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COMMENTS

MASTERS AND THEIR FEES

“We cannot all be masters. . . .”

—Othello

The bench and bar of Florida have been called upon by the State Supreme Court to reexamine the correlation between the administration of justice and its cost to the individual. Specifically, the fees paid to masters in chancery have been criticized as imposing an undue burden on those seeking relief in equity.

An understanding of the situation from the proper perspective requires consideration and explanation of these questions: What is the function of the master in chancery? What are his origins, and his right to compensation? To what extent is his compensation regulated in the United States? And, finally, what modifications are required to effect a balance between services and compensation in keeping with the expedient administration of justice?

HISTORICAL DEVELOPMENT

England

The history of the master being contained in the development of equity necessitates a brief historical review of the growth of equity.

After the Norman Conquest a dual system of justice was evolved: local law administered and controlled by the nobles, and the national law controlled by the king.1 The resistance of the nobles to centralization in the king was of no avail.2 Courts were modified to meet the demands of a populace largely freed from the autocratic control of local nobility.3 Contrary to popular conceptions, the Common Law found its origin not in the general law of the country arising from deeply rooted custom, but rather in the enforcement of legal concepts conceived and propounded by special tribunals usually called the Royal Courts.4 However, the common law courts were not sufficiently flexible to meet the pressing demands of a growing society. An alternate remedy was afforded by direct petition to the king, but soon it became the

1. POTTER, INTRODUCTION TO THE HISTORY OF EQUITY (1931).
2. “It was a most critical period, [Conquest to Edward I] which ended with the supremacy of the central government over all forms of local authority, bringing in its train the superiority of royal over all other kinds of justice.” POTTER, INTRODUCTION TO THE HISTORY OF ENGLISH LAW 9 (2d ed. 1926).
4. POTTER, HISTORY OF EQUITY 1 (1931).
practice to refer the petitioners to his Chancellor, who then became Keeper of the King's Conscience.

The boundaries on this development of the Chancellor's power were set out in the Statute of Westminster the Second, c. 24 (1285), to the effect that the Chancery would no longer be bound to precedent in the issuance of writs; it was sufficient if the relief sought and the circumstances of the case were similar to previous cases. In short, principle not precedent became the foundation of the court's jurisdiction.

Dean Pound, in his Spirit of the Common Law, identifies this principle with the natural law derived from the Roman "identification of law with morals." The Chancellor met with the King's Council and sat in judgment on the petitions praying for justice. As early as 1377 the Chancellor acted independently in dismissing petitions, and by 1474 sat as sole judge in exercising the King's Prerogative.

Pollock and Maitland point out that the power to issue writs could hardly be called judicial, and place the Chancery in the category of a "great secretarial bureau." It was the function of the principal assistant, whose title was Master of the Rolls, to supervise the clerks in their preparation of writs. Because of the impossibility of the Chancellor dealing personally with innumerable proceedings, the power of the Master of the Rolls was increased. The first delegation of the Chancellor's power occurred during the term of Cardinal Wolsey (1471-1530). Along with the growth of the duties of the Master of the Rolls there was a corresponding increase in the duties of the clerks, the more important of whom became known as "masters." The etymology of the term "master" involves the consideration that they were "... ecclesiastics holding deaneries or canonries; ... they were graduates, they were 'masters'..." The term magistri when applied to the Master in Chancery seems merely to mark them as men with university degrees. However, they were further denominated as praeceptores having the power in certain cases to order the issuance of writs.

After the Reformation the duties of the master were primarily confined

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8. Ibid.
11. Pollock & Maitland, op. cit. supra note 6, at 197.
12. Id. at 193.
13. Id. note 1, at 194.
17. Pollock & Maitland, op. cit. supra, at 193.
18. Id. note 1. at 194.
19. Ibid.
to hearings and making reports. The force and frequency of these reports attained such proportions that Chancellor Bacon (1561-1626) was finally constrained to restrict delegation and retained the power of final decision.

From the seventeenth century on, the chancery court was subjected to much criticism for its delays and expensive litigation. England recognized the importance of the master’s position as an integral part of the court’s machinery. Nevertheless, the system for the master’s appointment and fees was steeped in collusion and chicanery.

During the period from the Restoration to the early part of the seventeenth century the price of purchase of a Mastership rose to £5,000, and evidence was given against Macclesfield (1725) that Master Elde, being very anxious to obtain the post, had actually carried 5,000 guineas round to his house in a basket to ensure no delay. After the impeachment of Macclesfield, Masterships were no longer sold but they remained a valuable form of patronage, and the office was not invariably filled by a competent official. Incompetence did nothing to shorten proceedings, and the large number of deputies to Masters, Registrars, and Clerks not only caused dilatoriness, but added greatly to the expense of the proceedings, since these officials were largely remunerated from fees taken for such things as documents at least theoretically drawn up under their supervision and not a few of which were really unnecessary.

Reforms were effected in 1837 under the provisions of 7 W. 4 and 1 Vict. c. 30 which fixed the salaries of masters and forbade their acting as attorneys, except in certain cases. Further reforms were effected in the Judicature Acts when the Court of Chancery, the common law courts, and certain other courts were incorporated into the Supreme Court of Judicature.

The origins, defects, and reforms contained in this survey, developed and existed through the middle of the 19th century. At the time of colonization of America, substantive equity principles having attained a degree of fixity were transmitted to the colonies. There they were adapted to the frontier society and equity evolved its own system of procedure.

