Making Courts Efficient

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MAKING COURTS EFFICIENT†

Surveying the present movement for increased court efficiency, the author particularizes his discussion into the subjects of pleading and procedure and court organization. As to the first, he details the gains which may be and have been derived from the Federal Rules of Civil Procedure. Regarding the latter, he notes encouraging examples of integrated court systems, including that of California.

Charles E. Clark*

The title I have chosen for my brief paper is intended more to stimulate interest and activity than to define my subject matter precisely. Courts can never be made machine-like, and indeed no one would wish such a result. Some have feared that modern movements for improved, or at least more effortless, law administration will be destructive of more important values such as the independence of the judiciary. I would be the first to say that such a result must be carefully avoided; but I think we can go a long way toward improving court procedures before the independent prima donnas who constitute our judiciary find themselves really fenced in. So I am going to talk about present-day plans to make the courts more productive and easily operable, that is, to make them more efficient at least to a degree.

That the endeavor to achieve this end now constitutes a movement of vigor and power no one can doubt. It is in all probability the outstanding development of modern times in the procedural field. To me it is a particular source of satisfaction that it is professionally inspired and professionally executed in striking contrast to the one-hundred year struggle in England, which was an uphill battle by laymen — philosophers, writers, and public officials — while the profession held back.¹ In this country the basic original reform of the union of law and equity stemmed from a great lawyer,

† Developed from a public address of the same title given by the author as Regents' Lecturer of the University of California, Los Angeles on March 6, 1961.
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¹ See the classic article, Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725 (1926). See also Clark, Code Pleading 17-19 (2d ed. 1947); Clark, Practice and Procedure, 328 Annals 61 (1960). The writings of Jeremy Bentham and of Charles Dickens were important features of the English struggle.
David Dudley Field, who gave the Field Code to New York in 1848. It was his brother Stephen J. Field who, as Chief Justice of New York, brought the new procedural code to this state at a very early period (1850, 1851) before his notable long service as Justice of the Supreme Court of the United States under appointment by President Lincoln. So, too, the making of the Federal Rules of Civil Procedure, 1935-1937, was a professional job by lawyers and law teachers. That comparatively recent reform has kindled many a fire for better procedure and now increasingly for improved court organization. In consequence there is hardly a state where the profession is not taking an active interest and providing inspired leadership in working for a more effective administration of justice.

But perhaps the best part of this modern development is that now the bar associations have come awake. Formerly these solemn aggregations of sleepy mossbacks functioned only for stuffy annual dinners honoring their oldest and sleepiest members. They are now furnishing the leadership this cause has needed. And the point of particular satisfaction is that the spark, the goad, and in good part the inspiration comes from that part of the organized bar which is youthful in fact and in inspiration. I refer to the junior bar associations. Time was, and no longer than my own admittance to the bar, when the youngsters were not to be heard and only rarely to be seen. The best they could do was to hide behind some senior and surreptitiously supply him the knowledge he had to have. Now a career is right at hand for the young lawyer and he need not wait for gray hairs and stumbling feet before he can make himself well and favorably known to his associates and to the public. It is a truly inspiring turn, of advantage to the neophyte in building a practice and of inestimable gain to the public. It fills me with pride and makes me think better of my profession than I have often done in the past.

Since I cannot cover the whole range of law reform in a short paper, I shall concentrate upon two main topics, and shall then content myself with brief references to a few other considerations.

2 N. Y. Laws 1848, c. 379; First Rep’t Comm’rs on Prac. and Pl., N.Y. (1848); David Dudley Field Centenary Essays (Reppy ed. 1949) passim. This was of course the system of code pleading adopted in the majority of the American states beginning the next year after its adoption in New York. Clark, Code Pleading 21-26 (2d ed. 1947).

3 Cal. Stats. 1850, c. 142; Cal. Stats. 1851, c. 5; Parma, The History of the Adoption of the Codes of California, 22 Law Lib. J. 8, 12 (1929).


5 See, e.g., the history of the Connecticut reform leading to the state supported circuit courts in 1961 referred to in text and note 26 infra.
The first is the improvement in pleading and procedure, of which the federal rules of civil procedure, now the model for so many state procedures, remain the exemplar. And the second is the improvement in court organization represented by the integrated court, with as yet but a few concrete examples, but receiving ever growing recognition and support.

