The "Passed Master" - How to Fill the Void

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CHIEF JUDGE JOHN BOYLE has been acclaimed by judges, lawyers and law professors—in fact, by all who have followed the reorganization of the courts in Cook County—for having placed in operation, virtually overnight, a smooth, efficient, effective, unified court system. Due to his tremendous energy and determination, the quality and quantity of justice have improved vastly. But the population of the county and, therefore, the workload of its judicial system continues to burgeon.

The presiding Judge of the Law-Jury Division, Judge Harold Ward, has established a system which, under his remarkable guidance and control, brings into constant operation the trial and disposition of Law-Jury cases. His vigilance and zeal make it a common occurrence for lawyers and judges to be assigned to the trial of a case within ten minutes after reporting the disposition of another. Despite this extraordinary operation, it is eminently clear that the growth of population and the increase in the number of motor vehicles in the County of Cook has kept pace with the numerous judicial officers assigned to try Law-Jury cases.¹

One observer puts the problem into focus thusly:

That a problem might arise from the loss of the services provided by masters in the exercise of their quasi-judicial function was not entirely unanticipated; but it was also anticipated that the additional judicial man hours generated by other innovations under the new Article would more than compensate for such loss. Ultimately this may be true. In Cook County, however, the basic purpose of those members of the Chicago Bar Association who worked on the provisions of the Judicial Article was to reduce the backlog of pending common law cases (primarily personal injury cases). Consequently, to accomplish this purpose Chief Judge Boyle has assigned most of the additional judges in the county to hear common law cases and reduce this backlog. As a result he has been able to assign only one additional judge to hear chancery matters. In time, if the backlog of common law cases is essentially eliminated, additional judges can be assigned to the Chancery Division, but for the time being such assignments would defeat the primary purpose of eliminating the common law backlog. Therefore, unless some way is found to expedite the hearing of chancery cases it appears that instead of having delayed hearings in common law cases the delay will simply be transferred to equity cases.²

However, the undeniable continued increase in the number of law cases filed each year presents a continuing challenge to Chief Judge Boyle and the trial judges of the Circuit Court of Cook County who are determined to shrink the time span between filing and trial dates.³

Prior to the adoption of the amendment to the Illinois Constitution creating the new Judicial Article, much was written and said, pro and con, regarding the abolition of the masters in chancery from the judicial system. The most erudite expression on the wisdom, or lack there-of, of this constitutional prohibition is to be found in an article by Justice James R. Bryant, of the Appellate Court of Illinois.⁴ Justice Bryant's plea to preserve the master system was scholarly, practical, articulate and futile.

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³ Supra note 1. This figure confronts us after the addition of 17 judges in November, 1962; and the availability of nine additional trial court judges formerly assigned to the Appellate Division, who were assigned to law-jury by virtue of the provision in the Judicial Article providing for the election of Appellate Court judges. Thus, 26 trial court judges have been added since 1962.
THE INSTITUTION OF MASTER-IN-CHANCERY IS A VENERABLE ONE

In abolishing the masters, Illinois ended an institution which may be said to have had its origins prior to the inception of the chancery as a court treating only with matters of equity. The Office of Lord Chancellor is traceable to the Saxon kings. The Chancellor and his several clerks generally were men of the church, literate, a rarity in those days, whose duty it was to record and maintain various records of the kingdom and who were assigned the responsibility for transcribing, sealing and publishing ordinances of the king.

At about the advent of William the Conqueror, 1066, these clerks had been constituted into a body of twelve "Masters of Chancery." The chief of this group was titled the "Master of the Rolls." The masters were primarily responsible for drafting writs necessary for suit in the king's courts, and for attaching the great seal of the king after they determined that the writs were in proper form. This group of learned men also served as legal advisors to the Chancellor and the king and transcribed the proceedings in Parliament. With the growth and expansion of the population and wealth of the kingdom, the business of the courts mushroomed. It became necessary, therefore, in the twelfth and thirteenth centuries for the Chancellor to develop a larger staff of clerks who drafted writs of course. The original twelve masters remained as supervisors who drafted new forms of writs and continued to advise the Lord Chancellor when he sat as a judge. It is evident that the clerks and masters stimulated the growth of the chancery as a court of equity.

From the earliest Saxon times the king represented the source of all law and often sat as a judge, advised by his council. The writs, which eventually issued to the common law courts, were deemed only a delegation of the king's legal power; thus, all fields of justice not covered by writs were deemed to reside in the king. It accordingly developed that petitions in matters for which the common law had no writ or no remedy were sent directly to the king and his council. The most frequent cause for appealing to the king appears to have arisen when one of the parties to the suit was too powerful for a common law juror to dare find against him. Therefore, as the number of these petitions to the king grew, the only member of the king's council equipped to deal with such a volume of petitions was the Chancellor because of his staff of clerks and masters. Consequently, most petitions to the king were
turned over to the Chancellor for investigation and recommendation. The final decision, however, for many years continued to be the decision of the king and the council.