America

Colonial adoption of the Common Law (including equity) is still the subject of controversy. Chancery procedures were not particularly welcomed by the Puritans for two reasons: the very idea of equity ran counter to Puritan individualism and concept of free will as applied in accordance with the judges’

21. "... references to the masters were restricted in the reign of King James, when the masters were no longer allowed to hear and determine, but only to report..." Crabb, A History of English Law 548 (1st Am. ed. 1831).
23. 1 Chitty, Practice of Queen’s Bench 11 (Archbold’s ed. 1847).
personal standard;\textsuperscript{25} and the fact that equity courts would have been ex-

pensive.\textsuperscript{26} In spite of this opposition some form of chancery existed in all of the

thirteen colonies prior to the Revolution.\textsuperscript{27} In some colonies, it was the royal

governor who, with the council, sat as an equity court.\textsuperscript{28} In others, equity

jurisdiction was in the legislature,\textsuperscript{29} and several colonies provided for equity

sittings of the common law court.\textsuperscript{30} During the Revolution, the states made

constitutional provisions replacing royal governors with the state governors

as chancellors, or extending the jurisdiction of the existing courts. A survey

of the constitutions \textsuperscript{31} existing before 1789 reveals: constitutions of New

Hampshire in 1776 and 1783 continued equity jurisdiction in the superior
court; Massachusetts’ constitution of 1780 and acts of 1782 seemed to com-
bine law and equity; the other New England states followed the lead of the
Bay State, with Connecticut extending equity powers to the superior court.

New York under the constitution of 1777 and acts passed in 1778 continued
the provincial courts but set up a court of errors having equity jurisdiction.

New Jersey and South Carolina made the governor, and vice-president of the
state, respectively, chancellors with South Carolina, providing, in addition,
for three chancellors chosen by the state legislature. Pennsylvania made no
provision in her constitution of 1776 for equity except for limited purposes.

Delaware and Maryland maintained and expanded their courts of equity. Un-
der the Virginia constitution of 1776 an act providing for a high court of
chancery was approved in 1777. North Carolina in 1777 provided that all
civil actions were to be brought in the six districts of the superior court,
Georgia establishing virtually the same judicial system.

The history of equity courts in this period makes little mention of mas-
ters,\textsuperscript{32} and their existence is a matter for conjecture. One reason for this lack
of reported cases was the dearth of trained magistrates and their failure to
deliver written opinions.\textsuperscript{33} Another reason may have been the adaption of

\begin{footnotes}
\item 26. \textbf{Chaffee & Simpson, Cases on Equity} 9 (2d ed. 1946).
\item 27. Wilson, \textit{Courts of Chancery in the American Colonies}, 18 \textbf{AM. L. REV.} 226 (1884),
reprinted in \textit{2 Select Essays in Anglo-American Legal History} 779 (1908).
\item 28. They were New York, Virginia, New Jersey, Maryland, South Carolina and
Georgia. \textbf{Pound, Organization of Courts} 76-77 (1940).
\item 29. \textit{Id.} at 77.
\item 30. \textit{Id.} at 76.
\item 31. \textit{Id.} at 92 et seq.
\item 32. The \textit{Colonial Laws of New York} give the information that masters were probably
included in the Court of Chancery, “And that the Governour may Depute or nominate in
his stead a Chancellour, and be assisted with such other persons, as shall by him bee
thought fitt and Convenient. Together with all necessary Clerkes and other officers as to
the said Court are needful.” \textit{1 Colonial Laws of New York} 128, c. 7, passed November
1, 1683 (Statutory Revision Committee 1894). Another reference in the same set reveals,
“. . . Plaintiff in such Suit shall pay to the Defendant . . . his . . . full Costs to be taxed
by a Master . . . .” \textit{5 Colonial Laws of New York} 542, c. 1610, passed March 8, 1773.
The conclusion may thus be reached that where equity courts were established masters
were an integral part of the court administration.
\item 33. \textbf{Pound, Spirit of the Common Law} 113 (1921).
\end{footnotes}
equity court proceedings to the particular circumstances of the earlier American scene rather than the complete incorporation of all the formal trappings of the English courts.

The later development of United States courts, federal and state, has provided three lines of treatment: the first permits a separate court for equity; second, and this is the Florida judicial organization, has equity and law in the same court but following different procedure and on different sides of the court; and third, the code states which provide for the same procedure and the same court for law and equity.

FEES

From the earliest development of the office of master in chancery it was recognized that the master, as an officer of the court, earned his living through the fees paid him in the performance of his duties. Later development led to reforms in England and, in some of the states of the union, to the abolition of appointive masters and the creation of a salaried officer who would not be dependent on the services performed for his livelihood. At the same time the master was becoming an established tradition in the chancery courts, it was recognized that for a particular problem a special master could be appointed by the chancellor to render the same services as a general or regular master in chancery. Both general and special masters are sometimes called "masters," other times "commissioners," "referees," or "auditors." They are regulated by statute in every jurisdiction, but dispute often arises as to the amount earned for services performed.


35. The following is a private act passed in 13 Charles 2 for increasing the fees of Masters in Chancery:

Whereas the office of the master of the Chancery in ordinary is of very ancient institution, and of necessary use, and continual attendance for the dispatch of the business depending in that court; it appearing by ancient records that the constitution of that court was long before the conquest, much of the duty, pains, and attendance whereof lieth on the said masters. And for that it conduceth much to the due administration of justice, that those who exercise places of trust should have competent and certain rewards suitable to their pains and labour, whereby they may in due manner support the quality of their places; and that it is but fitting and necessary for the subject to allow a moderate payment, where they receive a proportional advantage (a fee of lower pence in times of that antiquity being as much in value as two shillings now) by reason whereof in process of time, and the improved rate of all necessaries, the present recompense of those ancient offices is no way competent and proportionable to their pains and attendance, which are likewise very much increased without any increase hitherto of what was so anciently allowed as aforesaid. . . ." I MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY note 3, 2 (2d Am. ed. 1822).

