$.50 in Philadelphia and Kansas City, Kansas, to a high of \$15.50 in San Diego.

For courts of limited jurisdiction, the filing fee is usually less and it often covers service by mail. In some jurisdictions the filing fee is graduated according to the amount involved. In some of the courts no charge is made for defendant's appearance, trial, or summoning of

witnesses. The lowest filing fees are \$1.00, usually for claims up to \$50.00, \$100.00, or \$150.00; while the highest fees are \$10.00 in San Diego, \$10.50 in justice of the peace court in Albuquerque, and \$15.00 in Oklahoma City. Other fees are similar to those in the courts of general jurisdiction, except that the amounts are usually less, and some of the fees are not charged.<sup>106</sup>

We also asked the legal aid offices about the costs of an appeal from the court of general jurisdiction to a higher court. Several of the offices either left this question blank, or filled it out but said that they did not take appeals or had never had occasion to do so. Fees charged by the clerk of the lower court for preparing the record depend in most states on the number of words, pages, or documents; a few offices reported flat fees ranging from \$2.00 to \$10.00. In addition, the reviewing court requires a filing fee that varies from \$1.00 in Tennessee to \$50.00 in California; the median is \$20.00. Most of the offices indicated that a supersedeas bond is required, the principal amount varying according to the amount of the judgment. Some states require double the amount. The various appellate costs can be waived in a number of jurisdictions. A possible auxiliary expense incurred on appeal is for printing the brief. This expense varies greatly, from \$.50 a page in Little Rock and Knoxville to \$5.00 or more in Newark. These charges cannot be waived, but several offices report that typewritten briefs are permitted and that the typing is done in their own offices.<sup>107</sup>

No doubt the cost of appeal, especially for a supersedeas bond and printed brief, deter legal aid offices from taking appeals. The director of the Chicago Legal Aid Bureau said in an interview that it was virtually impossible for a legal aid client to obtain a supersedeas bond since no bonding company would take the risk for a person without means. Moreover, the Bureau could not risk its own funds in signing such a bond or depositing cash in equivalent amount.

### 3. How the statutes work in practice: the experience of judges.

Our questionnaire to judges was designed to find out, in the 30 states that have in forma pauperis procedures, how much they are used in practice.<sup>108</sup> Where feasible, the questionnaire was sent to each trial

106. A detailed report on the questionnaire responses is available from the American Bar Foundation, 1155 E. 60th St., Chicago, Ill. 60637.

107. See generally Willcox, Karlen & Roemer, *Justice Lost . . . by What Appellate Papers Cost*, 43 J. AM. JUD. SOC'Y 6 (1959), 33 N.Y.U.L. REV. 934 (1958). Cf. Note, *The Right to Appeal*, 44 J. URBAN L. 505 (1967).

108. The Nevada statute was enacted in 1967, hence Nevada was not included in the study. A detailed report on the questionnaire responses is available from the American Bar Foundation, 1155 E. 60th St., Chicago, Ill. 60637.

court of general jurisdiction, excluding only cities where similar information had already been obtained from legal aid offices.<sup>109</sup> In all, 791 forms were mailed out and 449 returned, of which 434 were usable. The questionnaires inquired not only about provisions permitting waiver of fees or security deposits, but also whether the judge had had occasion to appoint counsel in a civil case in the last year. Finally the judge was asked for general comments about the subject of the study.

The most significant fact revealed by the judge responses is that the existing *in forma pauperis* procedures are used very little except in cases under the Uniform Reciprocal Enforcement of Support Act (URESA)<sup>110</sup> and a few other scattered instances. Of 364 judges who reported the number of pauper cases filed in their courts, 112 said "none," and another 141 judges said "few" or gave a number less than ten. Only 111 judges reported ten cases or more, and only 26 reported more than a hundred.<sup>111</sup> Several of the judges reporting large numbers of waivers volunteered the information that they were mainly or exclusively under URESA. This was mentioned by judges in ten different states.<sup>112</sup>

Since the responses indicate that URESA accounts for a substantial portion of waivers in courts where they occurred in large numbers, it seems likely that the same thing happened in other courts in the same state where the type of case was not specified. Consequently, if URESA cases were systematically excluded from the study, the number of sizable

