

## REFERENCE OF THE BIG CASE UNDER FEDERAL RULE 53(b): A NEW MEANING FOR THE "EXCEPTIONAL CONDITION" STANDARD\*

RULE 53(b) of the Federal Rules of Civil Procedure<sup>1</sup> permits a trial judge to refer specified issues or an entire case to a master.<sup>2</sup> The master may be instructed to hear and report evidence,<sup>3</sup> or to draw factual and legal conclusions.<sup>4</sup> In an era of crowded federal dockets,<sup>5</sup> the prospect of a time-consuming case has induced some trial judges to refer "big" antitrust or patent infringement suits to a master, thereby permitting speedier adjudication of other pend-

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\*Howes Leather Co. v. La Buy, 226 F.2d 703 (7th Cir. 1955), *cert. granted*, 350 U.S. 964 (1956).

1. "Reference. 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."

FED. R. CIV. P. 53(b). See, generally, 5 MOORE, FEDERAL PRACTICE ¶ 53.05 (2d ed. 1951).

The power to refer is usually more limited under state procedure. See note 40 *infra*.

2. *Specified Issues Referred*: Schlessinger v. Ingber, 29 F. Supp. 581 (S.D.N.Y. 1939); Dysart v. Remington Rand, Inc., 40 F. Supp. 596 (D. Conn. 1941); *cf.* Brosious v. Pepsi-Cola Co., 3 F.R.D. 335 (M.D. Pa. 1943); Columbia Equipment Co. v. Mercantile Trust & Deposit Co., 113 Fed. 23 (5th Cir. 1902).

*Reference of Entire Case*: Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927) (non-jury case); Neale, Inc. v. McCormick, 19 F.2d 320 (9th Cir.), *cert. denied*, 275 U.S. 530 (1927) (same); *In re Narragansett Pier Amusement Corp.*, 224 F.2d 231 (1st Cir.), *cert. denied*, 350 U.S. 862 (1955) (all issues in jury case).

Under rule 53(c), the order of reference may direct a hearing before the master, see notes 3-4 *infra*, or may require him to perform some ministerial act on behalf of the court, *e.g.*, FED. R. CIV. P. 70 (execution of documents upon failure of a party to do so in compliance with order of court).

3. FED. R. CIV. P. 53(c); see, *e.g.*, Kycoga Land Co. v. Kentucky River Coal Corp., 110 F.2d 894 (6th Cir. 1940); Aeroil Burner Co. v. Littleford, 15 F.2d 256 (S.D.N.Y. 1926).

FED. R. CIV. P. 53(e) (3) provides that "in an action to be tried to a jury the master shall not be directed to report the evidence." *Cf.* note 7 *infra*.

4. See Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927); Howes Leather Co. v. La Buy, 226 F.2d 703 (7th Cir. 1955), *cert. granted*, 350 U.S. 964 (1956); Neale, Inc. v. McCormick, 19 F.2d 320 (9th Cir.), *cert. denied*, 275 U.S. 530 (1927). The decision-making authority of the master is prescribed by the order of reference, Ferguson Contracting Co. v. Manhattan Trust Co., 118 Fed. 791 (6th Cir. 1902), but the finality of his determinations may not exceed the limitations set forth in FED. R. CIV. P. 53(e). See notes 7, 30 *infra*.

5. See ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1955 at 3-4 (1956); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1955 ANNUAL REPORT 132-39 (1956); *cf.* text at note 42 *infra*.

ing controversies.<sup>6</sup> However, reference in non-jury cases is authorized only when "some exceptional condition requires it."<sup>7</sup> And the Supreme Court, in

6. See *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927) (patent infringement); *Neale, Inc. v. McCormick*, 19 F.2d 320 (9th Cir. 1927) (same); *Howes Leather Co. v. La Buy*, 226 F.2d 703 (7th Cir. 1955) (antitrust); *In re Narragansett Pier Amusement Corp.*, 224 F.2d 231 (1st Cir. 1955) (same); cf. *United States v. Kirkpatrick*, 186 F.2d 393 (3d Cir. 1951) (admiralty); *Berlin v. Evans*, 300 Fed. 677 (E.D. Pa. 1924) (copyright). *But see Hartford-Empire Co. v. Shawkee Mfg. Co.*, 5 F.R.D. 46 (W.D. Pa. 1946) (refusal to refer complex damage issues).

Various proposals have been offered for expediting trial of the "Big Case" through increased employment of the pre-trial procedures provided by the federal rules. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON PROCEDURE IN ANTITRUST AND OTHER PROTRACTED CASES (1951), reprinted at 13 F.R.D. 62, 83 (rejecting complete reference to masters). For a survey of the procedural devices actually employed in complicated cases, see McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950).