36. See note 23 supra.

37. POTTER, HISTORY OF EQUITY 15 (1931).

38. FLA. STAT. § 62.06 (1941).


Statutory Control

In practically every state in the union the statutory control over the payment of masters falls into one of the following categories. One, strict control through specified fees. Two, control by judicial discretion. It should be noted that these classifications, in practice, are not always clear cut and are sometimes accompanied by unique innovations.

(a) Strict Control

A number of jurisdictions are careful to enumerate the fees of the master for every eventuality and create a situation where the local court cannot, or will not, overcome the rigid limitations established by the legislature.

Michigan, as early as 1850, found it necessary to establish a peremptory system of fees which also prohibited the appointment of masters in chancery. The commissioner is precluded from fulfilling any judicial functions and is restricted to ministerial responsibilities. In addition, an inflexible table of fees was set up which specifically provided against the payment for services not enumerated. Thus, the state has circumvented the placing of any discretion in the court. This is the most drastic solution to the master-fee problem now offered in the United States, if it may be called a solution at all. It is more in the nature of circumvention, as it reduces the duties of the master rather than provides for a just, understandable, and consistent method of compensation.

Some state courts, although furnished with statutory enactments setting out the exact compensation of masters, have found it advisable to ameliorate the provisions by increasing compensation where extraordinary work is performed. Kentucky is one of these jurisdictions. Illinois, which has met with a great deal of difficulty in dealing with the general problem of masters, now has a statute which reads: "Masters in chancery shall receive for their services such compensation as shall be allowed by law..." and then proceeds to set out a comprehensive schedule. The court has discretion to increase fees, but requires submission of a report stating work performed and time spent. In no event will the court allow per diem compensation of the master.

44. Foster v. Ingham, 128 Mich. 377, 87 N. W. 258 (1901) (where the court refused to allow compensation for folios on the ground that they were unnecessary and their preparation was judicial in nature and, therefore, not within the statute).
46. Ky Rev. Stat., c. 64.260 (1), (2) (1948); Fidelity Oil Corp. v. Southern Oil & Pipe Line Co., 197 Ky. 677, 247 S. W. 950 (1923); see Nants v. Doherty, 203 Ky. 596, 262 S. W. 979 (1924) (where court applies statute very strictly requiring statement of number of days commissioner acted on reference as required by statute).
48. Id. c. 53, § 38.
to exceed that of a chancellor. Reports of the masters are carefully scrutinized and the court applies an objective standard as to how long the work should have taken.

Missouri has an odd combination of discretion and limitation. A ceiling of $10 a day is enforced, up to which amount the court shall provide "fair and just compensation." Obviously where the prerogative of the court is so restricted, none in reality exists. Ten dollars per diem, in view of the present purchasing value of money and the standard of living, in most cases is inadequate. The obvious effect is to make it onerous and prohibitive for the more capable and efficient members of the bar to act as aides to the court.

Most states which have specified fees attempt to alleviate the severity of that legislation by statutory permission for setting of fees by agreement between parties. Alabama, Alaska, California, Georgia, Idaho, Montana, North Dakota, Rhode Island, South Carolina, and Utah fall...
generally within this group. South Carolina is in some degree illustrative of the shift from rigid fees to alleviation by consent. Originally she adhered to her schedule. Later the legislature unbent somewhat by permitting the parties to add to the customary three dollars per diem compensation. But the court has not been prone to generosity. This is indicated by decisions disallowing additional compensation when there was an agreement in open court that the master's fees should be fixed by the judge, but failed to specify that the statutory schedule should not control. It has also been held that a $250 fee for taking testimony and reporting it with conclusions of law and fact was proper because there had been a stipulation. Georgia employs this method to ameliorate an unusual system of control: fees limited by a percentage of the amount in litigation. The agreement may be incorporated into the order of appointment. North Dakota varies only in that it does not require the agreement to be in writing.

Statutory authorization to set fees by consent has usually been construed so as to allow reductions as well as additions. Theoretically, this plan would seem to operate fairly well. Since the daily rates of reference are usually so low, the parties might seek to mitigate the harsh statutory limitations, especially if the case involves larger sums.

A few states vary from the general pattern only in that they furnish definite fees by reference to other statutes. Colorado has a partial schedule and then calls attention to the fees received by the sheriffs and justices of the peace. Ohio and Indiana permit the same fees as are paid to other officers for similar services. Colorado, like Michigan, allows no increase under any circumstances. Indiana, when there exists no statutory fee, combines this system with discretion in the court, limited by the standard of "just and reasonable." 

(b) Control by Judicial Discretion

Under the Federal Rules of Civil Procedure, and in many states adopting this system as pertains to masters, the fee of the master is left entirely to

64. See note 61 supra.
68. See note 56 supra.
69. See note 59 supra.
70. Ala. Code, tit. 7, § 268 (1940) (provides "... a larger or less sum per day...").
74. Ibid.
76. Ariz. Code, c. 21, § 1101 (1939); Del. Rev. Code § 4383 (1935); Dist. Col. Code § 16-1715 (1940); Iowa Code, c. 624, Rule 208 (1946); Me. Rev. Stat., c. 95, § 8
the discretion of the judge. The method presently used in exercising the judicial prerogative was first outlined in Finance Committee of Pennsylvania v. Warren.\textsuperscript{77} In that cause a master was appointed to sell a railroad under a foreclosure of a trust deed. The railroad was heavily indebted and the amount bid and approved by the bondholders to protect their investment was $250,000. Evidence was presented by the master as to the preparation of papers, receiving and stamping of bonds and other services. Submitted was a fee bill of $5,000 which was appealed. Judge Jenkins called attention to the trust relationship existing between the master in chancery and the appointing court.