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109. In states with a large number of trial courts, such as Indiana, the questionnaire was sent to a random sample of judges drawn from court rosters. Courts of limited jurisdiction were included where we thought they would handle actions filed by the poor. The number of questionnaires sent out and the number of responses for each state were: Alaska superior court (4 sent out, 3 usable returns), magistrates (4-4); Arizona superior court (14-11); Arkansas circuit court (18-12), chancery court (9-5); California superior court (29-16); Colorado district court (20-10), county court (20-16); Florida circuit court (16-8), county court (22-12); Georgia superior court (19-8), municipal court (5-1); Illinois circuit court (20-17); Indiana circuit court (30-24); Kansas district court (20-14); Kentucky circuit court (25-13); Louisiana district court (31-14), city court (9-5); Michigan circuit court (40-30); Minnesota conciliation court (3-2); Mississippi circuit court (14-7), chancery court (18-6), county court (9-4); Missouri circuit court (21-11); New Jersey superior court (12-8), county court (21-10); New Mexico district court (11-5); New York supreme court (11-6), family court (1-1), civil court (1-1); North Carolina superior court (32-12); Ohio common pleas court (36-21); Oklahoma district court (24-13), county court (26-12); Rhode Island superior court (1-1); Tennessee circuit court (22-13), general sessions court (33-15); Texas district court (30-11); Utah district court (7-4); Virginia circuit court (20-10), corporation hustings, and city courts (10-5); West Va. circuit court (29-17); Wisconsin circuit court (25-16).

110. See text accompanying notes 58-60 *supra*.

111. The figures were 10-25 cases, 49 judges; 26-50 cases, 18 judges; 51-100 cases, 18 judges; 101-200 cases, 15 judges; 201-500 cases, 8 judges; over 500 cases, 3 judges.

112. Alaska, Arkansas, California, Colorado, Florida, Georgia, Illinois, Mississippi, New Mexico, Texas.



reports would probably be reduced drastically and the smaller returns would fall still lower.

Besides URESA, three types of cases were mentioned by various judges. One of these was habeas corpus and similar collateral remedies which, although civil in form, are used almost entirely to challenge criminal detention.<sup>113</sup> Second was the civil case prosecuted or defended by an indigent prisoner. The third type of case was workmen's compensation in Louisiana, where such a case is an ordinary civil action rather than an administrative proceeding as in most other states.

Each judge was also asked about practice in other sections of his state. The responses indicated lack of knowledge, either through a direct answer to this effect, or through inconsistent answers from different judges in the same state. This result supports other responses tending to show that, with few exceptions, available waiver procedures are little known and seldom used.

At least two factors have a limiting effect on the use of the waiver provisions. The first is limitations that inhere in the statutes themselves or their interpretation. Several states provide only for waiver of security deposits.<sup>114</sup> In these states security is typically required only under special circumstances, primarily on motion of the defendant or if the plaintiff is a non-resident. Judges replying from these states observed that the limited circumstances in which a waiver can arise renders the practice *de minimis* if not non-existent. In three other states<sup>115</sup> the *in forma pauperis* statute does not apply to divorce and other domestic cases, although such cases account for a high proportion of pauper cases in states without this restriction. Finally, in two states<sup>116</sup> an anachronistic definition of poverty inhibits use of the statute.

The second factor is the conservative attitude, in many localities, of the judges themselves. This is reflected in a reluctance to entertain actions filed in *in forma pauperis*. Some judges thought the process would be abused by persons not really indigent. Further, a Colorado judge said, "No person with any pride uses the pauper system." Judges from California, Illinois, New York, and New Jersey said that the existence of

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113. This type of case also accounts for much of the federal *in forma pauperis* litigation. See Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

114. Arizona, Kansas, Michigan, Montana, Ohio, Oklahoma, Wisconsin.

115. Georgia, Louisiana, Tennessee.

116. Kentucky, Arkansas. A Kentucky circuit judge said: "The Common Law rule applies in Kentucky, that, if an indigent has not 5 pounds exempt from execution, he can apply to the court, which will appoint him counsel, who must serve without compensation, and waive fees to all officials."

In Arkansas the procedure is available only to a person not worth more than \$10 over and above necessary wearing apparel for himself and family.

See text accompanying note 68 *supra*.

legal aid offices and bar association committees showed that the needs of the poor were getting adequate attention. A judge from Kentucky wrote: "Filing fees should be required. It would save and does save unjustified suits or nuisance suits from being filed." Finally, some judges indicated a reluctance to appoint attorneys even where state statutes clearly authorize it, because the judges do not want to burden the bar with non-paying cases. Yet the unavailability of appointed attorneys would prevent access to the courts by at least some poor persons.

The information gathered from the judges and legal aid offices suggests that in *forma pauperis* procedures are not of much use to a poor person unless some one else, some one more sophisticated, sets the machinery in motion for him. This could be the public welfare department, a private social agency, the district attorney acting pursuant to URESA, a legal aid attorney, an attorney in private practice who agrees to help the poor person, or even the judge or a court official to whom the person turns for help. In a later section we shall consider the systematic provision of counsel in civil cases.

#### 4. The decisional law.

The case law does not add a great deal to the field study. Although over 300 appellate decisions have considered questions of in *forma pauperis* proceedings, only a relatively small number of them deserve our attention.<sup>117</sup> The significant decisions center about two problems, (a) eligibility in the trial court, (b) appellate procedure.