Trial of a complex case may materially delay adjudication of other actions on the calendar. *Los Angeles Brush Mfg. Corp. v. James*, *supra* at 708; Brief for Respondent, p. 13, *Howes Leather Co. v. La Buy*, *supra* (871 cases on docket of trial judge).

However, complete reference may delay final determination of the particular controversy referred. *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942); see notes 26-29 *infra* and accompanying text.

7. FED. R. CIV. P. 53(b), quoted in note 1 *supra*.

The "exceptional condition" standard is expressly not applicable to "matters of account." *Ibid.* Thus, a court may refer any complex accounting question, see *Ramsey v. Home Mortg. Co.*, 47 F.2d 621 (E.D.N.C.), *rev'd on other grounds*, 49 F.2d 738 (4th Cir. 1931); *Dysart v. Remington Rand, Inc.*, 40 F. Supp. 596 (D. Conn. 1941), although such a reference should usually be delayed until the issues of liability are determined by the court, *O'Cedar Corp. v. F. W. Woolworth Co.*, 73 F.2d 366 (7th Cir. 1934). Reference in state courts over a party's objection is typically limited to cases involving "long accounts." See note 40 *infra*.

Cases in which a jury trial, available as of right, has been waived are included in the category "to be tried without a jury." Cf. 5 MOORE, *op. cit. supra* note 1, ¶ 38.04.

Rule 53(b) provides a separate standard for reference of jury cases, in which "a reference shall be made only when the issues are complicated." Such complicated issues may involve a lengthy problem of computation, see *Ex parte Peterson*, 253 U.S. 300 (1920), or other complex transactions, see *Graffis v. Woodward*, 96 F.2d 329 (7th Cir.), *cert. denied*, 305 U.S. 631 (1938).

The findings of a master in a jury action "are admissible as evidence of the matters found and may be read to the jury," whereas in a non-jury case, the master's findings of fact must be accepted by the court "unless clearly erroneous." FED. R. CIV. P. 53(e). Thus, in a jury case, the findings must be evaluated, and finally determined, by the jury. Evidence can be introduced before the jury to controvert the master's findings, *Gay v. United States*, 118 F.2d 160 (7th Cir. 1941). *But cf. Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 42 F. Supp. 225, 227 (D. Conn. 1940). Thus, the areas of real dispute can be clarified, and the questions simplified, for the jury's ultimate determination. See, e.g., *Ex parte Peterson*, *supra*; *Irving Trust Co. v. Trust Co. of N.J.*, 75 F.2d 280 (2d Cir. 1935); *Veneri v. Draper*, 22 F.2d 33 (4th Cir. 1927), *cert. denied*, 276 U.S. 633 (1928).

A reference order does not violate a party's constitutional right to jury trial if the jury finally determines the issues. *Ex parte Peterson*, *supra*; *Irving Trust Co. v. Trust Co. of N.J.*, *supra*; *Veneri v. Draper*, *supra*. But the master may not hear and determine the

*Los Angeles Brush Mfg. Corp. v. James*,<sup>8</sup> cautioned judges to use the reference procedure sparingly, emphasizing its preference for trials to the court under ordinary circumstances.<sup>9</sup> Although the Court suggested that mandamus would issue if the procedure were abused,<sup>10</sup> it held that a congested calendar could at times constitute an emergency invoking the exceptional condition feature of the rule.<sup>11</sup> Thus presented with a vague standard under *James*, appellate courts have had considerable difficulty in determining when a crowded docket would constitute an exceptional condition, and have reached conflicting results in essentially similar cases.<sup>12</sup>

The difficulty of applying rule 53(b) is demonstrated in the recent case of

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issues, absent consent of all parties, where a constitutional right to jury trial exists. *Vermeule v. Reilly*, 196 Fed. 226 (S.D.N.Y. 1912).

For the effect of a master's findings in a non-jury case, see note 30 *infra*.

8. 272 U.S. 701 (1927).

9. In *James*, the Court interpreted equity rule 59, from which the "exceptional condition" standard for non-jury reference under the present rule 53(b) was derived. Petitioner, a defendant in two pending patent infringement suits, sought mandamus, through an original petition before the Supreme Court, to compel the district judge to vacate orders referring the cases to a standing master for hearing. The petition alleged an agreement among the judges of the district to refer substantially all patent cases to the same master, at the parties' expense, *cf.* note 21 *infra*. Acknowledging its direct power to compel obedience to the procedural rules which it had established, the unanimous Court, speaking through Chief Justice Taft, declared:

"There is no reason why a patent litigant should be subjected to any greater expense than any other litigant, except as it may be involved in the inherent and inevitable difference between the presentation of the issues as to the merit and validity of a patent grant, and that which obtains in the litigation of an ordinary bill for relief in equity, or of an action at law upon a debt or for a tort."

272 U.S. at 706-07 (dictum).

10. *Id.* at 706.