The court looks to him to execute its decree thoroughly, accurately, and in full response to the confidence extended to him. His compensation should be measured accordingly. He should be remunerated for the actual work done, and the time employed, and the responsibility assumed. The amount of compensation should be fixed with due regard to the magnitude of the interests involved, and to the responsibility of the position. The amount of such compensation, while it should be reasonable, and perhaps liberal, should not be exorbitant. Possibly, much ground for complaint would be avoided if the amount of compensation could be determined by some fixed standard. Yet so various and dissimilar are the services performed, and the character and extent of the responsibilities assumed, that it might work injustice to deal with such matters by any ironclad rule.\textsuperscript{78}

This statement of the measuring stick of judicial discretion was adopted by the Supreme Court in 1922 in Newton v. Consolidated Gas Co.,\textsuperscript{79} and has since been acknowledged as a definitive statement of the rule for federal courts.\textsuperscript{80} Another approach, rejected by the Court, was founded on the re-
muneration of judicial officers 83 performing similar functions saying, "... a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings." 82 But the Court did compare the high fees awarded the master and the salaries of the mayor of New York, $15,000 per year, and the governor and justices of the Court of Appeals of New York, $10,000, and concluded that his fees were decidedly excessive when considered on this malleable basis.83

The decisions of the various circuit courts, before the Newton case and where the Finance Committee holding was not followed, established the value of the master's services by resort to the applicable state law;84 or, the salaries of judges,85 on the basis that the master was performing a judicial function; or, on consideration of the special services rendered;86 and also, the thoroughness of the report rendered and time spent in consultation.87

It may be seen that prior to the Newton case there were a number of foundations on which the various courts of the federal judiciary rested. Subsequently, the federal courts gave weight to all considerations, "... amount involved, ... responsibility, and the character of the work, ... difficulty of it, ... skill and knowledge required, and the compensation paid under like circumstances in other cases. ..."88 A similar test was utilized in a patent infringement case but was hedged in by the requirement that the allowance to masters should be kept within just and reasonable limits in order to avoid unnecessary expense in the administration of justice.89

Effects of the Newton case are illustrated in a corporate foreclosure action where the consideration involved was $3,000,000 and the value of the property in excess of $7,000,000 but the transfer was a paper one.90 A master's fee of $16,500 was reduced to $7,500 on the basis of the Newton case and the disbarment proceedings which followed that decision,91 where the Court had indicated that caution should be used and, "... vicarious generosity in such a matter could receive no countenance." 92

However, federal courts have generally not considered themselves confined

82. 259 U. S. 101, 105 (1922).
83. Id. at 104, 106 (in 282 days the fees awarded the master for eight causes, joined in this action, totaled $118,000).
84. Doughty v. West, Bradley & Cary Mfg. Co., 7 Fed. Cas. 971, No. 4,030 (C. C. S. D. N. Y. 1870) (however, the court increased the compensation on a showing of extra labor by the master, and the inadequacy of $3 per day rate under state statute).
90. First Trust & Sav. Bank, supra.
91. In re Gilbert, 276 U. S. 294 (1928).
92. Id. at 296.
under the *Newton* case, since it is inherently subject to wide construction. It permits a court to be bound only by its own discretion and the possibility of reversal on review.\textsuperscript{93} Several courts simply state that they are exercising the discretion they have under the Rules of Civil Procedure or the old Equity Rules.\textsuperscript{94} The time spent in the reference and the nature of the report rendered by the master are often emphasized as reasons for increasing or decreasing fees.\textsuperscript{95} In one case, the fund which the master was called upon to consider was reduced from $20,000 to $16,000 and the appellate court suggested to the district court that it take this matter into consideration and redetermine the master's fee.\textsuperscript{96} External standards were applied in determining the fee in a matter involving property of a public utility worth in excess of $112,000,000.\textsuperscript{97} The amount in dispute was $4,500,000 and was settled by the master after 285 days on the actual reference and 60 days preparing the report. Expert witnesses testified as to the worth of the services before the court decided on a fee of $25,000 based on their testimony.\textsuperscript{98} This seems to be a logical way to determine the fee, but it could deteriorate into a "wager of law" based on who could afford the best expert.

Statutes of Pennsylvania are indicative of the preference jurisdictions have for discretion over specific statutory fees.\textsuperscript{99} Originally Pennsylvania had a strict schedule. An early decision allowed a greater fee than permitted under the old statute; the court applied a new law which authorized the courts to give such additional compensation as they deemed proper.\textsuperscript{100} Concerning a master in a partition suit, the Supreme Court of Pennsylvania announced in 1938 that plaintiff would be bound by the facts in each case;\textsuperscript{101} it was the judge to whom the services were rendered who could best decide the master's fee; and, "... only in cases of an abuse of discretion of the court below ... will [this court] interfere."\textsuperscript{102} Pennsylvania's divorce laws are unique, permitting each of the various courts of common pleas to make its own rules for fees.\textsuperscript{103}
Oftentimes the courts are given discretion and then are instructed by statutory mandate to provide "just and fair compensation" or to be "reasonable" according to the situation. {104} Basically these jurisdictions conform to the federal doctrine where there also exists a broad prerogative, confined only by appellate review.

A further variation from the usual legislation may be found in those jurisdictions where the court has discretion and the fee is paid either by the county or the state. {105} Vermont has used this procedure ever since 1878 with the result that there have been no cases taken on appeal over a controversy regarding fees of masters, commissioners, auditors, referees or special masters.

