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Trends in Procedural Law*

EDSON R. SUNDERLAND†

THE ROLE OF THE LEGAL PROFESSION

It is quite possible that the most significant development in procedural law will prove to be the fundamental change which is taking place in the role of the legal profession.

No one would seriously assert that society has been content with the way in which courts and lawyers have performed their functions. Its criticisms have necessarily been directed to the general effectiveness of legal proceedings, rather than to the nature of the particular methods employed. Laymen have no way of knowing what is wrong with a technical mechanism. But they have been convinced that procedural law has not produced satisfactory results, and they have unhesitatingly laid the blame upon the legal profession.

There appears at first sight to be an element of unfairness in this accusation, because procedural law, like other law, is under the ultimate control of the legislature, which directly represents the public, not the legal profession. If judges and lawyers are forced to use a procedure imposed upon them by legislation, they ought not to be held responsible for its shortcomings.

But the argument here suggested will not bear close inspection. In the first place, the profession was never able to show whether or to what extent responsibility for poor results should be assigned to those who made the rules rather than to those who used them. The best rules might be crippled by a too technical administration on the part of the judges, and might be used as instruments of annoyance and oppression by lawyers with too little regard for their obligations as ministers of justice. In the second place, since lawyers not only constitute a very influential group in the community, but are always found in relatively large numbers among the members of legislative assemblies, it was difficult for the public to understand why, if the fault lay with the rules, the lawyers should not, with their superior technical knowledge

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* This article is based on a paper which was delivered on April 7, 1938, at the Dedication of Leche Hall, Law Building of the Louisiana State University Law School.
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and skill, contribute more to the improvement of legislation in the field of procedural law.

The public, therefore, rejected the plea by which the profession sought to avoid responsibility. This meant that the profession must either admit the charge of failure to perform its duties or must itself lead the way toward a reform of our procedural system which would make it responsive to the needs of modern society.

The choice seems definitely to have been made, and the profession is assuming more and more responsibility for providing an adequate and satisfactory administration of justice. This seems to me to mark the most significant of the modern trends in procedural law. A hundred years ago in England it was the public which was waging a long war for the reform of legal procedure against a hostile and entrenched profession.1 Today in the United States it is the lawyers who are actively seeking, through their national, state and local organizations, and with the constant aid of the law schools, by every means at their command, to demonstrate that justice can be administered without the delays, the expense and the uncertainties of which the public has so long complained.2

When we examine the means by which the profession is seeking to improve the quality of judicial administration, it is clear that their efforts cover an extraordinarily wide range. They have attacked the problem of the organization of both the courts and the bar; they have re-examined the character of the services which the courts ought to render; they have analyzed the various sources of regulatory rules; and they have devised new methods of meeting the age-old problems of pleading and preparation for trial. What are the more important trends observable in this notable effort on the part of the bar?

THE ORGANIZATION OF THE COURTS

At the very foundation of the administration of justice lies the problem of the organization of the courts. It is a double problem, and relates on the one hand to administrative direction within the court, and on the other to the relations which different courts in the judicial system bear to one another.

(a) **Administrative Direction**

As courts are commonly organized, no judge is subject to the direction of any other nor of all the others together. Each is separately appointed or elected and has an individual status, which renders him independent of the rest. Cooperation between them is purely a matter of personal choice and voluntary consent, and it varies from time to time in accordance with changes in personnel and current views of political expediency. No organization so destitute of centralized responsibility could be expected to function vigorously.

So far as the judges are concerned, it is impossible to maintain or equalize loads, eliminate duplications of effort, assign cases to those best qualified to deal with them, or develop expert performance through specialization, unless all the members of the court are subject to some administrative direction. This could be exercised through a presiding judge whose selection and tenure of office are not under the control of the judges whose work he directs, and who is sufficiently relieved of judicial duties to be able to devote an adequate amount of time and attention to the management of the business of the court.

Definite measures are being advocated and definite steps have been taken to develop an internal unity of direction and control of this kind over all the activities of the court. The movement has progressed further in large metropolitan communities than in the states at large, because the pressure of litigation in congested areas makes the need for administrative organization more obvious.

But the advantages of state-wide unification of judicial action are almost equally important. Judicial personnel is distributed over the state in accordance with fixed geographical lines, which perhaps once had some relation to the amount of local judicial business. But population and business activity in the various judicial districts constantly change, while judicial offices once created tend to continue forever. The distribution of the load among the judges of the state therefore tends to assume an almost fantastic irregularity. In the report of the Judicial Council of Michigan for 1937 it appeared that the trial load among the judges

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3. Detroit’s Common Pleas Court (1932) 16 J. Am. Jud. Soc. 117; Court Supervision Wins in Cleveland (1928) 12 id. 11; Best Organization for a Large City Court (1934) 18 id. 41; Plan to Integrate Washington Judicature (1936) 19 id. 147.