In the subsequent case of *McCullough v. Cosgrave*, 309 U.S. 634 (1940), the Supreme Court, interpreting the present federal rule 53(b), granted mandamus to prevent reference of a group of patent infringement cases. *McCullough* was a cryptic per curiam opinion which cited only *James*.

11. In *James*, despite the sentiments quoted in note 9 *supra*, the writ of mandamus was denied, the Court holding that trial judges should have discretion reasonably to allocate their limited time among various classes of cases. 272 U.S. at 707-08. *But see* *McCullough v. Cosgrave*, *supra* note 10.

12. The courts have not agreed with respect to the substantive definition of calendar congestion as an exceptional condition. *Compare* *Howes Leather Co. v. La Buy*, 226 F.2d 703 (7th Cir. 1955), *cert. granted*, 350 U.S. 964 (1956), *with* *Neale, Inc. v. McCormick*, 19 F.2d 320 (9th Cir.), *cert. denied*, 275 U.S. 530 (1927). Nor have they been in accord as to the propriety of mandamus as a remedy for a party objecting to a reference. *Compare* *Howes Leather Co. v. La Buy*, *supra* (mandamus granted); *United States v. Kirkpatrick*, 186 F.2d 393 (3d Cir. 1951) (same; ADMIRALTY RULE 43½ and FED. R. CIV. P. 53(b) held *in pari materia*), *with* *In re Narragansett Pier Amusement Corp.*, 224 F.2d 231 (1st Cir.), *cert. denied*, 350 U.S. 862 (1955) (mandamus unavailable).

Generally, a refusal to order reference is not reversible error, since, if the circumstances specified in rule 53(b) are present, the procedure is wholly within the discretion of the trial judge. *Buckley v. Altheimer*, 152 F.2d 502 (7th Cir. 1946).

*Howes Leather Co. v. La Buy*.<sup>13</sup> The Seventh Circuit granted mandamus to compel a district judge faced with a crowded docket to vacate an order referring a civil antitrust suit to a master. All plaintiffs and defendants had objected to the reference.<sup>14</sup> The majority of the court held that congestion of the trial calendar, complexity of the issues, and a subordinate accounting problem did not together constitute such exceptional conditions as to justify reference of a non-jury case in its entirety.<sup>15</sup> The reference was held an abuse of discretion sufficient to permit employment of the extraordinary remedy of mandamus.<sup>16</sup> The dissenting opinion stated that the *James* dictum, and other decisions granting mandamus against reference of specified classes of cases,<sup>17</sup> were not sufficient authority for such relief in this instance.<sup>18</sup> The Supreme Court has granted certiorari.<sup>19</sup>

Although the Seventh Circuit reached the proper result, neither *Howes* nor other cases in this field have adequately considered the disadvantages that compulsory reference of an entire case entails for an objecting litigant. While the services of judges, and miscellaneous court facilities, are provided at public expense,<sup>20</sup> the master's compensation as well as other costs of a reference must be borne by the parties.<sup>21</sup> And reference of a time-consuming case is expensive:

13. 226 F.2d 703 (7th Cir. 1955), *cert. granted*, 350 U.S. 964 (1956).

14. *Id.* at 706.

15. *Id.* at 707.

16. *Id.* at 705-06, 711. The majority opinion interpreted *McCullough v. Cosgrave*, 309 U.S. 634 (1940), see note 10 *supra*, as authority for adopting the dictum in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706-07 (1927), see text at notes 9-10 *supra*. The majority followed the Third Circuit decision in *United States v. Kirkpatrick*, 186 F.2d 393 (3d Cir. 1951), but disagreed with the First Circuit holding in *In re Narragansett Pier Amusement Corp.*, 224 F.2d 231 (1st Cir. 1955), on the availability of mandamus as a remedy. 226 F.2d at 705, 709, 711. See notes 48-52 *infra* and accompanying text.

17. The dissenting opinion of Judge Major distinguished *United States v. Kirkpatrick*, 186 F.2d 393 (3d Cir. 1951), as having granted mandamus against reference of admiralty cases pursuant to a *plan* among the judges in the district to refer all such cases. In view of the conflict in holdings between *McCullough v. Cosgrave*, 309 U.S. 634 (1940), and the *James* case, upon whose dictum *McCullough* relied, see note 10 *supra* and accompanying text, Judge Major concluded that *McCullough* must have involved either some flagrant act by a district judge, or "a concert of action on the part of several District Judges" (quoting the *James* dictum). *Howes Leather Co. v. La Buy*, 226 F.2d at 713 (dissenting opinion).

18. The dissenting opinion conceded the power of an appellate tribunal to grant mandamus in a proper case. But it contended that use of the extraordinary remedy in this instance, to correct what was at most an erroneous reference of a single case, would amount to an unwarranted substitution of the judgment of the court of appeals for that of the trial judge on a discretionary matter. *But cf.* notes 50-53 *infra* and accompanying text.

19. 350 U.S. 964 (1956).