It is not clear what factors accounted for the tremendous growth of chancery as a court. The Chancellor was not only the keeper of the king’s conscience, but he and his masters were generally ecclesiastics. In this activity of dispensing justice the Chancellor commanded a comparatively large manpower force by the end of the 13th century and by 1348 all petitions to the “King’s Grace” were first to be presented to the Chancellor. Under this procedure, minor judicial matters were disposed of directly by the Chancellor and only matters which the Chancellor felt were of sufficient import were brought to the attention of the king. The masters were truly “coming into their own.” These were their days of greatest glory. “In 1402 a petition by the Commons gives a list of ecclesiastics, in which Masters of the Chancery are placed in order of precedence next before the Chancellor and Barons of the Exchequer. Their robes were yellow or mustard-coloured and the masters were provided with two a year, one trimmed with fur for the winter and one with taffeta for the summer. They were also provided with twelve tuns of wine a year by the king’s butler and many other emoluments, including a barge on the Thames for travelling on official business.”

Throughout the 15th century the chancery became more and more established as a court separate and apart from the king’s council; bills in chancery were, however, still addressed to the conscience of the king. In the 16th century, the chancery apparently began to concern itself more with the procedural and technical injustices of the common law than with the inequities inherent in the imbalance of power between parties to a suit, and by the middle of the 16th century it was commonplace for the Chancellor to refer cases to his masters for investigation, hearing and recommendation. This practice was necessary in view of the fact that the Chancellor was, strictly speaking, a one judge court until the appointment of the Vice Chancellor in 1813 and the authorization of the Master of the Rolls to sit as a regular judge in 1833. Until the reign of Edward IV (1461–93), masters were appointed by the king, not the Chancellor. In 1833, the crown again recalled the power of appointment from the Chancellor and thereafter

masters were selected by the crown and salaried, abolishing the fee system in England.\textsuperscript{8}

The first evidence of a court of chancery being clearly established in the territory embraced in what is now the State of Illinois is found in an act passed by the General Assembly in Indiana in 1805 which provided for the organization of a court "to exercise all the powers and authority usually exercised by the courts of chancery."\textsuperscript{9}

A few years later, in 1812, a legislature was elected for the Territory of Illinois, which had been separated from the Territory of Indiana by an act of Congress, which became effective March 1, 1809. The 1812 legislature for the Illinois Territory enacted a law vesting judges of the General Court with the following power, "They are hereby authorized to exercise all of the powers and authority usually vested in and exercised by a court of chancery which said court shall be called and styled The Court of Chancery."

The Congress of the United States in 1815 gave jurisdiction in chancery to the judges of the United States for the Territory of Illinois. It is clear, therefore, that chancery jurisdiction was established at both the federal and territorial levels in Illinois several years in advance of the admission of Illinois to the Union as a state on April 18, 1818.

In 1827 a revised code of Illinois embodied "An act to prescribe the mode of proceeding in chancery" which provided for the assignment of a commissioner to aid the court of chancery. His powers were to execute a deed under order of the court.

In 1835, the legislature passed its first act designating Masters in Chancery\textsuperscript{10} and providing for the court to set the masters' fees.\textsuperscript{11} The Master in Chancery Act, which was repealed by adoption of the new Judicial Article, was enacted in 1872;\textsuperscript{12} thus, the same statutory powers and duties governed the master in chancery system for forty-two years. The long-lasting dispute, more theoretical than real, as to whether a master is a purely ministerial officer or a judicial one, was

\textsuperscript{8} For historical background of Masters in Chancery see: \textit{Carter, A History of English Legal Institutions} (1902); \textit{Pluckett, A Concise History of the Common Law} (1956); \textit{Henderson, Chancery Practice} (1904); \textit{Hoffman, The Office and Duties of Master in Chancery} (1904).

\textsuperscript{9} \textit{Supra} note 6, at 2. All historical data relating to Masters in Illinois contained in this article is gleaned from Justice Bryant's article.

\textsuperscript{10} \textit{Revised Code of Laws, Ill.} 94 (1827).

\textsuperscript{11} Ill. Sess. Laws 32 (1835).

\textsuperscript{12} Ill. Sess. Laws 562 (1871).
laid to rest in Ellwood v. Walter, which held that the master acts in a dual capacity and that he may be considered a ministerial officer in the sense that he makes no final determination of a judicial matter but that he is an arm of the court and may also exercise such powers as a court of equity may confer upon him subject, however, to review by the court.

A PROMISE, NOT A PLAN

Prior to the adoption of the new Judicial Article, one advocate of ending the master system said: "Mere abolition should produce a degree of clarity that is presently lacking. It is anomalous to say the least, to have a judicial officer whose status is so uncertain and whose duties are so varied." The author promised that

The demise of the master, however, does not mean that the services he performed will be left undone. The proposed judicial article provides the court of original jurisdiction with four classes of officers, namely: clerks, magistrates, associate judges and circuit judges. It may be anticipated that those functions of the master in chancery which are worth retaining can be appropriately divided among these officers. With respect to what is probably the masters most important function, that of taking testimony and reporting his conclusions thereon, it may be assumed that the judges and associate judges of the circuit court will be competent to fill the void created by the demise of the master.