(c) Florida

As early as 1845 the Florida legislature recognized the need for a system of compensation for masters. {106} Our present law is a modification of that legislation. {107} It reads as follows:

104. "Reasonable compensation": Ark. Stat., tit. 12, § 1711 (1947); Mass. Laws Ann., c. 221, § 55 (1933); Miss. Code § 445 (1930); N. C. Gen. Stat., c. 6, § 7 (1943). Indiana courts are directed to "... make such allowances for the service performed as shall be just and reasonable..." Ind. Stat., tit. 4, § 3406 (1933). Payment shall be in full, is the admonishment to the Wisconsin courts dealing with the problem of court commissioners. Wis. Stat. § 252.15 (3) (1947). There are four states where the courts are instructed to provide "just and proper" compensation for the master, auditors, commissioners or referees. Kan. Gen. Stat. Ann., c. 60, art. 2928 (1935); Neb. Comp. Stat., c. 20, art. 1137 (Dorsey, 1929); Okla. Stat., tit. 12, § 619 (1941); Wyo. Comp. Stat. Ann., § 3-2509 (1945). These statutes are identical, "The referees shall be allowed such compensation for their services as the court deems just and proper, which shall be taxed as part of the costs in the case." Prior to the adoption of Rules of Civil Procedure in Texas (Acts 1939, 46th Leg. p. 201 § 1) that state had authorized the appointment of masters in chancery. Under Rule 172 it has been held that the allowance of $5,368.30 to an auditor in connection with original report and suit in accounting of partnership, was not an abuse of discretion vested in the court by virtue of the "reasonable compensation" standard in the language of the rule. McGrew v. Britton, 206 S.W.2d 836 (Tex. Ct. Civ. Ap. 1947), citing Tex. R. Civ. P. 172. In Louisiana, the master is paid at the discretion of the court, but the court is required to consider the circumstances of the reference. La. Code of Prac., Art. 462.8 (Dart, 1942).

105. Me. Rev. Stat., c. 95, § 8 (1944) (may make county pay master's fee if court in its discretion decides it should); Minn. Stat., c. 546.33 (1945), (permits reference by consent of the parties and provides for payment out of the county treasury where the order of reference states said reference is required by "press of business"); c. 357.20 provides a minimum of $5 and a maximum of $25 per day for referees, and also permits increase by stipulation of the parties with increased payment devolved on them. N. H. Rev. Laws, c. 370, § 21 (1942). (The superior court is permitted to appoint certain retired justices as masters with a fixed salary. Where a master is appointed, the court is to allow a reasonable amount for his services to be paid by the county.) See c. 395, § 15 (with respect to referee, court shall follow same procedure providing reasonable compensation to be paid by the county). S. D. Comp. Laws § 2540 (1929); Vt. Rev. Stat., tit. 49, § 10, 473 (1947) (fees and necessary expense of the referee are fixed by the court and audited and paid by the county wherein the court is held which made the reference).

106. Fla. Laws, c. 51, § 6 (1845).

"The fees of the master shall be as follows:

Attendance on litigated case, per day ..................... $2 00
Attendance on unlitigated case, per day .................. $1 00
Attendance to settle litigated report, per day ............ 2 00
Attendance to settle unlitigated report, per day .......... 1 00
Deed or bill of sale, drawing ................................ 4 00
Deed, executing .............................................. 1 00
Deposition of witness, taking, per 100 words .......... 25
Exhibits, marking and numbering, each .................. 05
Moneys (except moneys arising from sales),
  receiving and paying out, on first
    five hundred dollars ..................................... 4½ per cent
On residue ...................................................... ¾ of 1 per cent
Recognizance, taking ......................................... 50
Report upon appointment of guardian ....................... 2 50
Sale, attending and adjourning ............................. 1 00

For making, the same fees as are allowed sheriffs.

"For all other services, the same fees as are prescribed for clerks of the circuit court. When no such fees are prescribed, then he shall receive such compensation as the judge may fix. All fees shall be taxed as part of the costs of the cause." 108

Florida, then, offers an unique combination of specific fees, specific fees by reference, and discretion. This scheme would seem to incorporate the best features of legislative control and judicial prerogative.

Failure to interpret properly the statute has not been the cause of grief for many judges prior to the 1948 term of the Florida Supreme Court. The first case considered by the court, Chandler v. Sherman,109 was in 1877. An action for accounting was referred to a master who spent over one hundred days in examining the books. He was allowed $500 for his services. The court decided that it could not hold that the labor charged for had not been performed and permitted recovery of five dollars per day as not being "... an extravagant charge for the services of a good, competent and accurate master and accountant." 110 It recognized a necessary discretion in the trial judge: "The question as to the actual employment of 100 days in this labor was before him [judge of the circuit court] and he found as a fact that such time was necessary to the examination of the books and the statement of the account." 111 The bench was cautioned, "It is the duty of the judge to be careful that he does not allow for more labor than has properly been performed." 112

109. 16 Fla. 99 (1877).
110. Id. at 118.
111. Ibid.
112. Ibid.
This dicta has been seized upon in other Florida cases as a limitation of discretion.

Master's compensation was not the subject of litigation for a long period of time. *Marion Mortgage Co. v. Moorman* 113 was a contest over an award of $2,500 to a special master based on, so-called, special duties performed by him. He prepared a report of disbursements; made several trips to various localities prior to the sale of the foreclosed property; and accepted moneys from a receiver. The court in examining the record decided that the labor performed required no hearings, findings of fact, or conclusions of law, and was not of an extraordinary nature.114 The implication, logically following, is that in order for a master to get a large fee he must do more than fail to come within the fee schedule established by statute. His function in this case impressed the court as merely one of sale, receipt, and disbursement of moneys. With respect to the trips made by the master prior to the sale, the court held that such was the performance of useless and unnecessary labor by the master which must be disregarded in fixing the amount of compensation.115 While in the *Sherman* case the court would not say that the labor was not performed and permitted compensation, the court now announced that it would examine the performance by the master and eliminate from his total fee those charges which indicated unnecessary work although erroneously performed. The apparent severity of this ruling might possibly be modified by a showing of honest error.