20. See 28 U.S.C.A. § 135 (Supp. 1955) (compensation of federal district judges); *cf.* 28 U.S.C. § 142 (1952) (court to be held only where federal quarters are available, or where court accommodations are provided to the government without cost).

21. See *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942); cases cited note 22 *infra*.

The amount of the master's fee is within the discretion of the trial court, and will only

in *Howes*, the parties were initially asked to post \$10,000 security for the master's fee.<sup>22</sup> The cost burden is especially significant when the litigants are of unequal economic strength.<sup>23</sup> Apprehensive of the expense of an impending reference, a party of limited means may be forced to concur in an otherwise unacceptable settlement.<sup>24</sup> True, calendar congestion poses a serious obstacle

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be modified upon a showing of error amounting to "abuse of discretion." *Newton v. Consolidated Gas Co.*, 259 U.S. 101 (1922) (compensation for 282 days' service reduced to \$49,250); *Universal Oil Products Co. v. Hall*, 76 F.2d 258 (8th Cir.), *cert. denied*, 296 U.S. 621 (1935).

The expenses of reference, including the master's fee, stenographic reporters' fees, and miscellaneous disbursements, are "costs" within the meaning of FED. R. CIV. P. 54(d). *Dyker Bldg. Co. v. United States*, 182 F.2d 85 (D.C. Cir. 1950). Rule 54(d) provides that costs shall generally be taxed in favor of the party prevailing on the merits, but permits the trial court to modify the general rule in its discretion.

Initially, the expense of reference falls upon the adversaries equally. See, *e.g.*, note 22 *infra*. But if the financial condition of the parties is grossly unequal, the more affluent may be ordered to advance the costs temporarily. *Heiberg v. Hasler*, 1 F.R.D. 735 (E.D.N.Y. 1941).

After judgment, the court may, in the exercise of the discretion granted by rule 54(d), divide the cost burden among the litigants. *Woods v. Piolet*, 187 F.2d 453 (7th Cir. 1951) (successful plaintiffs in action for treble damages for rent overcharges to pay half of cost of reference); *Robertshaw-Fulton Controls Co. v. Patrol Valve Co.*, 106 F. Supp. 427 (N.D. Ohio 1952) (both parties profited from speedy determination of patent validity; prevailing party ordered to pay \$5,000 of \$18,000 cost of reference); *Gold Seal Importers, Inc. v. Morris White Fashions, Inc.*, 4 F.R.D. 386 (S.D.N.Y. 1945) (successful party obtaining nominal damages to pay two-thirds of cost). And a prevailing party may be charged in full for the proceedings, if he alone favored an erroneous reference. See *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, *supra*.

22. Brief for Petitioners, p. 11, *Howes Leather Co. v. La Buy*, 226 F.2d 703 (7th Cir. 1955). As *Howes* involved two actions consolidated for trial, the immediate expenditure amounted to a total of \$2,500 for the plaintiffs in each suit, and a like amount for each group of defendants. Reply Brief for Respondent, p. 18, *Howes Leather Co. v. La Buy*, *supra*. The multiplicity of parties involved in the cases, however, resulted in a division of expense such that no party was required to post more than \$415. *Id.*, pp. 18-19. But there was no assurance that additional payments to the master would not be required. Letter from Jack I. Levy, Esq., Counsel for *Howes Leather Co.*, to the *Yale Law Journal*, April 10, 1956, on file in Yale Law Library. The cost factor was the principal reason for the objection to reference. *Ibid*. For examples of the possible magnitude of the cost of reference, see *Newton v. Consolidated Gas Co.*, *supra* note 21 (\$49,250); *Robertshaw-Fulton Controls Co. v. Patrol Valve Co.*, *supra* note 21 (\$18,000); *Dysart v. Remington Rand, Inc.*, 96 F. Supp. 655 (D. Conn. 1950), *appeal dismissed sub nom. Lyman v. Remington Rand, Inc.*, 188 F.2d 306 (2d Cir. 1951) (\$10,000).

23. *Graffis v. Woodward*, 96 F.2d 329, 332 (7th Cir.), *cert. denied*, 305 U.S. 631 (1938) (dictum). Petitioners, plaintiffs in a patent infringement action "at law" against the Ford Motor Company, sought mandamus to prevent reference of the case. Relief was denied, despite petitioners' allegation that they would be unable to bear the cost of the proposed reference, and despite the rule, prior to adoption of the Federal Rules of Civil Procedure, that the cost of reference in an action at law was taxable in favor of the prevailing party as of right. *Ibid*; *cf.* note 21 *supra*.

24. *Cf.* Petition for Certiorari, p. 16, *In re Narragansett Pier Amusement Corp.*, 350 U.S. 862 (1955) ("It is extremely doubtful, however, if any injured person of moderate

to efficient adjudication.<sup>25</sup> But the cost of alleviating a crowded docket should not be inequitably allocated to a few litigants whose disputes are expected to require lengthy trials.