Questions of eligibility may take several forms. On the issue of whether the plaintiff was poor enough to be eligible, some of the older cases were rather strict,<sup>118</sup> but the modern view is that the plaintiff need not be penniless to qualify.<sup>119</sup> As the United States Supreme Court said:

We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for the costs . . . and still be

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117. For collections of cases see annotations, "Financial circumstances which will enable one to sue *in forma pauperis*," 6 A.L.R. 1281 (1920); "Necessity of attorney on contingent fee making pauper's oath in support of suit *in forma pauperis*," 33 A.L.R. 731 (1924); "Right to sue or appeal *in forma pauperis* as dependent on showing of financial disability of attorney or other nonparty or nonapplicant," 11 A.L.R.2d 607 (1950); "What costs or fees are contemplated by statute authorizing proceeding *in forma pauperis*," 98 A.L.R.2d 292 (1964). Cf. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

118. *E.g.*, *Isnard v. Cazeau*, 1 Paige 39 (N.Y. 1828); *Sears v. Tindall*, 15 N.J.L. 399 (1836); *Moyers v. Moyers*, 11 Heisk. 495 (Tenn. 1872). Cf. note 125 *infra*.

119. *Adkins v. DuPont Co.*, 335 U.S. 331 (1948); *Thiel v. Southern Pacific Co.*, 159 F.2d 61 (9th Cir. 1946); *Singleton v. First Nat'l Life Ins. Co.*, 228 La. 148, 81 So. 2d 842 (1955); Cf. *Fiske v. Grider*, 171 Tenn. 565, 106 S.W.2d 563 (1937).

able to provide" himself and dependents "with the necessities of life." To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. . . .<sup>120</sup>

Another eligibility problem involves claims of infants, incompetents, bankrupts, or decedents' estates, the question being whether the personal representative must himself be poor or whether it suffices that the beneficiary or estate is poor. Most of the decisions are that the personal representative need not be poor.<sup>121</sup> On the other hand, the right to sue in *forma pauperis* is denied if the trustee is poor but the beneficiary is not.<sup>122</sup>

Formerly the courts were divided on the question whether a plaintiff could sue in *forma pauperis* in a contingent fee case. Courts that denied the right to sue usually did so on the theory that the attorney had an interest in the litigation, and since he was not poor, the usual fees must be paid. This concept of the attorney's interest has been rejected, hence the rule against pauper proceedings has fallen with it.<sup>123</sup>

Other eligibility cases have involved questions of residence or citizenship,<sup>124</sup> the content of the petition<sup>125</sup> and the right to amend

120. *Adkins v. DuPont Co.*, 335 U.S. 331, 339-40 (1948).

121. *E.g.*, *Barfield v. Hartley*, 108 Ga. 435, 33 S.E. 1010 (1899); *Strother v. Kansas City*, 187 Mo. App. 303, 173 S.W. 713 (1915).

122. *Clay v. Southern Ry. Co.*, 90 F. 472 (6th Cir. 1898); *Walker v. Ful-Kalb, Inc.*, 181 Ga. 574, 183 S.E. 776 (1936).

123. *Isrin v. Super. Ct.*, 63 Cal. 2d 153, 403 P.2d 728, 45 Cal. Rptr. 320 (1965), noted, 2 CALIF. WESTERN L. REV. 116 (1967); 6 SANTA CLARA L. REV. 236 (1966); 35 U. CIN. L. REV. 76 (1966), overruling *Gomez v. Super. Ct.*, 134 Cal. App. 19, 24 P.2d 256 (2d Dist. 1933). Other cases that uphold the right to sue are *Adkins v. DuPont Co.*, 335 U.S. 331 (1948) (eliminating a split of authority in the federal courts); *Richfield Oil Corp. v. LaPrade*, 56 Ariz. 100, 105 P.2d 1115 (1940); *Hogg v. Chicago & Alton R.R.*, 168 Ill. App. 609 (1912); *Loftin v. Frost-Johnson Lumber Co.*, 133 La. 644, 63 So. 252 (1913). *Cf. Smith v. Lyon Cypress Co.*, 140 La. 507, 73 So. 312 (1916), where the attorney had a one-half interest in the cause of action rather than a one-half contingent interest in any recovery. A 1906 statute allowed an attorney to acquire an interest in the subject matter. The court held, on the basis of the statute, that the plaintiff could sue in *forma pauperis*.

124. A resident who moves out of the jurisdiction after starting suit is not allowed to continue in *forma pauperis*. *White v. McClanahan*, 135 La. 25, 64 So. 940 (1914); *Southern R.R. v. Thompson*, 109 Tenn. 343, 71 S.W. 820 (1902). *Contra*, *Haehnel v. Seidentoff*, 63 Ind. App. 218, 114 N.E. 422 (1916).