The third in the series of Florida cases was *Mabry v. Knabb*. 116 On the remanding of the cause, a master was appointed and much testimony was taken with respect to payment by the lessee, Knabb, of an equitable lien held by the plaintiff attorneys, Mabry, *et al.*, on lands acquired under a mortgage foreclosure for Chicago Land Co. A fee of $1,250 was declared by the supreme court to be excessive and was reduced to $750. “We see no basis in the record for allowing a special master a larger fee than the statute allows counsel to litigate the cause.” 117 Here the standard adopted by the court was limited by statutory fees allowed counsel. This decision should be considered a weak and improper one. First, there is nothing to indicate that the master did anything other than take testimony the fees for which are specifically enumerated. Second, the reference to statutory counsel fees is uncalled for by statute 62.07 and is an unduly narrow construction. In effect, the court adopted a legislative standard when the legislature did not so intend, and refused to accept responsibility for efficient judicial administration.

*W. & W. Corp. v. Feit* 118 is another decision in this line of cases. The

113. 100 Fla. 1522, 131 So. 650 (1930).
114. Id. at 1527, 131 So. at 651.
115. Ibid.
116. 151 Fla. 432, 10 So.2d 330 (1942).
117. Id. at 453, 10 So.2d at 558.
118. 101 Fla. 1091, 134 So. 57 (1931).
COMMENTS

The supreme court gave an indication of its attitude towards the trial court's discretion in fixing master's fees. In revising the compensation allowed a receiver by the circuit court, "... ordinarily the court is loath to interfere with a chancellor's discretion in the allowance of fees to its officers for services efficiently performed. ..." 110 It would appear that when the services have been efficiently performed, and there is no applicable enumerated statutory fee, there will be no reversal unless the record reveals a flagrant abuse of the rights of one of the parties, or the record does not disclose any basis at all for the extra compensation.

The case of Cohn v. Cohn 120 was decided in 1948. A master was appointed in a divorce action and contended that he had heard testimony, conducted many conferences and, through his efforts, a settlement between the parties over the property in dispute resulted in an uncontested divorce. He then submitted a bill for $1,000 for services performed which was reduced to $750 by the chancellor. As the basis for his decision the chancellor enumerated fourteen points:

1. importance of the case
2. age of the special master
3. ability of the special master
4. experience of the special master
5. wide knowledge of the law
6. responsibility assumed by master
7. quality of work done
8. testimony taken of petition for rehearing
9. purchase power of money
10. financial ability of defendant
11. income of defendant
12. no testimony submitted to effect that allowance for special master will work financial hardship on defendant
13. large income of defendant, leading physician
14. plaintiff's and defendant's attorneys agreed that the charge was reasonable.

The supreme court said flatly that the chancellor had failed to be guided by the statute and cited with approval Kooman's Florida Chancery Pleading as containing a fair summarization of the Mabry and Marion cases.

Where masters are to hear witnesses, examine and consider evidence, try and determine controverted questions of fact, investigate and state complicated and controverted accounts, and make reports of the proceedings and results to the court, it has generally been understood and practiced that they

119. Id. at 1096, 134 So. at 59.
120. 36 So.2d 199 (Fla. 1948); 2 Miami L. Q. 336, Quarterly Synopsis.
121. Id. at 200.
should be allowed a reasonable compensation irrespective of schedule of fees. In such cases the court will allow compensation commensurate with the master's ability, experience, and fitness for the tasks assigned to him and commensurate with the importance and difficulty of his work and the responsibility it imposes upon him. But the tendency of the court should be to keep down these charges instead of adding to the burdensome expense of litigation. In all ordinary cases of no peculiar or special difficulty, and involving no extraordinary labor, the master should be allowed no greater compensation than that fixed by the statute or rule of court.\textsuperscript{122}

It should be noted that there was no attempt made to deal with the bases of the chancellor's decision, because the master had performed counsel's tasks entirely outside the scope of his reference, bases used to a great extent in other jurisdictions and accepted as being facts to be considered where the fees are discretionary with the court. Thus it is still a matter of conjecture whether the court under a proper set of facts would adopt any of the fourteen points enumerated.

\textit{Rainey v. Rainey}\textsuperscript{123} presented a situation where an action for divorce was brought in the Circuit Court of Dade County and a master was assigned to hear evidence concerning a counter-claim for $3,000. Testimony was taken and the divorce awarded the defendant. Incorporated in the final decree was an order for the plaintiff to return the $3,000 and pay the special master a fee of $1,500. An appeal was carried to the Supreme Court of Florida on that part of the decision dealing with the return of $3,000 and the special master's fee. Justice Terrell said in part,

\begin{quote}
The Special Master’s fee in a litigated matter like this is of secondary importance to the attorney’s fee. If the litigant is required to pay one-half the amount involved in the litigation for a Master’s fee, an attorney’s fee in proportion, and costs of courts in addition to all this, he will be required to resort to other resources to pay for the luxury of having his name connected with a lawsuit. Such a result is contrary to every canon of noblesse oblige and will justly shower undue criticism on the administration of justice.\textsuperscript{124}
\end{quote}

With this view the writer concurs unequivocally. At the same time it must not be forgotten that the administration of justice demands men of integrity, intelligence, training and patience. Under the fees provided by the statute it is not to be expected that trained attorneys will be eager to serve the courts. Many of them will find it a heavy burden to participate in the essential juridical process of reference. Either the court should have made specific reference to the inadequacy of the statute, thus stimulating revision, or it should have recognized that the proper conduct of judicial administration requires an interpretation which will encourage participation by the counsellors in each community. No attempt

\textsuperscript{122} KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE 306 (1939).
\textsuperscript{123} 38 So.2d 60 (Fla. 1948).
\textsuperscript{124} Id. at 61.
was made to guide the inferior court in determination or definition of the extraordinary labor doctrine established in the Marion case.