Moreover, reference of a case to a master for hearing frequently results in a considerable protraction of the fact-finding process.<sup>26</sup> A master appointed *ad hoc* by the court may be able to devote only a limited portion of his time to the referred case.<sup>27</sup> Furthermore, since the master's conclusions are subject to review by the court,<sup>28</sup> extensive duplication is an inherent feature of the procedure. The likelihood of delay in adjudication is greater when a case is scheduled for an early trial to the court at the time of the reference order.<sup>29</sup>

When a district court refers a non-jury case in its entirety, it creates a tribunal of considerable importance. Not only is an initial recommendation on the merits made by the master, but his findings of fact must prevail unless "clearly erroneous."<sup>30</sup> Yet, a master is appointed without the legal and other

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means would undertake the prosecution of an antitrust action against great combinations of capital if he anticipated that many years later it would be referred. . . ." (statement by petitioners); *Graffis v. Woodward*, *supra* note 23.

In *Narragansett*, the unsuccessful petitioners for mandamus were plaintiffs in civil antitrust suits, to be tried before a jury. *In re Narragansett Pier Amusement Co.*, 224 F.2d 231 (1st Cir. 1955). The reference was ordered seven years after commencement of the actions, after petitioners had expended over \$1,900 on formal pre-trial discovery proceedings, in expectation of a jury trial of all the issues. Petition for Certiorari, p. 26, *In re Narragansett Pier Amusement Co.*, 350 U.S. 862 (1955). See note 29 *infra* and accompanying text.

25. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1955 ANNUAL REPORT 95-121, 132-39, 162-93 (1956), presents a tabulation of civil litigation in the federal district courts, with detailed information as to those districts in which calendar congestion is most acute. *Cf.* notes 36-39 *infra* and accompanying text.

26. *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942); Letter from Jack I. Levy, Esq., *supra* note 22; *cf.* note 29 *infra* and accompanying text.

27. If a master is not employed on a full-time basis, *cf.* note 39 *infra*, his availability in a given case must depend on his other professional obligations at the time. *Cf.* FED. R. CIV. P. 53(d)(1) (party may apply for court order directing master to speed proceedings).

28. See note 30 *infra* and accompanying text; *cf.* note 7 *supra*.

29. Even if the proceedings before the master, and the judicial review of his report, require a longer period of time than a trial to the court, the trial calendar may be so congested that reference will speed the final disposition of the case. But even this advantage is not gained if reference is ordered when trial is imminent. See letter from Albert R. Connelly, Esq., Cravath, Swaine & Moore, New York, N.Y., to the *Yale Law Journal*, May 4, 1956, on file in Yale Law Library.

30. FED. R. CIV. P. 53(e)(2); *Carter Oil Co. v. McQuigg*, 112 F.2d 275 (7th Cir. 1940).

An appellate court must also accept such findings, if not clearly wrong, *Keefe v. Macomb County*, 140 F.2d 966 (6th Cir. 1944), even if objections thereto were sustained by the trial court. *In re Connecticut Co.*, 107 F.2d 734 (2d Cir. 1939); *cf.* *Carter Oil Co. v. McQuigg*, *supra*. However, the appellate court is free to draw any reasonable inferences of law from the facts found. *Socony-Vacuum Oil Co. v. Oil City Refiners, Inc.*, 136 F.2d 470 (6th Cir.) (dictum), *cert. denied*, 320 U.S. 798 (1943); *cf.* *Pallma v. Fox*, 182 F.2d 895 (2d Cir. 1950). And a master's findings, even if approved by the trial court, may be

institutional safeguards designed to assure the selection of a competent judiciary.<sup>31</sup> Although federal rule 53(a) authorizes the appointment of a panel of standing masters by the judges of each district, this provision is not commonly utilized.<sup>32</sup> Instead, a judge usually chooses a special master at the time of each reference.<sup>33</sup> Any disinterested attorney is eligible.<sup>34</sup> The parties are sometimes consulted prior to final designation of the master.<sup>35</sup> But, since the master is personally appointed by the trial judge, objection to a particular selection may in fact be a delicate matter.

The proper remedy for congested trial dockets is the expansion of the judiciary at public expense.<sup>36</sup> Congress should authorize the appointment of additional federal judges in those districts where the shortage is most acute.<sup>37</sup> Or, if a separate forum for certain classes of complex disputes is deemed advisable,<sup>38</sup> provision should be made for public remuneration of presidentially ap-

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reversed on appeal in the light of contrary evidence "beyond any reasonable doubt." *Home Mortg. Co. v. Ramsey*, 49 F.2d 738, 741 (4th Cir.), *reversing* 47 F.2d 621 (E.D.N.C. 1931).