4. Statistics are given in each annual report of the Judicial Council of Michigan showing the trial load carried by each judge in the state during the
of the various judicial circuits varied from 13 cases per judge per
year to 236 cases per judge per year. Such discrepancies, if they
cannot be removed by rearrangement of judicial districts, and
political considerations may make this impossible, can be substan-
tially reduced by the temporary assignment of judges in the light
circuits to aid those in the heavy circuits. This is a task for a
state-wide agency, which in some states is being provided in the
form of a presiding judge and in others in the form of a judicial
council. The Ashurst bill, introduced in the seventy-fifth Con-
gress, proposed to provide a very substantial degree of adminis-
trative unity for the United States district courts.

(b) Organization of the Court System

When we look beyond the institution which we call a court
and examine its relations to other courts in the system, we find an
amazing complexity and confusion in the distribution of judicial
power. In practically all states, for example, we have separate
courts for large and small cases, with an arbitrary line of division
between them. We usually have separate courts of first instance
and of review. We frequently have separate courts of probate,
separate criminal courts, separate courts of equity, and separate
courts for causes arising in certain localities. We often apportion
jurisdiction of the same kind among several different courts, each
exercising only a designated and restricted part of it, as where
certain appeals must be taken to one reviewing court and other
appeals to another. Sometimes we establish different courts with
concurrent jurisdiction in certain classes of cases and exclusive
jurisdiction in others. It is not uncommon to find a large number
of municipal courts, in the various cities of the same state, hardly
any two of which exercise the same jurisdiction. And as a final
complication, the legislature is constantly shifting and changing
the jurisdiction of the various courts, every change involving
more or less litigation to construe the meaning and ascertain the
effect of the legislative act.

Now, it is a principle of our law that whenever a case gets
into a court which lacks jurisdiction to deal with it, every act
done in connection with the case is a nullity, and any order or
judgment which may have been rendered is utterly void because
beyond the power of the court. The parties may have tried in
good faith to take their case to the proper court and may believe

preceding year, thereby providing a sound basis for assignments of judges to
equalize loads.

5. S. 3212.
they have done so, the judge may suppose that he is authorized to proceed with it. Statutes relating to jurisdiction are often vague, uncertain and difficult to apply, and in spite of the greatest caution the best lawyers and judges make mistakes. But neither good faith nor diligence, nor even the precedent of established practice, will ordinarily be of any avail, nor can anything be done to correct or cure the error. The mistake is fatal. It has even been held that if the plaintiff has once demanded a larger sum than the court has authority to grant, he cannot save his case by reducing the claim to an amount within the competence of the court. The case has been irrevocably ruined by the original error and no amendment can save it.6

Such serious consequences of an error in selecting the court in which relief is sought are by no means necessary, and they could easily be avoided. Cases ought never to fail at any stage by reason of jurisdictional errors, if there is power anywhere to deal with them. They should simply be transferred into the proper tribunal when the error is discovered, with no loss as to any proceedings already had. If the mistake is not discovered before judgment, that judgment should be just as valid for all purposes as though it had been rendered by the proper court. In other words, statutory provisions as to the distribution of business should be made directory only, and never mandatory. There will be safeguards enough against confusion of the legislative plan for doing judicial business, because either party can raise the point at will and the judges would be expected to allow no general break-down of the scheme of distribution. Such a rule for saving jurisdiction would prevent many accidental miscarriages of justice and reduce the risk which now makes litigation one of the most hazardous of occupations.

England led the way in eliminating jurisdictional hazards. All the superior courts were made divisions of a single great court, and the sole consequence of starting a case in the wrong division was a removal to the proper one.7

In the United States there is a distinct trend toward an escape from the tradition that getting into the wrong court is a monstrous sort of error which ruins the case beyond redemption, and that nothing remains but to hold the entire proceeding null and void from the beginning. Thus, in New Jersey an act was passed in

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1912 prohibiting the dismissal of any action pending in any of the four superior courts, on the ground of want of jurisdiction over the subject-matter, but requiring instead that the cause should be transferred, together with the record and files, to the proper court to be proceeded with as though originally begun there. And two years later an amendment provided that on any appeal taken in a cause that had not been transferred, the judgment should not be affected thereby, but the appellate court should decide the appeal and direct the appropriate decree or judgment to be entered by the court to which it should have been transferred. In Michigan such a transfer is authorized between the law and chancery divisions of the circuit court.

Professional opinion is steadily growing in favor of the establishment of a single unified court in the state, organized into appropriate operating divisions, such as a county court division for small causes, a district court division for other causes, and a supreme court division for appeals, with provision for transfer of cases from one division to another to preserve the statutory distribution of functions.