A resident next friend for a non-resident infant was permitted to sue for a tort that occurred in the forum state. *Vexolles v. Tenn. Cent. Ry.*, 175 Tenn. 544, 136 S.W. 2d 502 (1936).

A resident assignee of a non-resident's chose in action was deemed to be the real party in interest for purpose of suit. *Metropolitan Life Ins. Co. v. Brown*, 25 Tenn. App. 514, 160 S.W. 2d 434 (1942).

A temporary residence established by husband and wife is sufficient even though

it,<sup>126</sup> the requirement of good faith,<sup>127</sup> the effect of a former suit in forma pauperis on the same cause of action,<sup>128</sup> and other issues.<sup>129</sup>

Determination of eligibility is regarded as a matter within the discretion of the trial court, subject to review only for abuse of dis-

plaintiff husband was a citizen of another state. *King v. Leeman*, 30 Tenn. App. 206, 204 S.W.2d 384 (1946).

125. Petition must be verified. *Kerrigan v. Langstaff*, 64 App. Div. 497, 72 N.Y.S. 230 (2d Dep't 1901); *Johnson v. State*, 55 N.Y.S.2d 792 (Ct. of Claims 1945).

Oath may be administered before justice of peace or ordinary where no special officer is designated by statute. *Sasser v. Adkins*, 108 Ga. 228, 33 S.E. 881 (1899) (ordinary); *Phipps v. Burnett*, 96 Tenn. 175, 33 S.W. 925 (1896) (justice of peace).

Petition must follow statutory language. *Simkins v. Johnson*, 3 Ga. App. 437, 60 S.E. 202 (1908); *Williams v. George*, 104 Ga. 599, 30 S.E. 751 (1898). Appeal dismissed for failure to state that inability to give security was because of poverty. *Gibbons v. McComb*, 3 Ga. 252 (1847). Party and not attorney must sign affidavit. *Hubby v. Harris*, 63 Texas 456 (1885).

See also cases cited in Annot. 6 A.L.R. 1281 (1920).

126. In general, the pauper plaintiff has the same rights to amend as any other plaintiff, whether the amendment involves a different cause of action, *City of Bloomington v. Osterle*, 139 Ill. 120, 28 N.E. 1068 (1891), or a mere defect in stating the original cause of action, *Woods v. Bailey*, 113 F. 390 (M.D. Pa. 1902); *Wever v. Wever*, 191 Ga. 241, 12 S.E.2d 636 (1940); *Boudreaux v. Rossen*, 19 La. App. 188, 139 So. 706 (1932); *State ex rel. Maggett v. Roberts*, 108 N.C. 174, 12 S.E. 890 (1891). Cf. *Jones v. United States*, 180 F. Supp. 425 (W.D. Pa. 1959). *Contra*, *Coyle v. Third Ave. Ry.*, 19 Misc. 345, 43 N.Y.S. 499 (City Ct. of N.Y.C. 1897) (court may require plaintiff to pay expenses as condition precedent to permitting amended complaint).

127. Plaintiff who alleged she had only \$60 in the bank when she really had \$600 was denied right to sue in forma pauperis. *Wynn v. Carbajal*, 194 So. 730 (La. App. 1940). Cf. *McClure v. McClure*, 100 N.J. Eq. 38, 135 A. 332 (1926), where the court denied a woman the right to sue as a pauper because she maintained a filthy home, let her children run loose in the streets, and brought men home for the purpose of drinking.

Three states specifically provide criminal penalties for false swearing in the statutes authorizing proceedings in suits in forma pauperis. *Hawaii*, HA. REV. STAT. § 229-11 (1953, 1965 Supp.) (up to 20 years imprisonment); *Indiana*, IND. STAT. ANN. § 49-1305(c) (1964) (1 to 10 years); *West Virginia*, W. VA. REV. CODE § 59-2-1 (1961) (up to one year or \$1000). In the remaining states it may be inferred that the general criminal provision on false swearing would apply.

It is improper for a trial judge to disregard a properly presented motion to dismiss a suit filed in forma pauperis. *Fort v. Noe*, 144 Tenn. 337, 233 S.W. 516 (1920).

128. See Annot., 156 A.L.R. 956 (1944). The decisions depend partly on whether there is a statutory provision on this point and also whether the second action is meritorious.

129. It makes no difference if the plaintiff files his affidavit in a different county from the one where he filed his action. *Knoxville Iron Co. v. Smith*, 86 Tenn. 45, 5 S.W. 438 (1887).