The author goes on to observe that, "Empirically, it seems sounder that the person with the responsibility for decision on the trial level shall have heard all of the evidence rather than attempt to derive his decision from a cold record and someone else's conclusions.”

What measures were adopted by way of implementation to fill the void? Did such measures provide, or deny, the means to fill the void? The new Judicial Article provides for the establishment of judicial circuits. Section 8 consists of three full paragraphs defining the judicial circuits, the number of judges, associate judges and magistrates for each circuit, the number of associate judges in the City of Chicago, the number of associate judges in Cook County outside of the city and the method of selecting the Chief Judge in each circuit. The last sentence of the second paragraph tersely reads: “There shall be no masters in chancery or other fee officers in the judicial system.”

The "Schedule" providing for the transition from the Judicial

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13 103 Ill. App. 219 (1902).
15 Id. at 27-28.
16 Id. at 28.
17 Ill. Const. art. VI, § 8 (1962).
Article of the Constitution of 1870 to the new Judicial Article provides:

Notwithstanding the provisions of Section 8 of this Article, masters in chancery and referees in office in any court on the effective date of this Article shall be continued as masters in chancery or referees, respectively, until the expiration of their terms, and may thereafter by order of court, wherever justice requires, conclude matters in which testimony has been received.\textsuperscript{18}

The General Assembly repealed sections 38 and 38b of Chapter 53, which formerly provided for fees of Masters in Chancery, all of Chapters 90 and 117 which related generally to Masters in Chancery and referees, and section 24 of Chapter 116, which related to special commissioners who were fee officers.

The Article and the Schedule became effective January 1, 1964. Section 627 of Chapter 37, Illinois Statutes (1963), provides:

Nothing herein contained shall authorize the delegation or assignment to magistrates or others of the function heretofore exercised by masters in chancery or referees, or special commissioners of taking testimony for the purpose of making or reporting findings of fact or of law to a judge for adjudication.

On the other hand, the Supreme Court, recognizing the purpose to use magistrates to perform at least some of the functions heretofore performed by the masters, provided that the Chief Judge or any judge designated by him may assign to magistrates who are attorneys at law the following duties formerly performed by masters:

(a) \textit{To hold and approve sales of property ordered by the court, regardless of the amount involved, and to execute all proper documents in connection therewith}. (b) \textit{To hear and decide petitions to sell or mortgage interests in real estate to pay debts in decedent's estates and petitions to sell or mortgage interests in real estate in conservatorships and guardianships}.\textsuperscript{19}

These provisions have not and cannot fill the void.

\textbf{PROGNOSTICATIONS AND PROBLEMS}

Judge Cornelius J. Harrington, in an address to the Chicago Bar Association, called attention to a meeting he had attended with the then Chief Justice of the Illinois Supreme Court, Ray Klingbiel, Chief Judge John S. Boyle and Judge Harold Ward. Following that meeting the Chief Justice wrote:

The first suggestion contemplated that equity cases be referred to magistrates to hear and report the evidence to a judge of the Circuit Court. After serious consideration, our court has decided not to adopt such a rule. In our

\textsuperscript{18} ILL. CONST. art. VI, § 8 (Schedule). \textsuperscript{19} ILL. SUP. CT. R. 295.
opinion, the Judicial Article of the Constitution contemplates that with respect to those matters which are within his jurisdiction, a magistrate is to have the authority and power of a judge, and his determinations are reviewable only by the Supreme and Appellate courts.

If, as you anticipate, the volume of equity cases cannot be handled by the five judges presently assigned to that work, we would suggest that additional judges of the circuit court be assigned to that work as promptly as possible. 20

However, when the hue and cry was raised for additional judges, the demand was virtually entirely concerned with the backlog of personal injury cases rather than chancery litigation. 21

Many of the advocates for adoption of the judicial amendment exulted in the thought that the backlog would be diminished by the elimination of the masters. It was argued that:

The replacement of part-time non-adjudicatory personnel by full-time judges will expedite the disposition of chancery cases. An inherent flaw in the system of masters is that the original decision having adjudicative effect must be made by one who has not heard the evidence. There is an unnecessary duplication of function in the report of the master and decree of the court and too often excessive expense to the litigant. The part-time nature of a master's services and his lack of judicial authority also combine to cause undue delay. Surely, any innovation designed to eliminate these undesirable features merits sympathetic consideration.

Moreover, the loss of manpower that will result from the abolition of masters in chancery will be more than compensated by the unification of the court system under the proposed Article and the provisions making possible a more efficient utilization of judicial personnel. The General Assembly will have flexible authority to provide for an adequate number of circuit and associate judges to man the trial courts. 22

Other advocates of the Judicial Amendment applauded the provisions which abolished fee offices. They argued that, “Today there is no place for the fee system in our state court structure and the proposed amendment will cure the well recognized abuses of the fee offices.” 23

In reply it was argued that the abolition of Masters in Chancery will increase the backlog by virtue of the fact that the taking of such evidence, which is now done by the 56 masters, will be an additional workload falling upon the trial judges . . . the Cook County backlog

can be reduced only by an increase in judges and courtrooms and not by the abolition of Masters in Chancery."