The Organization of the Bar

Hardly less important than the organization of the courts is the organization of the bar. Qualifications for membership are not satisfactory, but there is a growing realization of the need for better standards of admission. The weakness in the present situation is shown by the amazingly large number who come to the bar with only the superficial training of commercialized schools. There is, however, a very definite trend in the direction of closer cooperation between the American Bar Association, the state bar associations, the state boards of law examiners, and the better law schools, in improving the safeguards against the admission of undesirable candidates.

But it is not enough to close the doors to applicants who should not enter. There must exist somewhere an adequate control of those who have been admitted. Where should that control be lodged?

In England, from which we inherited most of our judicial institutions, the problem was a comparatively simple one. The English bar was always a fully self-governing organization. The Inns

10. C. L., 1929, § 14,008.
of Court controlled, their own membership, and that membership constituted membership in the bar. The courts had no power either to admit or disbar, and Parliament never assumed any authority to determine the right to practice law. With the entire matter resting in the bar itself, as organized in the form of the various Inns, it was merely a problem of internal administration to keep out undesirable applicants and to expel those who appeared unworthy of retaining their membership.

In France, likewise, where the bar has complete disciplinary power over its members, the profession stands high in public esteem, and cases of misconduct are so rare that professional ethics presents no problem of public importance.

In the United States this simple and effective plan of maintaining the standards of the profession has not been available, for the bar has had no legal right of self-government. It has therefore been driven to employ a number of expedients for enforcing proper conduct on the part of its members, which have proved very inadequate.

Grievance committees are seldom effective, for two reasons: (1) They lack power to investigate by compelling the attendance of witnesses and putting them under oath, and (2) they have no power of discipline.

Disbarment proceedings, on the other hand, are unsuitable because they are too drastic. Such proceedings are too much like criminal prosecutions. Their publicity is so damaging that a mere accusation will destroy a man's professional career. Their penalties are so severe that they are never brought except as a last resort. They have no flexibility, which will enable them to be adjusted to various degrees of dereliction, actual or potential, or to be used as deterrents at the first manifestation of a tendency to stray from the straight and narrow path.

Confronted with the impossible task of effectively controlling the conduct of the bar by means of these utterly inadequate devices, the ingenuity of American lawyers brought forward the proposal of an integrated state bar, clothed with disciplinary powers over its members.

The California State Bar is the outstanding example of this type of organization. Power to discipline rests ultimately in the Board of Governors, but complaints are first heard by local com-

mittees, at private hearings, with full power to summon witnesses. Unless they recommend action by the Board of Governors, and the latter decide in favor of imposing discipline, no public notice of the complaint and hearing is ever given. So effective has been this method of dealing with professional conduct that in the first three and one-half years after its adoption three times as many disbarments took place as during the preceding 77 years of state experience.\textsuperscript{13}

Such a system incorporates all the advantages of the English self-governing bar and provides an efficient administrative procedure which England lacks. This plan has made a profound impression upon the entire legal profession of the United States. It has implemented the bar with an effective procedure by which it is able to carry the responsibility for the proper conduct of its members. Many states have already adopted the plan. It is under active discussion in many others. No trend in procedural law is more clear and definite than the movement toward the self-government and self-discipline of the bar.\textsuperscript{14}

\textbf{TYPES OF JUDICIAL SERVICES RENDERED}

(a) \textit{Declaring Rights}

There are no theoretical limitations upon the types of service which the courts may render in dealing with controversies between parties. What will satisfy the people of one era may be utterly inadequate for those of another. When the remedies offered by the common law courts ceased to meet the need of the times, the court of chancery came forward with its more flexible remedies and demonstrated the inherent versatility of judicial power. The capacity for developing new types of service has not been exhausted.

There are two kinds of possible remedies—those which prevent trouble and those which ameliorate or cure it or give compensation for damage done. The first are much the more effective.

Judicial remedies have been largely of the latter type. The law would not enforce or protect a right except against one who had actually violated it, or who had gone so far as to threaten to do so. Justice was administered only against wrongdoers. Thus, if two persons, having made a contract, were in doubt as to its meaning or application, and neither wished to violate its provi-

\textsuperscript{13} 11 Mich. State Bar J. 50 (1931).
\textsuperscript{14} Bar Integration Is a National Movement (1939) 22 J. Am. Jud. Soc. 211.
sions, there was no way in which they could obtain a decision of the court upon which they could rely for an amicable settlement of their difficulty. It was first necessary for one of them to break the contract and thereby injure the other, before the controversy would be considered and passed upon by the courts.