If a bill of exceptions is obtained in the name of two or more parties, and one of them wants to appeal in forma pauperis, the poverty of all must be shown before the court will allow the pauper appeal. *Walker v. Equitable Mortgage Co.*, 114 Ga. 862, 40 S.E. 1010 (1902); *Tuthill v. Forbes*, 164 App. Div. 930, 149 N.Y.S. 559 (1st Dep't 1914); *Ostrander v. Harper*, 14 How. Pr. 16 (N.Y. Sup. Ct., Brooklyn Spec. Term 1857); *Johnston v. Geary*, 84 Utah 47, 33 P.2d 757 (1934). *But cf.* *Adkins v. DuPont Co.*, 335 U.S. 331 (1948).

An affidavit must be filed concurrently with the initial pleading. *Petithory v. Mailhes*, 131 La. 652, 60 So. 24 (1912).

Notice of application to sue as a pauper must be given to the adverse party. *Lewis v. Simmons*, 200 Tenn. 60, 289 S.W.2d 702 (1956).

cretion.<sup>130</sup> Either party may appeal the trial court's determination of eligibility, even though it is an interlocutory order.<sup>131</sup>

As stated previously, some of the statutes authorize suits in forma pauperis at the trial court level but not on appeal.<sup>132</sup> Even in the jurisdictions that allow pauper appeals, certain eligibility tests are imposed. A common rule is that the appeal must not be frivolous. Various devices are used to enforce this restriction, such as requiring the attorney to certify that the trial court made an error of law,<sup>133</sup> or having the trial court rule that the appeal is not frivolous,<sup>134</sup> or having a similar determination by the appellate court.<sup>135</sup> The appeal must be filed according to the time limits prescribed by statute or rule.<sup>136</sup> Other requirements are imposed in some jurisdictions.<sup>137</sup> An appellate court, however, may allow a litigant to appeal in forma pauperis even though

130. *Peck v. Farnham*, 25 Colo. 141, 49 P. 364 (1897); *Roberts v. Brunz*, 92 Ill. App. 479 (1901); *Hoey v. McCarthy*, 124 Ind. 464, 24 N.E. 1038 (1890); *Stevens v. Sheriff*, 76 Kan. 124, 90 P. 799 (1907); *Nemarich v. Star Checker Cab Co.*, 150 So. 862 (La. App. 1933); *Standley v. Western Auto Supply Co.*, 319 S.W.2d 924 (Mo. App. 1959).

131. Most of the cases previously cited were interlocutory appeals. Also *Schaneville v. Toye Bros. Yellow Cab Co.*, 173 So. 464 (La. App. 1937). *Cf. Burleson v. Rawlins*, 174 S.W.2d 979 (Tex. Civ. App. 1943) (order was reviewable by mandamus rather than appeal).

132. The following cases have denied a right to appeal in forma pauperis unless the appellant filed a security bond: *Spain v. Murry*, 77 Colo. 197, 235 P. 338 (1925); *Life & Casualty Ins. Co. v. Walters*, 190 Miss. 761, 198 So. 746 (1941); *Benson v. Anderson*, 9 Utah 154, 33 P. 691 (1893); *Tyler v. Garrison*, 120 Va. 697, 91 S.E. 749 (1917). *Contra, County of Sutter v. Super. Ct.*, 53 Cal. Rptr. 424 (3d Dist. Ct. App. 1966) (statutory concept of waiver of fees implies also waiver of bond for costs).

133. *Clark v. Clark*, 225 N.C. 687, 36 S.E.2d 261 (1945); *Berwer v. Union Central Life Ins. Co.*, 210 N.C. 814, 188 S.E. 618 (1936). The requirement is mandatory and jurisdictional. *McIntyre v. McIntyre*, 203 N.C. 633, 166 S.E. 732 (1932).

134. This is the rule in federal court. 28 U.S.C. § 1915 (1964). *Moss v. Thomas*, 299 F.2d 729 (6th Cir. 1962); *Barkeij v. Ford Motor Co.*, 230 F.2d 729 (9th Cir. 1956); *Smith v. Firestone Tire & Rubber Co.*, 255 F. Supp. 905 (E.D. Pa. 1966), *aff'd*, 374 F.2d 892 (3d Cir. 1967).

*Cf. Jaffe v. United States*, 246 F.2d 760 (2d Cir. 1957) (circuit court cannot review denial of pauper appeal where transcript is also denied). *But cf. Aninos v. Maguire*, 127 F.2d 817 (6th Cir. 1942). If the district court fails to act within a reasonable time or it denies the appellant permission to appeal in forma pauperis, he may apply directly to the circuit court, unless the district judge certifies the appellant's lack of good faith in taking the appeal. *Waterman v. McMillan*, 135 F.2d 807 (D.C. Cir. 1943). *Cf. Perkins v. Cingliano*, 296 F.2d 567 (4th Cir. 1961); *Holland v. Capital Transit Co.*, 184 F.2d 686 (D.C. Cir. 1950); *Schneider v. Lehigh Valley R.R.*, 94 F.2d 85 (2d Cir. 1938).