The layman's reaction to the abolition of the masters is reflected in an editorial broadcast by the general manager of radio station WIND, who stated that:

As we hear it, with abolishment of the office of Master in Chancery last December 7th, the task of breaking the logjam becomes more difficult. Masters in Chancery took the pressure off judges by hearing testimony in long and complicated cases, and they made recommendations to the judges. Now, five judges assigned to the Chancery Division are charged with hearing voluminous testimony themselves thus putting even more demands on their limited time. . . . Fulltime court commissioners, it seems to us, are sadly needed as a major step forward in overcoming the major shortcoming of the new judiciary under the new amendment.

A recent Supreme Court decision, Centennial Laundry Co. v. West Side Organization, holds that the discretion of the Chancellor in determining whether an interlocutory order shall be granted does not extend to the granting of an injunction without a hearing in cases where all the material allegations have been put in issue by an answer and the necessity of immediate relief is not apparent. The result of this sweeping delimitation of the Chancellor's discretion has resulted in an immediate response to notice of a complaint for injunction in the form of an answer traversing all of the material allegations of the complaint. A hearing is therefore required in every case before temporary relief is granted even where notice is given and bond is offered since dispensing with notice is generally frowned upon. Consequently, the answer in prompt response to the notice results in a hearing on the material allegations of the complaint and the court must, in effect, proceed to a trial on the merits. The resulting burden upon the Chancellors is monstrous. The abolition of the masters and the present implementing statutory provisions require that the five Chancellors hear all

26 34 Ill. 2d 257, affirming 55 Ill. App. 2d 406, 204 N.E.2d 589 (1965).
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such trials. All of these matters are alleged to be of an emergency nature; many of them are.

MAGISTRATES CANNOT FILL THE VOID

The efforts to offer solutions to the problem of the equity backlog explosion resulting from the abolition of the office of Master in Chancery include a suggestion that a magistrate could take the evidence, rule on objections and report to the Chancellor the controverted issues of fact which in his judgment are determinative of the case. Counsel, of course, would be given an opportunity to file objections to the magistrate's report and argue that the magistrate erred in considering certain controverted issues as being controlling, or erred in failing to include certain other issues that in the opinion of counsel should be considered by the court. After argument on the magistrate's report and any objections filed, the Chancellor, either at the request of counsel or in his own discretion could require that certain testimony be again presented before him if he concluded that this was necessary or desirable before entering the final judgment or decree.  

This suggestion overlooks Section 627 of Chapter 37 which provides, "Nothing herein contained shall authorize the delegation or appointment to Magistrates or others of the function heretofore exercised by Masters in Chancery or referees, or special commissioners of taking testimony for the purpose of making or reporting findings of fact or of law to the judge for adjudication." It is certain that such a procedure would not be countenanced by our Supreme Court!

The several thousand pages of correspondence, drafts, memoranda and minutes comprising the files of the Joint Committee of the Illinois and Chicago Bar Associations on Implementation of Judicial Amendment reveal a number of interesting facts. The committee file contains a reference to limitation upon the matters assignable to magistrates.

"Magistrates Legislation Number 4" concerning the authorization to empower the Supreme Court to make rules covering pleading, practice and procedure for the Circuit, Appeals and Supreme Courts was the subject of much discussion among committee members who apparently thought the delegation to the Supreme Court was too broad. Judge John Fitzgerald, formerly dean of the Loyola University School of Law and then Deputy Administrator for the Supreme Court of Illi-

28 Supra note 2.

29 Joint Committee of the Ill. & Chi. B. Assn.'s. on the Implementation of Judicial Amendment, Minutes, Reports and Documents, 499 et seq. (1962).
nois for Cook County, apparently led the discussion and expressed concern that the provisions of Section 6 of the draft of April 20, 1963, of the Magistrates Bill relating to delegation to the Supreme Court might give rise to reinstatement of the master in chancery system. On motion of the committee, unanimously approved, Section 7 was added to Magistrates Bill Number 3.\(^{30}\)

Section 7 of the act limiting or defining the matters to be assigned to magistrates which prohibits the “delegation or assignment to magistrates or others” of the master’s, referee’s or special commissioner’s former function of taking testimony and reporting findings of fact or law was therefore found in the earliest draft of the bill. Moreover, it appears that the committee had some doubt concerning the constitutionality of any attempt to have magistrates perform the function of hearing evidence and reporting to a judge.\(^{31}\)

With respect to the delimitation upon the matters assignable to magistrates, the report of the Joint Magistrates Committee notes that “With respect to those matters that Magistrates cannot hear, we have attempted to exclude certain extraordinary remedies and other matters that are most vital to one’s life and personal liberty. We feel that these matters should be determined by a Judge.”\(^{32}\)

In a footnote, the committee explains: “We rejected the suggestion that matters otherwise excluded could be heard by a Magistrate if the matter were uncontested. We concluded that uncontested matters often require greater judicial attention and experience, because the parties by collusion may be seeking something that is unlawful or not in the public interest.”\(^{33}\)