There is, however, no inherent reason for any such restriction upon the exercise of judicial power. If the courts are to render maximum service within their proper field, they should be able and willing to take hold of controversies in their early stages, before they have resulted in injury to anyone, and to make such decrees determining and declaring the rights of the parties as may be necessary for their safety and protection. Taken in time, the issues may be kept simple and held within very narrow limits, and the decision will almost amount to a friendly adjustment under the advice of the court.

The theory of the declaratory judgment is strictly in accord with our modern conception of the function of a civilized state, in which the mere existence of governmental power tends to make its exercise unnecessary, and a declaration may serve every purpose of an order.

A request for a declaration of right plainly implies full confidence that the defendant will promptly and voluntarily do his duty as soon as the court points it out to him. It makes the lawsuit a cooperative proceeding, in which the court merely assists the parties to settle their own differences by stating to them the rules of law which govern them. If it appears that the plaintiff's confidence in the defendant's readiness to do right is misplaced, the coercive decree of the court is always ready to be promptly issued in support of its declaration.

But there are many situations in which there is no present possibility of developing a controversy of the conventional type, even if a party desired to do so. In such cases he merely finds himself in a position of uncertainty, insecurity or peril, from which he might be rescued if the court were willing to declare what his rights would be if he should later be subjected to the attack which he fears.

Rights which can be exercised only at a future time will be ascertained and declared immediately, in order to enable the parties to adjust their plans accordingly. The validity or meaning of statutes or ordinances prescribing conduct under penal sanctions may be judicially determined without requiring persons affected by them to act at their own risk. A party against whom another
asserts a right is no longer required to remain in a state of suspense and uncertainty until that other decides whether or when he will bring an action, but the prospective defendant may himself bring an action for a declaration that he is not subject to liability.

The enormous advantages to society inherent in this type of judicial service have been so clearly demonstrated that the adoption of enabling acts bids fair to become universal among the jurisdictions of this country. But the trend goes further. The reluctance with which the courts granted declaratory relief in the earlier days of its use is disappearing. Technical considerations no longer seem so important, and convenience and social or economic value is becoming the real test for employing the remedy.

(b) **Effecting Conciliation**

There is another type of service which courts are amply equipped to render. Conciliation as a judicial function has long been recognized on the continent of Europe, and, in some of the Scandinavian countries a hearing for the purpose of attempting conciliation is required before a suit of the ordinary type may be instituted.

England never developed an interest in judicial conciliation. English litigation was always an adversary proceeding from beginning to end, in which the parties conducted hostile maneuvers with very little advice or mediation from the court.

In the United States the English tradition has always been strong, and the procedure of the courts was designed for the trial of issues which were to be fought out before a judge or jury. In a number of the municipal courts in our larger cities, conciliation divisions for small claims have been organized and operated with much success, but there has been no effort to make conciliation a normal function of courts of general jurisdiction.

With the growing sense of responsibility for the proper administration of justice which characterizes the present attitude of the legal profession in this country, there has been developed a remarkable departure from the conventional practice of courts of record which involves the principle of conciliation. This is the

15. Thirty-five American jurisdictions have acts authorizing declaratory judgments, all of which were enacted within the last twenty years. See statutes cited in Sunderland’s Cases and Materials on Judicial Administration (1937) 315.


so-called Pre-trial Procedure, which originated in Detroit and has already been adopted in Boston and Los Angeles.\textsuperscript{18}

Conciliation of the European type is a hearing which precedes the commencement of an ordinary action, and takes place before conciliators, not before judges of the regular courts. Conciliation of the American small claims type is merely one feature or aspect of the final hearing in a regular suit brought in the small claims court. If the conciliation succeeds in that court the judgment is by consent, but if it fails the case is then and there tried and an ordinary judgment is rendered. In both the European and the American small claims type of conciliation lawyers are excluded or their presence is discouraged.

The new Pre-trial Procedure differs from both of these types. It does not precede the commencement of an ordinary action, as in Scandinavia, nor is it a part of the final hearing or trial as in American small claims courts. It occupies a middle position, and is employed after the case has been regularly brought to issue but before it has been set for trial. And instead of being excluded, the lawyers are required to be present.

At the pre-trial hearing the judge interrogates the lawyers as to their real positions regarding the various matters involved in the case. Every point upon which they are willing to agree is noted and it is thereby eliminated from the issues in the case. In this way, by mutual discussion, the dispute may be reduced to a very small compass, thereby restricting the scope and expense of the trial which may thereafter take place. Unsubstantial and fictitious issues fade away under such a process. With individual issues settled, the settlement of the entire case becomes less difficult, and this may occur either then and there or as a result of a short continuance suggested by the judge for the purpose of enabling the parties to consider a settlement. If any issues remain unsettled the case is set for an early trial.