135. *Farkas v. Washburn Wire Co.*, 251 App. Div. 751, 295 N.Y.S. 589 (3d Dep't 1937).

136. *Anderson v. Worthington*, 238 N.C. 577, 78 S.E.2d 333 (1953). *Cf. Oakes v. High*, 11 Misc. 313, 32 N.Y.S. 289 (N.Y.C. Com. Pleas Ct. 1895); *Fletcher v. Gannaway*, 84 Tenn. 124 (1885).

137. *Russell v. Hearne*, 113 N.C. 361, 18 S.E. 711 (1893) (strict compliance with statutory requirement to notify other party of desire to appeal). *Cf. Legate v. Ward*, 45 Tenn. 451 (1868) (statutory language requiring notice is directory only, since defendant in fact appeared).

he paid his own way in the trial court.<sup>138</sup>

The remaining cases involving appeals in forma pauperis deal with transcripts<sup>139</sup> and miscellaneous questions.<sup>140</sup>

### *Appointment of counsel*

It can be argued that the Constitution requires appointment of counsel in civil cases as a matter of equal protection and due process, especially where the impoverished party is the defendant.<sup>141</sup> The economic consequences of lack of counsel in a civil case can be devastating, perhaps more so for certain individuals than a criminal conviction followed by fine or probation, or even a short jail sentence. This question, however, is beyond the scope of this paper.

Apart from the constitutional requirement, it seems a matter of simple justice that a person ought not be deprived of his legal rights for lack of ability to hire a lawyer. This principle has been recognized by legislation authorizing appointment of counsel in a civil case in 11 states (Arkansas, Illinois, Indiana, Kentucky, Missouri, New York, North Carolina, Tennessee, Texas, Virginia, West Virginia) and the federal courts. New Jersey has a rule affording appointment in matrimonial actions. These provisions are usually a part of in forma pauperis statutes, so they are subject to the infirmities of these statutes noted above. Another defect is that the counsel provisions apply only to litigation and not to legal advice and representation outside court. Apart from these general statutes, most states have enacted laws directed primarily at establishing a more effective legal remedy for a single wrong (*i.e.*, non-support, unpaid wages, or industrial accidents) and these laws incidentally include provisions for legal services.<sup>142</sup> We are concerned here only with the

138. *Sonnier v. U.S. Casualty Co.*, 150 So. 2d 782 (La. App. 1963). *Cf.* the Criminal Justice Act of 1964, 18 U.S.C. § 3006(A)(c) (1964), which has a similar provision as to appointment of counsel in criminal cases.

139. When the reporter has failed to transcribe the testimony, the appellant is entitled to have the trial court order this to be done. *Kilcrease v. Ouachita Coca Cola Bottling Co.*, 197 So. 165 (La. App. 1939). Failure of the pauper appellant to obtain the free trial transcript does not entitle him to a trial de novo. *Chelette v. Roberts*, 185 So. 678 (La. App. 1939). The appellant may obtain documentary evidence as a part of a stenographic transcript. *Aybar v. Vara*, 48 P.R.R. 176 (1935). Failure to include a transcript, or statement of facts in lieu thereof, will result in dismissal. *Williamson v. Enterprise Brick Co.*, 190 La. 415, 182 So. 556 (1938).

140. A joint appeal in forma pauperis by several defendants will be dismissed unless all of them file an affidavit. *See* cases cited note 129 *supra*.

Even though the Tennessee statute forbids use of the in forma pauperis proceeding in a trial court in an action for false imprisonment, a defendant in such an action may appeal in forma pauperis. *Heatherly v. Bridges*, 48 Tenn. 220 (1870).

141. Note, 66 COLUM. L. REV. 1322 (1966); Note, 76 YALE L. J. 545 (1967). *Cf.* O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L. J. 1 (1967).

142. As to the Uniform Reciprocal Enforcement of Support Act, see text accompanying notes 58-60 *supra*; both the 1952 and the 1958 versions of the Act require representa-

first type of statute.

On paper the statutes look good. The litigant without means not only is admitted to court without payment of the usual entry fee, but also the court appoints an attorney for him. Our field study, however, revealed that the statutes are used very little. The judge questionnaire, which we circulated in all 12 states named above, is our chief evidence. Many judges replied to the question about appointment of counsel by either denying the existence of a statute in their states or by referring only to a federal statute, the Soldiers and Sailors Relief Act, which provides for appointment of counsel for a party who is in the armed forces.<sup>143</sup> Most of the judges indicated that they make appointments only on request of the party, not on their own motion, the chief exception being in West Virginia. Appointments are made most frequently in cases involving non-support and child custody.<sup>144</sup> The total number of appointments is small.