Mr. Justice Terrell speaking for the court again in Garlick v. Garlick,\textsuperscript{125} objected to the payment of court costs of more than $5,000 including a master’s fee of $1,000 in what was called, “... a run of the mill divorce case. ...” \textsuperscript{126} The question of fees involved was not presented to the court for its consideration but was treated because “... it is so obviously out of harmony with justice and legal proprieties.” \textsuperscript{127} Here the court established that the statute relating to the compensation of masters must be strictly construed unless there is “proper showing” to permit modification. A “proper showing” requires an announcement by the master of controverted questions which have been decided together with a careful report of time spent on the different matters in the reference. This seems to establish that the court is in agreement with several other jurisdictions where the compensation of masters has been hedged in by statutory provisions and judicial decisions.\textsuperscript{128} An earlier 1948 \textit{per curiam} decision\textsuperscript{129} ordered the reduction of the fee of the special master from $2,500 to $1,200 since it was not sustained by substantial evidence. The last case in which the problem of master’s fees was considered by the highest court in this state was Cravero \textit{v. Dea} \textsuperscript{130} where the court cited its previous decisions and ordered a reduction in costs.

It is difficult, if not impossible, to attempt to establish a pattern on the basis of the reported cases. The only thing that appears to be settled is that the master is required to perform some acts not enumerated in the schedule to remove him from its fee restrictions. Vacillation from the distant attitude of the Chandler case; the careful examination of the master’s performance as in the Marion and Cohn cases; the incongruous standard of attorney’s fees in the Mabry case, alluded to in the Garlick decision; and the “proper showing” doctrine announced in Garlick \textit{v. Garlick}, permits for no standard test. Undoubtedly, it is more advisable to have a standard subject to criticism than to have none at all.

\textbf{Summary and Conclusion}

Because of the very complexity of our society we are compelled to take stock of our judicial system and its fulfillment of its mission. The objective of our system of laws is the speedy administration of justice. This is not a concept which may be discussed in a social vacuum but is an idea inextricably intertwined with the pattern of a complex industrial society. Sometimes we

\textsuperscript{125} 38 So.2d 222 (Fla. 1948).
\textsuperscript{126} \textit{Id.} at 223.
\textsuperscript{127} \textit{Ibid.}
\textsuperscript{128} See notes 46, 50 \textit{supra}.
\textsuperscript{129} Robbins \textit{v. Robbins}, 36 So.2d 786 (1948).
\textsuperscript{130} \textit{Fla. Sup. Ct.} March 4, 1949.
survey the entire field and demand complete revision; at other times it is necessary to examine a minute fragment of this province. The collation of master's fees and the speedy administration of justice is the minute, but important, fragment under discussion.

As has been illustrated, the master is regulated by statute and still further controlled by judicial decision. He is an officer of the court, in most cases performing judicial functions, and is looked to by the court to expedite judicial administration. His value to the court is demonstrated by his handling of controverted questions of fact and law which require much time to hear and determine. The position of master in chancery is one of trust to the court and to the litigants, both of whom he serves. Often it is the master's report on which the court relies in formulating its decision.

Few matters are quite as important in a legal contest as is the question of the cost to the parties. When a person enters into a lawsuit which may require a reference he is understood to assume the possible burden of paying for that work. As in so many other fields of the law, the standard is one of reasonableness according to the exigencies of the situation. The costs of the mastership may make litigation a burden and prevent the assertion or enforcement of legal rights. What may be considered inexpensive by one party may very easily be exorbitant to another. Theories of law can not be divorced from economic realities.

A reference takes the time of an attorney or other person learned in the law and his efforts must be compensated, if a mastership is not to become a penalty. Facing the legal "facts of life" it must be conceded that to get capable, efficient, and competent masters a fair standard of compensation should be announced. In each community the finest lawyers should be attracted to serve as masters. To fix his fees of reference at a low figure is, in effect, to compel him to shirk public responsibility. This is not the same as charity cases where the bar has the duty to see that an individual, who can not afford to pursue his remedy in the courts, is given legal aid. It is the duty of the bar to insure that it serves the public, and a reciprocal duty of the public is to provide fair remuneration for specialized services. The matter devolves to an attempt to effect a balance between the adequacy and reasonableness of the master's fees, and the limitation of expense of litigation to the disputants.

When discretion is in the court, it is essential that an understandable and easily ascertainable standard of payment be announced. This avoids confusion as to the amount, hesitation as to the actual award, and litigation in the appellate court. It provides an award for services, fixed by the one for whom the services have been performed, and who should be best able to appreciate their value. To be effective it must not sacrifice flexibility for definiteness. Traditionally, it has been the factor of flexibility that has enabled our judicial organization to cope with public problems and personal difficulties involved
in a dynamic industrial community. Appellate review must be exercised with
restraint and firmness and should provide the flexible, but understandable
and ascertainable, standards necessary for orderly judicial administration.

Since the master is an officer of the court it is proper that he be appointed
by the chancellor. This power in the chancellor inheres within it the possibility
of its use as a source of political patronage, especially when it is remembered
that most state judges are elective officers. While the particular problem is not
within the scope of this comment, it is imperative to draw attention to its
existence.