An early opponent of the Judicial Article and later a member of the Joint Committee, Attorney Harry G. Fins, writes concerning the proposed statute defining matters to be assigned to magistrates:

(d) This proposed section is, in my opinion, unconstitutional. Section 8 of the Judicial Article provides: “There shall be no masters in chancery . . . in the judicial system.” It does not say merely that the designation of Master in Chancery shall not be employed. This means that the judicial officer who sees and hears the witnesses and observes their demeanor is to render the final decision. To permit references and to denominate the referees as ‘magnistrates’ instead of ‘masters in chancery’ is a transparent circumvention of the express constitutional prohibition and is, therefore, unconstitutional.\(^{34}\)

\(^{30}\) Ibid. 
\(^{31}\) Supra note 29, at 129. 
\(^{32}\) Supra note 29, at 379; Joint Magistrates Committee, Report, 44 (1962). 
\(^{33}\) Joint Magistrates Committee, supra note 32. 
\(^{34}\) Letter from Harry G. Fins to Professor William Trumbull, Chairman Joint Magistrates Comm., Jan. 7, 1963.
The suggestion that a reference may be made to a magistrate, a salaried officer, to hear and decide certain Chancery matters is wholly inconsistent with Section 627 of Chapter 37 which prohibits the assignment "to a Magistrate or others" of the function heretofore exercised by Masters in Chancery. Thus an assignment of a chancery matter not specifically authorized by statute would have the effect of giving the magistrate an assignment of a greater responsibility that he is prohibited from receiving by Section 627. Or is it that the framers of the new Judicial Article and the authors of the implementation statutes were determined that there be no procedure which would countenance any form of hearing and report by a quasi-judicial, non-judicial or judicial officer who does not make the decision at the trial or hearing level? If this is the spirit and intent of the new Article and the implementation statutes then anything short of an arbitration agreement would not suffice to conform to the constitution and implementation statutes.

The sessions, correspondence and first drafts of legislation considered by the Joint Committee on Implementation Amendments shed light on the attitude of the committee with respect to hearing evidence and reporting findings and conclusions by some officer other than a Chancellor. One must glean from a search of this material that the committee was opposed to such a procedure. This attitude or intent is reflected in the enactment of Section 627.

Many proposals have been submitted by judges, law professors and leaders of the bar designed to "fill the void." We shall attempt to analyze and criticize these proposals.

ARBITRATION

It should be noted that all non-judicial hearings were not abolished by the legislature which adopted the Judicial Article; at the same session of the General Assembly our lawmakers adopted the Uniform Arbitration Act.\(^{35}\)

It has been argued, therefore, that the Constitution and implementing statutes do not prohibit a reference per se. Since the Arbitration Act provides for the payment of fees to an arbitrator, the parties by agreement could employ an arbitrator and by agreement allot to him the same power of recommendation formerly conferred upon a master rather than the broader powers of final, binding decision provided in the Arbitration Act. It may well be argued that the parties to the arbitration agreement may thus agree to limit and define the scope and

\(^{35}\) ILL. REV. STAT. ch. 10 § 101 (1961) and following sections.
power of the arbitrators. The parties, pursuant to the Arbitration Act, may provide for the method of the appointment of the arbitrators; whether their powers shall be exercised by a majority or by unanimous action; the time, place and notice of hearing; the procedure to be employed and the continuance of the hearing in the event that any arbitrator for any reason ceases to act during the course of the hearing. The parties may also agree concerning venue, the form of the award, the manner in which the parties shall be apprised of the award, the time in which the award shall be made, and all expenses and fees not including attorney's fees. In all instances where the parties have not agreed relative to the foregoing matters the statute prescribes the procedure.

A recent report of the Chicago Bar Association Real Property Law Committee includes the recommendation that a study be made of the feasibility of employing arbitration procedure in resolving disputes related to real property transactions. In contested foreclosure and partition matters, may not the arbitration procedure be employed to supplant the former Masters in Chancery? It is doubtful if the Supreme Court of our state will approve the use of the Uniform Arbitration Act to resurrect Masters in Chancery, who would henceforth be known as arbitrators.

THE AMICUS

One possible solution to the problem which suggests itself is the appointment of an Amicus Curiae to perform the services heretofore performed by the Master in Chancery. An Amicus Curiae may be appointed by the court to make an investigation and conduct hearings; he is not a party to the action but is merely a friend of the court and one whose sole function is to advise or make suggestions to the court. Absent a stipulation of the parties, it is doubtful that the Amicus Curiae could be compensated. It is patent that any matter involving a litigant's individual rights may be made the subject of a stipulation which is binding and enforceable unless unreasonable or against good

38 CBA, REAL PROPERTY LAW COMMITTEE REPORT (1966).


38 Clark v. Sandusky, 205 F.2d 915 (7th Cir. 1953).

39 For a general treatment of this subject see 3 C.J.S. Amicus Curiae § 4; Covey, AMICUS CURIAE: FRIEND OF THE COURT, 9 DE PAUL L. REV. 30 (1959).
morals or public policy, viz., parties may stipulate to set aside a former order even though it is beyond the time allowed for appeal. While a stipulation of fact is binding, a stipulation as to legal conclusions arising from the facts is inoperative. Parties cannot confer jurisdiction upon a court by stipulation.