Responses to the questionnaire to legal aid offices also furnish information about practice under the statutes. Asked whether the court ever appoints an attorney from the legal aid office under the statutory provision, 11 of 34 offices reported that they are sometimes appointed. Seven of the eleven offices indicated either that they are appointed on request of the indigent litigant, or that the court refers the client directly to the office. The other offices said they are appointed either routinely or occasionally in cases where they already represent the litigant.

The legal aid questionnaire also inquired about the court's policy as to appointing private counsel in proceedings in forma pauperis. A few offices located in states that authorize such appointments reported that in fact none were made (Little Rock, Peoria, Kansas City, Mo.). Elsewhere appointments are made only at the request of the litigant (Knoxville), where counsel agrees to serve without compensation (New York City), only for minors in *non compos mentis* cases (Birmingham), only in matrimonial cases (Newark), only in divorce cases to represent non-appearing female defendants (Denver), or only in juvenile cases (Des Moines, Omaha). In Albuquerque the policy is to appoint only for special cases such as insanity proceedings, serious juvenile matters, and litigants needing special help. In Chicago lawyers are usually appointed without compensation, but if appointed to serve as guardian ad litem for an indigent incompetent, they may be paid by the opposing party.

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tion by the prosecuting attorney or other public attorney, on request of the welfare department, court, etc. As to wage claims statutes see note 61 *supra*. As to workmen's compensation statutes see note 10 *supra*.

143. 50 U.S.C. App. § 520 (1966). No legal fees are to be charged.

144. Habeas corpus petitions by prisoners are not considered civil actions for the purpose of this discussion.

In other cities the court follows a varying policy, or the policy was not reported (Louisville, Oklahoma City, Providence, San Antonio).

The judges were also asked for general comments on the subject of the questionnaire. The responses reflect the views of judges in all states that have in forma pauperis statutes, not merely states where counsel may be appointed under the statutes. The responses suggest the following observations:

1. Most judges are satisfied with present methods for bringing together poor persons and lawyers, but rural judges are more satisfied than city judges. That any person with a meritorious claim can get a lawyer is the consensus of all judges replying from West Virginia, Virginia, Mississippi, and rural Tennessee, and is the view of some judges from Florida, Georgia, Indiana, Missouri, and Arizona. An Arkansas judge observed: "The major problem is not accessibility of the bar, but inability to finance proper preparation of the suit once it is filed." A Texas judge said that the poor do not have much trouble getting legal help if they are "cooperative, appreciative, and not too demanding." Judges from New Jersey, Illinois, and California frequently referred to the existence of legal aid societies and bar committees as evidence that the problem is receiving adequate attention.

2. Some judges recognized a substantial unmet need. Louisiana and North Carolina judges thought counsel is readily available only where a money judgment is possible, and a judge from Arkansas said that lawyers will take a case only with "cash in hand." New Jersey and Louisiana judges complained that their local legal aid societies did not handle domestic relations cases. A judge from Illinois said:

[T]he main problem is with counsel for child custody and support cases. Lawyers get paid for divorce, but do not want to continue with problems several years old when they cannot make a substantial fee.

A judge from Indiana noted a great need for appointed counsel in divorce cases and a great disadvantage to the poor evidenced by frequent defaults for lack of counsel and the virtual impossibility of financing an appeal. Another Indiana judge said, "Bench and Bar are guilty of failing to provide adequate representation for indigents in both civil and criminal cases." Further, a Tennessee judge wrote:

The poor possibly lack legal advice in areas of non-litigation more than they lack for representation in litigated matters. Debtors' rights and relief procedures and domestic relations problems cry for a system of legal advice for the indigent.



A judge from North Carolina and one from Ohio made the point that services are needed more for the "uninformed" than the indigent.

Some of the comments suggest that a judge's attitude about legal aid programs may be a critical factor in his assessment of the need for reform, as indicated below.

3. Providing legal services for the poor is a sensitive subject among judges. The answers reflect widely varying notions on the desirability of such services. From Montana came this comment :

It appears that this state is an island amid a vast wasteland of legal difficulties and shortcomings . . . we have an excellent legal society in this state and as far as I know need no surveys to show us the way to salvation. We follow the law and see to it that equity is done.

A Louisiana judge said: "In my opinion there are too many gratuitous services already—Medicare, legal care, etc. This is destroying incentive, etc." A Mississippi judge thought the cause of legal problems is that people live beyond their means. At the point of litigation, he suggested, an attorney can do little. "I don't know the answers," he concluded, "but appointed counsel is not one of them."

Some of the judges objected to organized legal aid in terms of a general fear of socialism (Arizona and West Virginia), while others specifically disapproved federal aid. For example, a judge from Indiana said: "OEO's kind of legal services idea is another socialistic federal program that we do not need or want."