The objectives outlined above provide a basis to test those jurisdictions
which have a strict statutory fee schedule. In Michigan, a very strict juris-
diction, it is doubtful that the processes of judicial administration are expedited
under a statute which provides for the election of commissioners to serve the
functions of masters, and restricts them to ministerial responsibility. As previ-
ously pointed out, this approach is definitely inadequate. Expedition is com-
pletely sacrificed as the master no longer exists. Also, it may be observed
that elected ministerial officers are seldom acclaimed for causing the wheels
of justice to grind more rapidly. Its brightest feature is the limitation of costs
which may not be departed from, and which does not allow for payment where
the functions performed by the commissioner are not provided for in the detailed
statute. There is little question to the assertion that the compensation is far
from fair when the normal functions of the master are considered. This does
not work too much hardship in Michigan, the commissioner not being permitted
to decide questions of law. The strictness of the schedule has the beauty of
inexorability and definiteness for those who crave these features.

An objective standard is applied in Illinois and Kentucky to ameliorate
the fee schedule rigidity. By providing supplementary compensation for extra-
ordinary services performed, these courts encourage speedy litigation. In com-
penstating the master the courts examine the services performed and the
payment awarded to see if it is justified under all the circumstances involved.
It seems to be fair to the parties in the requirements that (1) extraordinary
labor be performed; (2) the compensation awarded the master be in conformity
with the time spent on the reference itself and in deciding questions presented to
him; and, (3) the limitation that the per diem fee not exceed that of the
chancellor. The standard is not difficult to determine and these jurisdictions
provide for flexibility where it is needed the most: in cases requiring excep-
tional labor.

Where the statute provides for discretion up to $10 per day there is
no real discretion. Flexibility is accomplished up to the maximum fee, but this

131. See notes 43, 44, 45 supra.
132. See notes 46, 49 supra.
133. See note 52 supra.
is not the concept of flexibility which should be associated with the work of a master who may be called upon to solve intricate questions of fact and law. Nor is there fair compensation to the master if the same considerations are kept in mind. An easy measure of fees is set by the monetary limitation and serves to keep the costs of litigation to a minimum.

The parties may stipulate in certain states, such as South Carolina 134 and California,135 to ease the restrictiveness of the statutory fees. When the parties do stipulate, the process of administration is accelerated. By the stipulation, however, the parties must agree to sacrifice the limitations of fees under the statute to speed the decision in their cause. This might not operate too well for the penurious litigant seeking a speedy disposition of his grievance. The basic weakness is that the compensation might only be equitable in those situations where the parties agree to the stipulation. No standard is easier than that established by the parties or definitely enumerated in the laws of the state. Nowhere is flexibility present if the parties are too poor to pay an extra fee to the master, or do not wish to do so.

Georgia,136 in setting a high enough ceiling on the payment to auditors, probably avoids strictures on the speedy hearing and deciding of causes by reference. The cost to the parties is limited to $1,000 under the percentile system. This is indeed a strange way to decide fees; who can say that the questions to be decided in a case involving $500 are not more knotty than those involved in litigation where the amount in controversy is ten times that sum? In most situations the fee limit would provide fair compensation to the master. Situations calling for exceptional ability and lengthy reference are not covered and reveal the weakness in an inflexible limitation on payment to master. A perusal of the statute discloses an exact standard to be followed in determining the auditor’s remuneration—a guide to the judge, the attorney and the client.

Generally then, strict jurisdictions are able to maintain costs at a reasonably low level and to create an easy self-operating standard of compensation. Sacrificed to low-cost litigation and easy standards are flexibility and fair compensation to masters. The result of the conjunction of these facts is that the system tends to defeat itself. Inadequate and unfair fees breed inefficiency and dilatory handling of complex legal matters under reference.

Federal courts have the widest possible latitude in determining the compensation of masters. The rule allows the district court judge to set the recompense of the master at his discretion, permitting fair remuneration where exceptional services for the court have been performed. At all times this basis confers a high degree of flexibility subject only to possible restriction in the appellate court’s interpretation of the worth of the services performed. These two factors

134. See note 61 supra.
135. See note 55 supra.
136. See note 67 supra.
combine to give expeditious handling of judicial matters too complex for the courts to handle without preliminary investigation and tentative determination by the master. But the solution is not complete. Parties to the litigation can rarely tell in advance what the fee bill will be. There is very little chance of predetermination by comparison, since each fee case seems to be decided on its particular merits. What then is the standard to be utilized in fathoming fees? There is a barrier of words of limitless extent; words which serve to declaim rather than explain or announce fee standards. Words such as "work done," "time employed," "responsibility assumed" might guide an attorney, while others confuse with "reasonable," "liberal," and "not exorbitant." At one time federal courts did not try to use judicial salaries in instituting a comparison, but this criterion has now been abandoned for the "all factors are to be considered" elusive pattern.

Complete contentment can not be found under the federal doctrine or the strict (and modified strict) jurisdictions. The federal doctrine satisfies the requirements of expeditious handling of judicial affairs, and asserts flexibility to permit fair reward to the master for his efforts, while losing any hope of a definite standard. Courts which apply the strict doctrine accomplish reasonable cost of litigation and lose flexibility and speedy disposition of causes. Combination of the two has resulted in some success in Illinois. It must be realized that there are unique advantages to both discretion and strictness, just as there are disadvantages.

It might easily be thought that since Florida incorporates features from both these systems it would prove successful. There are several factors which have hindered the probability of success. First, is the inadequacy of the statutory fees which compels the chancellor to make matters discretionary which need not be so. There is a definite need for a revision of the Florida statutes setting the basic fees of masters in chancery. As constituted at present, the fees are much too low to attract the caliber attorney so necessary to achieve a high level of judicial administration. Those who serve on an ordinary reference are not properly compensated for their services if the statute is strictly observed. Second, when discretion must be exercised, the supreme court has failed not only to provide a discernible standard, but also has complicated matters by vacillating in its holdings. The Supreme Court of Florida should, at the first opportunity, establish definite rules to guide lower courts in the objective exercise of their discretion. This step must be taken, because legislation can not adequately cover the topic of discretion.

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