The results of this new type of service offered by the court have been very satisfactory. In 1937 out of 5,798 cases appearing on the pre-trial docket in Detroit, 3,198 were finally settled and disposed of there, without the necessity of any trial.\textsuperscript{19} Regarding the other 2600 cases, which went to trial, no statistics are available to show how far the elimination of issues effected by the pre-


trial hearing reduced the time and expense of the trial, but it was undoubtedly very substantial.

The value of pre-trial procedure is by no means limited to metropolitan courts with crowded calendars. It is proportionally as valuable in a small court as in a large one, for it operates upon each separate case to effect a settlement or to eliminate those matters which ought not to be permitted to take up time and cause expense at the trial. The new federal rules authorize the United States district judges to provide for pre-trial hearings, which will make the practice available in rural as well as metropolitan districts.

THE SOURCES OF RULES OF PROCEDURE

What is the true source of authority for procedural law? The administration of justice has always been a difficult and delicate function of the state, and the complexity of its problems increases with the development of civilization. No one can possibly understand or appreciate the work of the courts who is not familiar with the conditions under which litigation proceeds. And if a judicial procedure is to be kept in close adjustment with the constantly changing requirements of society, the regulation and development of that procedure must be under the supervision of those who carry on the work of the courts.

England, with its genius for government, always understood and acted upon this principle. No legislative code of procedure was ever imposed by Parliament upon the English courts. Even during the stormy days of the 19th century, when popular resentment against the manner of administering justice threatened to destroy the legal profession, there was no effort to take the regulation of procedure out of the control of the judges and place it in the hands of the legislature. Every one of the procedure acts passed during that long struggle for reform, expressly recognized and reserved authority in the judges to make general rules and orders, even to the extent of changing forms of proceedings established by Parliament itself.

The United States, on the other hand, abandoned the principle of professional control of procedure. Under the leadership of David Dudley Field, New York set the American pattern for the regulation of the practice of the courts by legislative codes. The

20. Rule 16.
Field Code was adopted at the very moment when the west was being opened and new state governments were being organized and developed, and it was seized upon almost everywhere as an easy solution for the problems of judicial administration.

But it has become more and more apparent that there are grave defects in the system of legislative regulation of procedure. Rules laid down by legislative mandate do not show that delicate adaptability to circumstances which distinguishes a professional technique. They embody legislative theory not judicial experience, and often tend to defeat by their crudeness and rigidity the very purposes they are created to serve. The subtle appreciation of the conditions of litigation, which can only come to those who spend their lives in the active administration of justice, is not possible among the members of a popular assembly. The political atmosphere of a legislative body is not conducive to a close and painstaking study of an intricate mechanism. Normally legislatures hesitate to make important procedural changes, because they lack technical information, with the result that the practice in many states has fallen into a state of obsolescence.

Faced with these considerations the American legal profession has been driven to a re-examination of the problem of procedural regulation. The success of the English courts has particularly directed attention in this country to the advantages of regulation by rules of court, and a steadily increasing number of states have enacted statutes authorizing their highest courts to promulgate general rules of judicial procedure. Many of them have gone so far as to grant absolute rule-making power. Three of these, Indiana, South Dakota and Pennsylvania, took that step during the year 1937. Many others have authorized the courts to make rules not inconsistent with the statutes. The trend toward judicial regulation of procedure is clear and unmistakable.

But experience with the court rule system has developed an inherent weakness. It has been found that the courts lack incentive to execute the power conferred upon them. They are fully occupied with the strictly judicial duties of deciding cases and determining the law, and find little time or energy to devote to the less urgent task of regulating the practice.

Such has been the experience everywhere. Judicial neglect of the rules in England brought the appointment of a royal commis-

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sion in 1913 to see what was wrong. In its report, after suggesting various specific changes in the rules, the Commission said:

"The question may be asked, why the delays in the administration of justice which have been so long complained of could not have been remedied by the adoption of these proposals by the responsible authorities ... without recourse to a royal commission. We regret to say that we do not think a satisfactory answer can be given to this question.

"Section 75 of the Judicature Act, 1873, enacts that a Council of judges ... shall assemble once at least in every year on such a day or days as shall be fixed by the Lord Chancellor ... for the purpose of considering the operation of this Act and of the Rules of Court ....

"It appears that successive Lord Chancellors, commencing with Lord Selbourne and continuing to the present day, have only taken the initiative imposed on them by this section of fixing a day for such a meeting on three occasions in thirty-seven years."23

American experience with rule-making by courts has been exactly the same as that of England. The United States Supreme Court was given power in 1792 to make rules of practice in equity for the federal courts.24 Thirty years went by before the court took up this task and enacted the first set of rules. The rules of 1822 stood substantially unchanged for twenty years. Thereafter, seventy years went by before the next revision was made in 1913, and since that time the rules stood practically unchanged until the promulgation of the new Rules of Civil Procedure in 1938.