Other judges, however, expressed opinions favorable to organized legal aid. In the few rural courts where judges expressed a need for such a system, they pointed out that rural counties cannot afford to support such organizations from local public funds, hence state or federal funds would be needed. A former legal aid director, now a judge, stated :

I feel that adequate services for the poor are needed, but discretion as to what actions should and should not be filed should be placed in the local agency. The fact that one can file a law suit, does not mean that he necessarily should for the poor any more than for anyone else. Services should be organized so that they are not subject to pressure from local landlords, collection agencies and financial companies.

Other judges objected to legal aid programs on grounds of legal ethics or professional conduct. For example, a judge from Arkansas wrote that legal aid organizations "are a waste of money, result in much

vexatious litigation, burdensome to courts and taxpayers." An Oklahoma judge asserted :

It has become more and more apparent that much finesse is required to prevent "legal aid" type of programs from actually coming into conflict with the professional ethics of our profession, in that one who wholeheartedly throws himself into the spirit of the service program may inadvertently circumvent the spirit of the solicitation, advertising, etc., ethics. . . .

Still other judges were afraid that persons who were not indigent would take advantage of more comprehensive programs of legal service. An Oklahoma judge said: "If anyone who says he is an indigent is considered to be an indigent . . . then an uncontrollable monster is created." Similar fears were expressed by judges from Virginia, North Carolina, Indiana, Louisiana, and Utah. A judge from Virginia said :

I feel that too much publicity with regard to the law, which enables us to appoint attorneys in civil cases for poor persons, will eventually destroy the private practice of law. These people who are poor will certainly take advantage of it and very shortly the middle income groups will find they too can obtain counsel this way and the court would be rather reluctant to refuse them counsel when they vigorously insist that they do not have funds to employ one.

#### CONCLUSIONS AND RECOMMENDATIONS

1. The courts ought to be free to everyone, like the other branches of government,<sup>145</sup> but, pending this reform, the courts ought to be free to the poor. This means waiver of not only the usual fees and deposits for costs, but also appellate and other bonds if possible, *e.g.*, upon certification by counsel that the appeal is not frivolous. Further, a fund should be provided from general public revenues to finance the non-waivable but necessary expenses of litigation, such as publication fees, expert witness fees, transcripts for appeal, and fees for non-waivable bonds.

2. The existing *in forma pauperis* statutes, while sound in principle and well-intentioned, have been generally unsuccessful because of limitations in the statutes themselves; occasional hostile attitudes among judges; lack of public knowledge of the statutes, especially among the poor; and, perhaps most of all, because the statutes are not self-executing but require the guidance of counsel or other sophisticated person to make

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145. Costs should be imposed, however, in vexatious cases or as a punishment for unreasonable delay or other misconduct.

proper use of them. Therefore, to be useful to the poor, an in forma pauperis statute should be well publicized and readily available to the applicant, *e.g.*, through an organized legal aid service, or at the minimum by a large sign in the courthouse directing the applicant to the clerk's office, where a trained and sympathetic public official would assist him.

3. As a matter of priority, if fees cannot be eliminated immediately for the poor in all courts, they should first be abolished in courts handling claims of \$500.00 or less and in courts of domestic relations, since this is where the poor are most likely to sue and be sued.

4. Pending adoption of a general statute eliminating fees for the poor, every state that has not done so should adopt the 1958 version of the Uniform Reciprocal Enforcement of Support Act, which has a more liberal provision for waiver of fees.

5. A model in forma pauperis statute should include, *inter alia*, the following features: It should apply to all levels of courts and to any quasi-judicial administrative proceeding where fees are charged. The procedure should be open to any person, not merely citizens or residents, and should apply to all parties to an action, not merely to plaintiffs. Determination of eligibility should be as simple as possible. Instead of a detailed affidavit, a simple statement, subject to the penalty for perjury, could be used, similar to the statement on the federal income tax return. The applicant should be required to state only that he is financially unable to pay court fees and other expenses of litigation. Even this statement could be excused for any public welfare recipient or any client of an attorney for a legal aid organization, as already provided in Rhode Island and West Virginia. The model statute should avoid the term "pauper" and its English and Latin variants, since this is demeaning to the applicant and unnecessary. It is important that the statute require a system of appointment of counsel for any litigant who does not already have counsel. To take account of organized legal aid services, the statute might direct the court, or the clerk thereof, to appoint counsel from the legal aid organization, if any, and if not, to appoint an attorney in general practice before the court. Finally, some system for annual reporting to a central state body should be included so that it could be ascertained how the statute is working. Depending on local conditions and preferences, this body might be the administrative office of the state court system, the judicial conference, the attorney general's office, or the legislature.