The parties can, by stipulation, provide that the master's report shall be final with respect to questions of fact. FED. R. CIV. P. 53(e)(4). Such a stipulation places the master in a position similar to that of an arbitrator. See 9 U.S.C. §§ 9-11 (1952) (arbitration statute).

31. Federal district judges are appointed by the President, with the consent of the Senate. 28 U.S.C. § 133 (1952). Masters are appointed by one or more district judges. See FED. R. CIV. P. 53(a).

32. Replies to *Yale Law Journal* questionnaire, sent to clerks of selected federal district courts, April 1956, on file in Yale Law Library.

33. *Ibid.*

34. In the absence of some specific factor which would disqualify any judicial officer, *cf.* *Finance Committee v. Warren*, 82 Fed. 525 (7th Cir. 1897), or a specific statutory disqualification, 28 U.S.C. § 458 (1952) (near relatives of judge); *id.* § 957 (court clerks and their deputies), any person well versed in the law may serve as master. Misconduct of a sort judicially recognizable may result in denial or reduction of compensation, *Universal Oil Products Co. v. Hall*, 76 F.2d 258 (8th Cir.), *cert. denied*, 296 U.S. 621 (1935), or disciplinary action by the court, *In re Gilbert*, 276 U.S. 294 (1928) (suspension from bar of Supreme Court for withholding portion of fee ordered remitted on review of case).

35. Replies to *Yale Law Journal* questionnaire, *supra* note 32.

36. See ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1955 at 3-6.

37. *Ibid.*

It is estimated that an additional federal district judgeship costs \$58,300 for the first year, and \$50,000 yearly thereafter, exclusive of the cost of additional quarters. Letter from Orin S. Thiel, Assistant Chief of the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, to the *Yale Law Journal*, May 24, 1956, on file in Yale Law Library.

38. Such separate tribunals might be established for complicated litigation in general, in order to obviate the delay to parties in other cases, and to minimize cost by compensating the judicial officials concerned on a per diem basis. Alternatively, specialized referees might be appointed for each field of controversy. *Cf.* *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 42 F. Supp. 225 (D. Conn. 1940); 38 STAT. 722 (1914), 15 U.S.C. § 47 (1952) (Federal Trade Commission may be appointed master in chancery to recommend form of decree in antitrust suit by government). *But cf.* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 366 (1955) (economic

pointed masters, selected for part-time or full-time duty.<sup>39</sup> Simultaneously, rule 53(b) should be amended to permit reference to such tribunals of cases of the specified types, unless some exceptional condition warrants trial to the court.

In the absence of congressional action, the burden of crowded dockets should not be relieved by indiscriminate resort to the reference procedure.<sup>40</sup> Since many federal courts are currently confronted with a substantial backlog of cases,<sup>41</sup> the labeling of calendar congestion as an exceptional condition justifying compulsory reference under rule 53(b) is patently unrealistic.<sup>42</sup> Considering the serious disadvantages of reference from the litigants' point of view, a pending case should never be referred because of calendar congestion if, as in *Howes*, both parties object.<sup>43</sup> The objection of one party, if interposed in good faith, should ordinarily suffice to prevent such reference. However, when the opposition is based primarily upon considerations of expense, the judge may order reference on condition that the party seeking reference underwrite its cost, regardless of the outcome of the litigation.<sup>44</sup> Calendar congestion should

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"experts" should be confined to status of witnesses in antitrust suits; Sherman Act should be administered by judicial personnel).

Constitutional problems could be avoided by limiting the decision-making powers of the newly created tribunals to those now delegable to masters. *Cf.* note 7 *supra*.

39. Public compensation of masters would eliminate the cost burden which attends reference under the present procedure. *Cf.* note 22 *supra*. Some states provide for salaried referees. See N.Y. JUDICIARY LAW §§ 116-116a (retired state judges); CONN. GEN. STAT. § 8177 (1949) (same).

40. See text at notes 20-35 *supra*.

Under state procedure, reference of an entire case over the objection of one or more parties is generally permitted only when matters of account are at issue. *E.g.*, CAL. CODE CIV. PROC. § 639 (Deering 1953) (long account on either side); N.Y. CIV. PRAC. ACT § 466 (long account without difficult questions of law). In Illinois, where the rule appears more liberal, ILL. ANN. STAT. c. 110, § 185 (Smith-Hurd 1955) (any chancery action, or any action at law involving a matter of account), the maximum master's fee allowable without consent of the parties is \$5 per day, *id.* c. 117, § 3, so that, realistically, there is no compulsory reference.

41. See authorities cited note 5 *supra*.

42. *Cf.* *Howes Leather Co. v. La Buy*, 226 F.2d 703, 709 (7th Cir. 1955) (dictum).

43. See text at notes 20-29 *supra*.

When all parties consent, there is no objection to complete or partial reference. See *Flanders v. Coleman*, 249 Fed. 757, 758 (S.D. Ga. 1918). An objection to reference must be made before the trial court, and cannot be asserted for the first time on appeal. *Coyner v. United States*, 103 F.2d 629 (7th Cir. 1939).