In 1916 the Virginia legislature, through the efforts of the State Bar Association, gave the Supreme Court of Appeals full rule-making power over the procedure in all the courts of record of the state.25 The act provided that "the court shall prepare a system of rules and practice and a system of pleadings, etc." The court took no action, and two years later the legislature, possibly to save its face, amended26 the act by substituting "may" for "shall," but the power so conferred remained unused and unexecuted. In 1928 another statute was passed,27 in a further effort to

23. Royal Commission on Delay in the King's Bench Division, Report, pp. 41-42.
24. 1 Stat. 275 (1792).
enlist the help of the Supreme Court of Appeals, as a result of which that court enacted one rule. That is all they have done with that rule-making power, aside from certain rules respecting the mechanics of appeals in the Court of Appeals.

In Alabama, in 1915, the legislature gave the Supreme Court power to adopt rules for all courts of the state provided they did not interfere with existing statutes. Nothing was ever done.

In Michigan, by the constitution of 1850, the Supreme Court was given power and charged with the duty “by general rules to establish, modify and amend the practice in such court and in the Circuit Courts and simplify the same.” It was eight years before the first set of rules was promulgated. I do not know who prepared them, but I think it probable that the Supreme Court itself did not. By 1896, forty years later, only a few minor changes had been made in the practice. In that year a State Bar Association Committee, impressed with the imperative need of doing something to modernize the practice, prepared a new set of rules and submitted them to the court, and the court promptly adopted them. There was no trouble about their adoption after the work of preparation was done.

For eighteen years no further changes were made, when another Bar Association Committee drew up a set of revised rules and they, also, were promptly adopted. In 1928 the legislature created a procedure commission which radically revised the rules. The court adopted them and they went into effect. The initiative in no case was in the court.

In New Jersey rule-making power was granted in 1912, authorizing the Supreme Court to make rules for its own conduct and for that of the circuit courts, common pleas courts and other inferior courts, which should supersede prior statutes in conflict therewith. So far as I know, there has been no substantial use of that power.

It appears, therefore, that in theory the court is an unsuitable agency for initiating changes in procedure, and experience has fully demonstrated that it will not in fact do so.

These results have introduced a new problem, namely, how can the grant of rule-making power be made effective? The solu-

30. Art. VI, § 5, of the present constitution (1908).
32. N. J. Laws, 1912, ch. 231, § 32.
tion is being sought through an auxiliary agency, to be charged with the primary duty of studying the operation of the courts, preparing from time to time such rules and amendments as seem to be needed to keep the processes of litigation adequately effective, and to present them to the court for consideration and adoption.

A permanent advisory committee has in some cases been appointed by the court itself. This is the plan adopted in Wisconsin, with very satisfactory results. In June, 1937, the legislature of Pennsylvania, in conferring rule-making power upon the Supreme Court of that state, authorized the court to appoint a Procedural Rules Committee to assist it in the preparation, revision, promulgation, publication and administration of the rules, and the judges, clerks, prothonotaries and other officers of the several courts of record in the state were required to furnish to the Supreme Court or to the Procedural Rules Committee such statistics and information as might be reasonably requested concerning the administration of justice in civil actions in those courts.

The Supreme Court of the United States, in June 1935, appointed an advisory committee to assist it in preparing the new rules for the United States district courts, and the American Bar Association, at its meeting, held in Kansas City, in September, 1937, adopted a resolution recommending that the Advisory Committee should be made permanent.

In some states a judicial council has been created, to make a continuous study of the judicial system and to report to the legislature or to the court, from time to time, its recommendations as to needed improvements in the means and methods of administering justice.

An auxiliary agency of this general type will also serve another exceedingly important purpose. The courts themselves should be protected from public criticism in their strictly judicial work. Their function is to impartially declare the law, not to please the parties or support special interests. It is a delicate question how far political attacks upon the judgments of courts can be carried without undermining confidence in the courts themselves. Certainly it would be sound policy to remove the courts as far as possible from political controversy by relieving them of non-judicial duties likely to arouse criticism. It is the

delay, expense, technicality and uncertainty of litigation, rather than the legal quality of judicial decisions, which dissatisfies the public with the administration of justice. If the courts are to be responsible for both the methods employed and the judgments rendered, public criticism directed against them in respect to the former function will react against them in respect to the latter. On the other hand, by relieving them of administrative duties which arouse popular complaints, they will be able to perform their strictly judicial duties in an atmosphere much less violently charged with political controversy.