It has been held that where the court referred a complaint and answer in a divorce matter to an Amicus Curiae "to hear and report his findings and recommendation for and as to final disposition and judgement of matters involved herein" that "there is no warrant in law which authorizes the court to appoint or refer the cause to an Amicus Curiae. Divorce cases should be heard by the court. Nor do the facts in the instant case warrant the appointment of a Special Commissioner."

In defining the role of the Amicus Curiae it may be helpful to point out three things that he is not. He is not an agency or arm of the court; he cannot perform the functions of the court. He is not a party and he is not bound by the resulting judgment. Finally, he is not an intervenor or intervening party to the suit.

The employment of the services of the Amicus Curiae is the exercise of an inherent right of the court and the parties cannot successfully object. Neither the parties nor the intended Amicus have grounds for appeal from a decision concerning the use of an Amicus' services since this is a matter wholly within the discretion of the court. We are left, therefore, with no provision for the payment of fees of the Amicus whose services are sought by the court; moreover, it is clear that the court may not compel parties who object to submit their evidence in hearings held by an Amicus.

The parties could, however, stipulate to submit evidence in hearings held by an Amicus and stipulate concerning payment of his compensation. They could further stipulate that the findings of fact by the

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40 Plano Foundry Co. v. Industrial Commission, 356 Ill. 186, 190 N.E. 255 (1934); People ex rel. Reinhart v. Herrin, 284 Ill. 368, 120 N.E. 274 (1918).
41 Goostree v. United States, 110 F.2d 444 (7th Cir. 1940).
42 People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950); In re Fahnestocks Estate, 384 Ill. 26, 50 N.E.2d 733 (1943); People v. Byrnes, 405 Ill. 103, 90 N.E.2d 217 (1950). See also Boehmer v. Foval, 55 Ill. App. 71 (1893).
43 Wainer v. United States, 87 F.2d 77 (7th Cir. 1937).
45 See Covey, supra note 39, at 31.
46 Ibid.
47 Supra note 38.
Amicus shall constitute the stipulation of facts by the parties. Whether this procedure violates Section 627 of Chapter 3748 presents a thorny question. Certainly, unless this section is repealed the Amicus could not submit conclusions of law for the Chancellor to review. Another heavy doubt is raised by the contention that such an Amicus would in essence be “a fee officer in the judicial system” in contravention of Section 8 of the Judicial Article.

It has been argued that Section 8 of the new Judicial Article is, in essence, constitutional admonition against the establishment of a judicial process similar to the Master in Chancery function under different nomenclature.40 The argument is made that the words “other fee officers” are not words of art subject to precise definition. The phrase, therefore, raises doubts as to the status of guardians ad litem, trustees for persons not in being and commissioners in partition. It is urged, however, that the better view is that the phrase has reference to officers performing quasi-judicial functions. We agree with this interpretation and regret that the legislature has confounded the problem by the passage of Section 627.

One observer noted that the Joint Committee of the Illinois State and the Chicago Bar Associations on Implementation, which participated in the drafting of Sections 621 and following of Chapter 37 were of the opinion that Section 628 applies to an improper assignment regardless of the section under which it is improper. “Therefore, any wrong decision on the impropriety of an assignment to a Magistrate would simply be error within the proceeding and not a jurisdictional defect. Such a decision, therefore, should not be subject to collateral attack.”50

It is our view, however, that an agreement between parties not to object to such an assignment could lead to a practice of improper assignments. Such a practice, though done in the interest of eliminating congestion from the court’s calendar, would not long survive condemnation by our Supreme Court.

48 “Nothing herein contended shall authorize the delegation or assignment to Magistrates or others of the function originally exercised by masters in chancery or referees or special commissioners of taking testimony for the purpose of making or reporting findings of fact or of law to a judge for adjudication.” (Emphasis added.)


50 Id. at 594.
It has been suggested that the appointment of masters is an inherent power of the chancery and not subject to legislative control. The leading case on the subject arises under the laws of Wisconsin which appears to be the first state to abolish Masters in Chancery by its Constitution. The Wisconsin Constitution of 1848 provides that "testimony in causes in equity shall be taken in like manner as cases at law, and the office of Master in Chancery is hereby prohibited."\(^{51}\)

Despite this constitutional inhibition, Wisconsin has a statute which provides for reference to a referee or commissioner when involved or lengthy matters of account are in issue.\(^{52}\) This has been rationalized on the basis that even at law, under the common law, cases involving the examination of a long account could be taken from a jury and referred to an outside hearing officer.\(^{53}\)

The Oregon high court has held that a statute providing for references in specified cases without the consent of both parties is mandatory and exclusive and applies as well to suits in equity as to actions at law.\(^{54}\) At the other side of the continent, we find the Maine high court holding that although a reference of an appeal from a probate decree was by consent and the action of the referee in sitting and deciding the appeal was by stipulation, consent could not confer jurisdiction where law had not initially given it.\(^{55}\)

It has been said that statutory provisions for compulsory reference in equity cases may not as readily be termed exclusive as those providing for reference of actions at law because the constitutional guaranty of the right to trial by jury ordinarily has no application to equity cases. Furthermore, compulsory references to Masters in Chancery have ancient precedent. In the Oregon case,\(^{56}\) the court pointed out that a judge under the ancient chancery practice might refer a case in equity without the consent of the parties, provided he gave only advisory effect to the master's findings. Reference of equitable causes

\(^{51}\) Wis. Const. art. 7 § 19.