44. The party in favor of reference should be permitted to partake of its principal advantage—swift adjudication in a district whose calendar is congested—only upon unconditionally assuming its most onerous burden, that of cost. If other bona fide objections are presented by an adversary, however, reference should nevertheless be denied. But if the circumstances surrounding the objection to reference indicate bad faith, reference should be ordered despite the objection, with costs to be assessed in favor of the party prevailing on the merits. See *Helene Curtis Industries, Inc. v. Sales Affiliates, Inc.*, 105 F. Supp. 886, 906 (S.D.N.Y.), *aff'd*, 199 F.2d 732 (2d Cir. 1952); note 45 *infra*.

Allocation of the cost of reference is within the discretion of the court. FED. R. CIV. P. 53(a); see, generally, 5 MOORE, *op. cit. supra* note 1, ¶ 53.04; note 21 *supra*.

be held an exceptional condition only when the court finds that one party has objected to reference in bad faith, in order to threaten an adversary with irreparable injury by delaying the adjudication of a claim.<sup>45</sup>

Although the presence of a crowded docket should generally be disregarded in the application of the exceptional condition standard, other factors may at times warrant reference of one or more specified matters in an action tried before a judge. A partial reference, limited to particular issues, is not subject to the same objections as reference of a burdensome case to a master *in toto*. Complete reference summarily removes the trial of a case from immediate judicial supervision.<sup>46</sup> In contrast, partial reference, when warranted by exceptional conditions, connotes a discriminate selection of questions whose initial examination by a master will aid the court in the adjudication of the case before it.<sup>47</sup> Moreover, insofar as reference of selected issues entails the

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45. See *Helene Curtis Industries, Inc. v. Sales Affiliates, Inc.*, *supra* note 44. Defendant had sued plaintiff's distributors in another forum, claiming infringement of a patent. Plaintiff sought a declaratory judgment holding defendant's patent void, demanding reference as a time-saving device (as an alternative to a trial preference, see FED. R. CIV. P. 57), on the ground that an entire industry was interested in the outcome of the highly complex action. Reference was ordered, over defendant's objection, the trial court holding that a litigant "forum shopping with a vengeance," 105 F. Supp. at 902, would not be permitted to delay adjudication in a district whose trial calendar was "29 months behind," *id.* at 905. The district court, denying defendant's demand for a trial by a judge, stated that "a former Federal Judge . . . would be considered for appointment as a master." *Id.* at 906. The court also held the objection to cost immaterial, in view of "the financial standing of the parties in litigation and the huge stakes involved in the outcome." *Ibid.* On appeal, the Second Circuit affirmed the decision below and refused mandamus to revoke the reference order. 199 F.2d at 733-34.

In *Helene Curtis*, the objecting defendant was apparently seeking to delay determination of whether its patent was infringed by its opponents' manufacture and distribution of a product. Although an eventual judgment in defendant's favor would compensate it for any delay in adjudication, by means of increased damages on its infringement claims, *cf.* *Textag Co. v. Hayslip*, 192 F.2d 435 (5th Cir. 1951), a final judgment for plaintiffs would not compensate them for inhibitions on their business brought about during the delay in determination of the validity and scope of defendant's patent. Such an "exceptional" situation warrants reference to prevent injury to a party that would not be adequately compensated by a subsequent judgment. Under these circumstances, the party seeking reference should be required to pay the cost if its opponent's objection to the cost burden is made in good faith. See note 44 *supra* and accompanying text.

A trial preference may be granted when the nature of the controversy requires a speedy trial. See FED. R. CRIM. P. 50 (criminal prosecutions); FED. R. CIV. P. 57 (declaratory judgments). When, however, a party attempts in bad faith to delay litigation, compulsory reference should be available as an alternative remedy. For a trial preference delays adjudication of suits filed before the preferred case, thus depriving other litigants of equal access to the tribunal.

46. This removal of judicial control is most arbitrary when an entire class of cases is referred en masse. See *United States v. Kirkpatrick*, 186 F.2d 393 (3d Cir. 1951) (mandamus granted to revoke reference of group of admiralty cases). *But cf.* *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927) (mandamus denied).