Turning to the first, the layman is doubtless perplexed at the emphasis put by the lawyer on pleading and on procedure — the way of getting a case to trial, rather, more than the trial itself. But there are natural reasons in both history and actual need for a very considerable stress, though possibly not as much as has been given it. Historically the development of trial by jury pointed to the need of isolating the issues, of uncovering the actual area of conflict, so that the lay jurors could understand the case. Hence arose the famous issue-formulating process of common-law pleading — the ideal that the parties by their successive written statements and allegations would eventually arrive at a single contention affirmed on the one side and denied on the other. This general need of pre-trial defining of the case is still important (possibly even more important) under modern methods of discovery and other devices to advance the contested case to sharp issue before trial. It is well known that an overwhelming part of modern litigation consists of negotiations leading to settlements before actual trial; that is notoriously a feature of modern automobile accident litigation. Sharply defining the area of contest before trial is a needed and worthy means of enabling the parties either to avoid the trial by settlement or to expedite trial when reached by emphasizing the major dispute or disputes and eliminating the minor ones.

6 At least 20 jurisdictions, in addition to the federal courts, have now adopted the federal civil rules: Alaska, Arizona, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Kentucky, Maine, Minnesota, Montana (effective Jan. 1962), Nevada, New Jersey, New Mexico, North Dakota, Puerto Rico, Utah, Washington, West Virginia and Wyoming. Others — Florida, Iowa, Louisiana, Missouri, Pennsylvania and Texas — have been stimulated to complete revisions of their procedure, drawing heavily on the federal rules. Yet others have adopted substantial portions of the federal system, notably the discovery and the joinder rules, e.g., Alabama, Arkansas, California, Connecticut, Illinois and New York. And individual rules have been even more widely adopted; thus Rule 16 on Pre-Trial Procedure or its equivalent has been adopted to some extent at least in nearly all states. Wright, Procedural Reform in the States, 24 F.R.D. 85 (1960), appearing also in 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 9 (Wright ed. 1960); 44 J. AM. JUD. SOC’Y 107 (1960); id. at 197 (1961).

7 Note the reforms in court organization discussed in text and notes 22-29 infra.

8 See my article on Practice and Procedure cited note 1 supra.


So the pleading stage deserves our concern and nonetheless so because it is the stage where delay and confusion are obvious for all to see. After action has been filed, the parties require an additional period to bring their respective cases to a head; the Administrative Office of the United States Courts has suggested a period of six months as a reasonable and useful yardstick. But during and after that period the case should be made to move along expeditiously to uncovering the issues and preparing for trial if that is to be had.

Now that in general has been the objective, often not fully achieved, of all pleading rules. The federal civil rules represent several major gains; three I would term quite vital, and three at least highly desirable. The three I would term vital are (1) the merger of law and equity; (2) simple general pleadings, i.e., allegations and defenses; (3) removal of tactics of surprise through efficient discovery and pre-trial proceedings. The first was indeed envisaged in the Field Code of 1848, but was only established for all the federal courts in 1938 with the coming of the rules. The second was necessary because of a wrong turn taken in the Field Code and proliferated by the natural trend of technical procedural rules to drive out the liberal, namely, the emphasis upon the facts constituting the cause of action. This apparently simple direction turned out to be an abstraction incapable of precise definition, at least as to the amount of detail; and the pressure for more detail led in some states, as in New York, to extreme and delaying shadowboxing as to how much was enough. The federal system calls for a simple set of general forms, illustrated by the appendix of forms, which is adequate to disclose the over-all nature of the case to the court and the opposing parties, but avoids the futile skirmishing as to degree. This has been one of the most successful parts of the federal reform; and it appears to have worked well, notwithstanding objections voiced from time to time by the modern descendants of the common-law pleaders, including the very distinguished protagonists from this (the Ninth) Circuit.