This point has not been overlooked in England in the struggle to find some way of freeing the courts from the shackles of an impractical procedure. The Solicitors' Journal (November 26, 1921) presents the reasons for a separate administrative organization for regulating the business of the courts as follows:

"... The conditions that have brought about reform in the Navy and Army require to be brought to bear upon the Judiciary in order that it may come under the same beneficial influences. These reside primarily in the fact that . . . naval and military administration . . . comes under public comment and stimulus. No such system prevails with regard to the Judiciary. The Lord Chancellor, . . . as head of the Judiciary . . . exercises an unquestioned . . . authority, and so is himself removed, as are all the functions which he exercises removed, from parliamentary review and comment.

"The fact is that the offices of the Lord Chancellor as they affect . . . the Bench and the Woolsack are . . . at variance with those which touch the services of the Judiciary . . . . If the services of the Judiciary are to meet public expectations, it is required of him that he should hold himself liable to attack when they fall below the standard set. The immunity from attack he now enjoys is at the root of the inadequacy of the services. . . . We have, in fact, a situation in which matters of organization and procedure in the law are left, as far as the public is concerned, very much to take their course. And yet organization and procedure are at the root of efficiency in the law."

A judicial council or an advisory committee charged with public responsibility for devising efficient machinery for litigation and a proper organization for the various administrative agencies which are involved in the work of the courts, would sub-
stantially meet the need here suggested. It would relieve the courts from duties which would tend to produce embarrassment and impair the public confidence which they ought to enjoy.

THE PROBLEM OF PLEADING

Nothing in the history of the law has proved more burdensome to the bench and bar and more exasperating to the public than the technique of pleading. It has been the traditional theory of our law that the pleadings constitute a necessary, and at the same time a sufficient and satisfactory, basis for the trial or hearing of the case. Their function is to set forth the contentions of the parties in such a way as to fully disclose the nature and scope of the controversy.

In the system of pleading employed at common law, there were a number of glaring departures from this ideal, such as the rule which permitted affirmative defenses to be shown under general issues without the slightest warning to the plaintiff, and the rule authorizing the use of the vague conclusions of the common counts which gave no intimation of the real issues. But it was, nevertheless, the general design both at law and in equity, that every assertion of either party should be met by an admission or denial from the other, so that an inspection of the pleadings would make it possible to ascertain exactly what each party would be required to prove in order to succeed. By confining the trial within the issues raised in the pleadings the law sought to enable each party to prepare his case with full confidence that he would neither be surprised by unexpected evidence from his adversary nor be burdened with the expense of assembling unnecessary proof.

This highly desirable aim has never been possible of realization, and pleadings never have offered and never can offer a satisfactory basis for the trial. There are two reasons for this.

In the first place, allegations in pleadings are required to deal with facts of a generalized type, known as material or ultimate facts, and not with evidence. How these ultimate facts will be proved at the trial cannot be determined from the pleadings. If proof of one kind were to be offered, certain evidence would be necessary to meet it, whereas to oppose proof of another kind an entirely different line of evidence might be necessary. For example, the allegation of a promise by the defendant might be proved in any one of a dozen different ways—by letters, by telegrams, by oral conversations, through the act of this or that agent, by ratifi-
cation; but the defendant can form no idea from the pleadings which kind of evidence will be used, and the less the claim rests upon a foundation of fact, the more difficult will be the task of preparing evidence to meet it.

In the second place, a pleader may allege many things that he knows perfectly well may not or cannot be proved, since he is free to claim what he will. This may be due either to abundant caution in asserting every possible fact in behalf of his client, or to a more or less definite design, well understood and highly regarded in military circles, of concealing the real point of attack by a show of activity on a wide front. But whatever the motive, the effect is the same. The other party has no way of determining from the pleadings what facts will actually become the subjects of proof and what will be merely ignored at the trial.

The same double uncertainty inheres, for obvious reasons, in the denials which the pleader employs. In the first place, denials are no more concrete than the allegations to which they are directed, and it is therefore impossible to know in advance what sort of evidence will be employed in their support. In the second place, they may or may not be used for the bona fide purpose of contesting the truth of all the allegations denied. Whether general or specific in terms they are likely to present numerous issues which, although they seem genuine on their face, will be found at the trial to be entirely fictitious. In such a case the party having the burden of proof will be loaded with the useless expense of proving or preparing to prove facts which his adversary has no actual intention of disputing.

On account of these characteristics of pleading, by virtue of which assertions and denials may be set up with no indication either as to the manner in which they will be supported by proof nor even as to which of them will be supported at all, counsel are faced with a disagreeable dilemma in preparing for trial with no guide but the pleadings.