\(^{52}\) Killingstad v. Meigs, 147 Wis. 511, 133 N.W. 632 (1911).

\(^{53}\) Ibid.

\(^{54}\) Tietzel v. Southwestern Construction Co., 43 N.M. 438, 94 P.2d 972 (1939).

\(^{55}\) Chaplin's Appeal, 131 Me. 187, 160 Atl. 27 (1932); Faxon v. Barney, 132 Me. 42, 165 Atl. 165 (1933).

\(^{56}\) Tietzel v. Southwestern Construction Co., supra note 54.
pursuant to statutory authorization is ordinarily held to be governed exclusively by such statutory provisions. The question of a reference without statutory sanction, either with the consent of the parties or sua sponte and compulsory, does not appear to have been treated by any opinion of the Appellate or Supreme Courts of Illinois.

The number of courts using language to the effect that equity has an inherent power to refer cases is in a distinct minority. Furthermore, there appear to be no decisions that equity has any inherent power which cannot be delimited or eliminated by statute; the Wisconsin situation is anomalous. Moreover, in Illinois we are confronted by (1) no statute authorizing a reference, such statutes having been repealed; (2) a statutory inhibition against references; and, most conclusively, (3) a constitutional prohibition.

The advocates of the "inherent power" theory may find a ray of hope in the following quotations:

The 'inherent powers' of a court are an unexpressed quantity and undefinable term, and the courts have indulged in more or less loose explanations concerning it. Undoubtedly, courts of justice possess powers which were not given by legislation and which no legislation can take away. These are 'inherent powers' resident in all courts of superior jurisdiction. These powers spring not from legislation but from the nature and constitution of the tribunals themselves. The 'inherent powers' of a court are such as result from the very nature of its organization and are essential to its existence and protection and to the due administration of justice. It is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.

SALARIED HEARING OFFICERS

Salaried hearing officers working on a part-time basis would not violate the constitutional inhibition against fee officers in the judicial system. As reported by the Presiding Judge of the Chancery Division, of the Circuit Court of Cook County, a large portion of the volume of

58 Id. at 313.
61 Ill. Const. art. VI, § 8.
chancery litigation consists of complicated, bitterly contested allegations of breaches of fiduciary obligations, intra-corporate and partnership struggles, suits for accounting, specific performance and for emergency relief. The bulk of these cases involves persons who can well afford a substantial filing fee as well as the cost of such litigation. These costs should hardly be borne by taxpayers whose participation in the commercial life of the community rarely, if ever, brings them to court.

If the biggest objection to masters is that the parties are required to pay fees, then part-time salaried officials could be created by statutory enactment and references could be made to them in the same manner as heretofore made to Masters in Chancery. Payment could be made on a per diem basis, subject to the requirement that proof of the per diem service be proffered before the Chancellor certifies payment of the per diem salary. The source of funds for such salaries could be derived from an increased filing fee for all chancery matters and the payment could be made through the same type of machinery established for payment of part-time retired judges who are assigned cases pursuant to Section 18 of the Judicial Article.

THE PROBLEM IN PRAGMATIC PERSPECTIVE

The masters in the twilight of their existence averaged 10,000 hours per year in hearing time or 2,000 court days, or ten full-time Chancellors working the full 200 court days per annum. These figures pose a problem which can only be solved by providing for ten additional

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64 Address to the Chicago Bar Association by Judge Cornelius J. Harrington, January 27, 1966.
65 Ibid.
66 "Any retired judge may, with his consent, be assigned by the Supreme Court to judicial service and while so serving shall receive the compensation applicable to such service in lieu of retirement benefits, if any."
67 As of December, 1966, there were 68 masters in the court system. The masters were asked to report on their time spent in hearing, drafting reports, legal research, conducting master's sales and upon the estimated number of hours spent by their secretaries and other help during 1963, 1964 and 1965. The following was tabulated from the information supplied by the masters:

<table>
<thead>
<tr>
<th></th>
<th>1963</th>
<th>1964</th>
<th>1965</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hours Spent in Hearing Time</td>
<td>8,885</td>
<td>10,771</td>
<td>10,175</td>
<td>29,831</td>
</tr>
<tr>
<td>Hours Spent Drafting Reports</td>
<td>5,934</td>
<td>8,131</td>
<td>7,721</td>
<td>21,786</td>
</tr>
<tr>
<td>Hours Spent in Legal Research</td>
<td>2,361</td>
<td>2,997</td>
<td>2,987</td>
<td>8,345</td>
</tr>
<tr>
<td>Hours Spent Conducting Master's Sales</td>
<td>1,307</td>
<td>1,574</td>
<td>1,275</td>
<td>4,156</td>
</tr>
<tr>
<td>Estimated No. of Hours Spent by Secretary and/or Others</td>
<td>10,292</td>
<td>16,054</td>
<td>12,489</td>
<td>38,835</td>
</tr>
<tr>
<td>Number of Reports Filed</td>
<td>1,140</td>
<td>1,537</td>
<td>1,294</td>
<td>3,971</td>
</tr>
<tr>
<td>Number of Masters Reporting</td>
<td>51</td>
<td>55</td>
<td>46</td>
<td></td>
</tr>
</tbody>
</table>
Chancellors. These additional Chancellors may be assumed to be full Circuit Court Judges at present salaries of $29,000.00 per year. This increment in judicial personnel necessarily involves additional courtroom personnel, a clerk, a court bailiff, a personal bailiff and secretary, adding an additional $18,000.00 per year plus the cost of providing courtroom space and other physical facilities or imposing an additional total cost to the taxpayers in excess of $500,000.00 per year. If this cost is to be avoided, other means must be devised to fill the void.

As the Presiding Judge of the Chancery Division has said:

In a not uncommon type of 'family feud' over control of a corporation heard by one of the former Chancellors and concluded within the last several months, there was consumed in this single case in excess of 5,000 hours of hearing time before the master and the court. Approximately 4,900 hours of this time was consumed in hearings before the Chancellor. Other similar instances of Chancery cases taking up more than five years at five hours per day of court hearing time in total man-hour time of a Chancellor could be cited. In this instance, the litigation endured, at the trial level, for more than eight years.

At the Chancellor's current salary, more than $150,000.00 would be allocated to this single case, not to mention the aggregate salaries of the court clerk and bailiff.68

THE FEDERAL VIEW

The Federal Rules of Civil Procedure provide:

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.69

In LaBuy v. Howes Leather,70 strong language was used by the Supreme Court in condemnation of a reference to a master. The reference was made sua sponte over the objections of all of the parties who then filed motions to vacate the reference. The matter involved eighty seven plaintiffs against six defendants in one anti-trust action and the other action involved six plaintiffs and six defendants. Both cases charged violations of the Sherman and the Robinson-Patman Acts; the litigation was of monstrous proportions.71 The Supreme Court, nevertheless, upheld the writs of mandamus issued by the Court of Appeals ordering Judge LaBuy to vacate the reference.72 The Supreme Court said:

68 Address by Judge Harrington, supra note 53.
69 FED. R. Civ. P. 53 (b).
70 352 U.S. 249 (1957).
71 Ibid.
72 Ibid.
Under the circumstances, the Court of Appeals was justified in finding the orders of reference were an abuse of the petitioner's power under Rule 53(b). The orders amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation. The use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the court.'

The court conceded that the petitioner in the case at bar had referred only eleven cases to masters in the past six years but further observed that "even a little cloud may bring a flood's downpour." After conceding further that there is heavy congestion of the court calendar in many of the District Courts, the court stated: "But, be that as it may, congestion in itself is not such an exceptional circumstance as to warrant a reference to a master." The abolitionists found the majority opinion in the Howes case a source of devastating ammunition in their efforts to eliminate the master.

Somewhat in contrast to the U.S. Supreme Court's philosophy concerning references is that of the American Bar Association's Section of Judicial Administration:

That in law cases involving complicated fact issues, there well may be reference to a special master or auditor in advance of a jury trial with the submission of his report for consideration by the jury . . . . In jury actions the findings of the referee, special master or auditor should be made admissible as evidence of the matters found and be read to the jury subject to the ruling of the court upon any objection in point of law which may be made to the report.

EULOGY

The significance of the Master in Chancery, or the Chancery Master as he is titled in the British system of jurisprudence, is treated with profound ponderings by an English observer, who remarks:

'The Chancery Master or Clerk in Chancery, occupies, and has always occupied, a somewhat anomalous position in the English legal system. His roots extend to the very beginnings of the centralized system of justice which he helped form.

From his detached and yet central position, with his ancient but yet modern office, a Chancery Master may perhaps be allowed to speculate a little as to the course of the profession of the law in the future.

With present trends of morality . . . it would seem that Chancery's concern with illegitimate infants is bound to increase unless the Probate, Divorce and
Admiralty Division frees itself from the bonds of matrimony. Should the increase become very great, may we not see a new department of Chancery, possibly under a Master in Bastardy, under a politer name, mainly concerned with the welfare of the illegitimate?77

The author indulges in a highly satirical speculation of man's future and the role of chancery in that future. He concludes, in his caustic satire, that only when society becomes a monolithic bureaucracy will the work of the chancery be done and "survive as a strand of the collective consciousness."78

Has the Judicial Article catapulted the Illinois Master in Chancery into a comparable place in history? The demise of the Illinois Master has left his judicial relatives with an abundance of problems. The British reverence for the Chancery Master does not exist for his Illinois counterpart, if indeed it ever did. Perhaps the legislature, again aided by leaders of the bar and bench, will find a lead to a sound solution in what has been said.

77 Supra note 7. 78 Id. at 357.