47. See *Heiberg v. Hasler*, 1 F.R.D. 735 (E.D.N.Y. 1941) (reference on question of foreign law); *Schlessinger v. Ingber*, 29 F. Supp. 581 (S.D.N.Y. 1939) (issue of juris-

expenditure of less time and money than reference of a complete case, it is less oppressive to the parties.<sup>48</sup>

An order referring substantially all the issues in a pending case to a master should be subject to appellate review upon petition for a writ of mandamus.<sup>49</sup> Unless an appellate court is willing to consider such a petition on its merits, the litigants will be denied effective relief from the unique burden of an erroneous reference order.<sup>50</sup> Reversal of a final judgment, predicated upon improper use of the reference procedure, will not permit the parties to recover the wasted fee paid the master.<sup>51</sup> Moreover, existing law suggests that a final judgment will not be reversed merely because the trial judge has misapplied

diction over defendant); *Bartlett v. Gates*, 118 Fed. 66 (C.C.D. Colo. 1902) (superintendence of corporate election); *cf. Brosious v. Pepsi-Cola Co.*, 3 F.R.D. 335 (M.D. Pa. 1943) (in civil antitrust action, reference of damage computation prior to trial of issue of liability was refused, in view of absence of exceptional condition justifying reference of liability question). See also *Troyak v. Enos*, 204 F.2d 536, 545 (7th Cir. 1953) (*inter alia*, hearings at various places throughout the country required).

The master in chancery was traditionally employed as an aid to, rather than a substitute for, judicial determination of controversies. See *Kimberly v. Arms*, 129 U.S. 512, 523 (1889); *cf. cases cited note 2 supra*.

48. See text at notes 20-29 *supra*.

49. The appellate court should examine the scope of the reference as a prerequisite to consideration of the merits of the petition for mandamus. And mandamus should be granted whenever complete reference has been ordered in violation of the requirements of rule 53(b). Since partial reference does not subject objecting litigants to the same hardships, see notes 47-48 *supra* and accompanying text, the desirability of avoiding excessive interlocutory appeals demands curtailment of the right to review unless a substantially complete reference is made. See Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102, 1107-09 (1950); *cf. Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943), quoted in *Howes Leather Co. v. La Buy*, 226 F.2d 703, 712 (7th Cir. 1955) (dissenting opinion).

If a party objects to complete reference in bad faith, see note 45 *supra* and accompanying text, he still would be given a right of review. However, the possibility that this would produce the same delay which prompted the objection is slight. Appellate courts can give priority to petitions for mandamus; this procedure should be employed whenever the district court finds that any delay would be unduly prejudicial to the interests of the litigants seeking reference. See 3D CIR. RULE 19; 7TH CIR. RULE 19.

50. Refusal to entertain the petition for mandamus on its merits will delay relief for a party to an erroneous reference until the final judgment can be appealed. See 28 U.S.C. § 1291 (1952) ("final judgment statute").

51. Costs can be re-allocated on appeal, but the litigants as a group cannot recover the expenses of the reference. See *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809 (7th Cir. 1942) (judgment below affirmed on merits; expense of reference shifted to prevailing party, who alone had requested procedure, in view of appellate court's finding "exceptional condition" lacking); *Tendler v. Jaffe*, 203 F.2d 114 (D.C. Cir. 1952) (costs of erroneous reference divided equally between parties); *cf. note 21 supra*.

If one party has requested a reference which is held erroneous, his adversary can be relieved of the cost burden on appeal. *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, *supra*. If the trial court has ordered reference on its own motion, even this partial relief is not fully available. See *Howes Leather Co. v. La Buy*, 226 F.2d 703, 706 (7th Cir. 1955), *cert. granted*, 350 U.S. 964 (1956).

the standards of rule 53(b), and has referred to a master matters which should have been heard by the court.<sup>52</sup> In light of this doctrine, a party will be barred from obtaining meaningful review of a district court's decision to employ a master unless a mandamus proceeding is available. Thus, the Supreme Court should approve the conclusion in the *Howes* case that a petition for a writ of mandamus to vacate an order of reference may properly be entertained.<sup>53</sup> Since the order of reference itself was without merit, the decision of the Seventh Circuit should be affirmed. Furthermore, the Supreme Court should repudiate its holding in the *James* case, and declare that calendar congestion is not an exceptional condition justifying employment of a master over the bona fide objection of a party.

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52. See *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, *supra* note 51 (affirmed on the merits; costs re-allocated); *cf.* *Tendler v. Jaffe*, *supra* note 51 (same). Reversal of a decision which was based on the report of a master seems to require a showing that the report was clearly erroneous on the merits. See *Prudence Bonds Corp. v. Prudence Realization Corp.*, 174 F.2d 288 (2d Cir. 1949) (affirmance despite express disapproval of reference); *cf.* *Helfer v. Corona Products, Inc.*, 127 F.2d 612 (8th Cir. 1942); note 30 *supra*.

53. See *McCullough v. Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927); *Howes Leather Co. v. La Buy*, 226 F.2d 703 (7th Cir. 1955), *cert. granted*, 350 U.S. 964 (1956). *But see In re Narragansett Pier Amusement Corp.*, 224 F.2d 231 (1st Cir.), *cert. denied*, 350 U.S. 862 (1955).

Since the reference ordered in *Howes* encompassed all the issues in the case, 226 F.2d at 706-07, the petition was properly heard on its merits. See note 49 *supra*.