If a lawyer undertakes to so prepare his case as to meet all the possible items of proof which his adversary may bring out at the trial, or to meet all the assertions and denials which his adversary has spread upon the record, much of his effort will inevitably be misdirected and will result only in futile expense. If, on the other hand, he restricts his preparation to such matters as he thinks his adversary will be likely to rely upon, he will run the risk of being a victim of surprise.
Is there any way of bridging this gap between what is set up in the pleadings and what will come out in evidence? It is of course important to know in advance the nature and extent of your adversary's claims. This knowledge is given by the pleadings. But it is equally important, in preparing your proof, to know what proof your adversary will be able to present in support of his claims and in opposition to yours. This knowledge the pleadings do not give.

The allegations and denials in the pleadings point only to the results which the pleader may wish to establish by his proof. They give little or no notice of the nature of that proof. How can one effectively prepare to meet the proof to be offered by his adversary if he has no reliable knowledge as to what that proof will be?

As a contribution toward the solution of this difficulty, the common law, after six or seven centuries of indifference or incompetence, came forward with the feeble and restricted bill of particulars.

Equity, which ought to have done better, refused even to recognize the problem as a legitimate subject of judicial concern. Bills in equity were, it is true, designed for the purpose of obtaining discovery as well as relief, and bills of discovery were used in aid of actions at law. In bills of both kinds interrogatories were set forth to which the defendant was required to make specific answers. But the discovery which was sought in equity was not of the type which we are now discussing. It was discovery of evidence which the pleader wished to obtain in support of his own case, not discovery regarding the case which his opponent might put up against him. Such discovery was not sought in order to protect himself from surprise at the trial, nor to enable him to avoid futile preparation to meet anticipated proof which the other party might never present. The discovery provided by equity was nothing but a method by which the pleader obtained admissions from his adversary regarding matters which he himself, and not the adversary, was required to prove.36

The obvious solution of this difficult problem of obtaining information necessary to prepare adequately for trial, is to supplement the pleadings with a broad and liberal procedure for discovery. The rapidly expanding use of this remedy is one of the

36. Sunderland, Scope and Method of Discovery before Trial (1933) 42 Yale L. J. 863.
most striking developments in contemporary procedural law. A dozen states have abandoned the chancery restrictions, and authorize unrestricted mutual discovery, for defense as well as for attack. Not only may it be employed to aid parties in assembling their own proof but also to protect them from surprise and to relieve them from taking unnecessary and useless precautions to meet evidence that will never be offered. Simple and convenient methods are being devised for taking discovery depositions both on oral examination and by written interrogatories, on mere notice and without any order of the court. Such depositions when taken offer an invaluable security against subsequent loss of evidence. Inspection of documents may be had, with opportunity for copying or photographing. In a number of jurisdictions property may be inspected, and physical examination of parties may be ordered, and even the mental condition of a party is subject to examination when material to the case. The new federal rules probably go farther and provide a more effective procedure than any system of discovery now in use.

Unrestricted mutual discovery has been found by experience to be one of the greatest preventives of perjury. The party is examined early, while his memory is fresh, before he has had time to work out a protective scheme of fictitious circumstances, and while it is still comparatively easy to check up on his testimony to ascertain how far it may vary from the truth. Coaching of the witness by counsel in preparation for the discovery examination is much less common than coaching for the trial, so that the testimony is more spontaneous. After the testimony has once been taken, and a copy filed or lodged with examining counsel, it is impossible for it to be changed to bolster up the case. This has been conspicuously demonstrated in Massachusetts, where the narrow chancery rule was formerly in force but was gradually enlarged under both judicial decisions and liberal legislation until discovery before trial has become as broad as examination at the trial itself—an evolution extending through seventy years, from Wilson v. Webber in 1854, to Cutter v. Cooper in 1920.

If discovery is available to supplement the pleadings, the latter will no longer occupy the position of extreme importance to

37. Ragland, Discovery before Trial (1932).
39. 68 Mass. 558 (1854).
40. 234 Mass. 307, 125 N.E. 634 (1920).
which they have been assigned for the last five hundred years. Emphasis will shift, as it ought to do, from the form of the allegations to the character of the proof.

CONCLUSION

Typical of the new spirit with which the legal profession has assumed its role of responsible leadership in improving the administration of justice, is the recent program launched by the American Association. A new section, on Judicial Administration, was created at the 1937 annual meeting of the Association. It was immediately organized into seven committees, each assigned to one of the important departments in the field of procedural law. Four hundred lawyers and judges accepted positions as active or advisory members of those committees, representing all the states of the Union. They undertook a systematic study of the problems of Administrative Tribunals, Judicial Administration, Appellate Practice, Pre-trial Procedure, Evidence, Trial by Jury and Trial Practice. Their conclusions will represent the best judgment of the bench and bar of the United States as to ways and means for making the administration of justice more effective, and their recommendations may be expected to receive the vigorous and sustained support of the legal profession.