12 While the union of law and equity is adopted in all the code pleading states, yet in some, such as New York, the courts have been slow to give it full effect. Clark, A Modern Procedure for New York, 30 N.Y.U.L. Rev. 1194 (1955); Clark & Wright, The Judicial Council and the Rule-Making Power: A Dissent and A Protest, 1 Syracuse L. Rev. 346 (1950). The federal precedents indicate that the reform is operating satisfactorily there for the most part. Compare Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).
The third vital step, the development of discovery and pre-trial, looms constantly in more importance as its utility in leading to the disposition of cases and the increasing congestion of trial calendars make the need for it more apparent. Under the discovery rules counsel may take testimony of witnesses and parties to disclose what may come up thereafter at trial and, indeed, in many instances to provide evidence actually used at the later trial. The pre-trial conference, as its name indicates, is a get-together of court and counsel to settle the issues to be tried, to eliminate all formal details of trial and proof, and to discuss means of expediting the trial. Undoubtedly, too, discussions as to settlement, while not a proper condition of pre-trial, are forwarded and made more realistic. And finally the motion for summary judgment affords a quick and final means of disposing of the case which is made clear by these preliminary steps as requiring either a plaintiff's or a defendant's judgment. These are all notable means of effective and expeditious adjudication.\textsuperscript{15}

The three additional features of great utility are the liberalizing and now wide joinder of parties and of claims in a single action, the provisions for waiver of jury trial by failure to make claim therefor at an appointed early stage of the litigation (thus avoiding the confusion of such claims when delayed until trial), and the simple provisions for appeal on the papers of the original trial, rather than upon a complicated formal record.\textsuperscript{16} I shall not pause to discuss these in detail, except to point out that California — which has not yet adopted the federal rules in their entirety — has gone a measurable distance in accepting the party joinder and pre-trial rules,\textsuperscript{17} has been influenced by the simpler federal appellate practice,\textsuperscript{18} and in 1958 took a major step in adopting the federal discovery rules.\textsuperscript{19} It is to be hoped this means that adoption of the


\textsuperscript{16} Extensively discussed in my book and article, note 1 supra, and in other references there given.


\textsuperscript{18} See 1 Barron & Holtzoff, \textit{Federal Practice and Procedure} 49 (Wright ed. 1960).

full federal system is not too far off. The whole impact of the discussion on pleading in the recent major work, the notable new California Pleading by Messrs. Chadbourn, Grossman, and Van Alstyne, is to point to the desirability of that step.

The other major breakthrough in improved law administration is as to the organization of the court itself. This is the movement for the integrated court, a court for the entire state organized as a unit, with separate divisions for the dispatch of business, with a central office handling all clerical, financial, reporting, and other details of the work, and with a directing head, normally the State Chief Justice, with full power to assign and allot the personnel as needed. Thus are direction and control added to what has normally been a sprawling system, with isolated and duplicating systems, each one a separate island to itself. With such wasteful, independent, and often conflicting courts, it is often the case that one court is sadly overworked, while another court, often sitting in the same territory, has not enough to do. There is not only the advantage from the new system which expert direction can give, but also the boon of careful and trained attention to all sorts of housekeeping details, involving finances, budget, clerical supplies and assistance, and the like. Little wonder, therefore, that agitation for this improvement is now great and spreading; there appear to be active movements for court integration in fully three-fourths of the states.

In spite of its desirability the weight of inertia and of vested interests is so strong that the last decade has shown perhaps more promise than actual accomplishment in most places. The most fully integrated court system in the country seems to be in Puerto Rico, where certain advantages of a closely knit territory, without too many past commitments, and a dynamic political leadership permitted rather swift accomplishment of unification of all the island courts from major to minor under a single office, with the Chief Justice as directing force. In Connecticut a major reform went

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22 VANDERBILT, IMPROVING THE ADMINISTRATION OF JUSTICE — TWO DECADES OF DEVELOPMENT, c. 2, The Application of Sound Business Principles to Judicial Administration, at 49, 50, 80 (1957); Trumbull, The State Court Systems, 328 Annals 134 (1960). See also the references given in notes 24-26 infra.
23 Tolman, Court Administration: Housekeeping for the Judiciary, 328 Annals 105 (1960); ASSOC. OF THE BAR OF THE CITY OF NEW YORK, BAD HOUSEKEEPING 17, 150 (1955); VANDERBILT, THE CHALLENGE OF LAW REFORM 121 (1955).
24 These are regularly noted in the pages of the Journal of the American Judicature Society, see note 27 infra, and the publications of the Institute of Judicial Administration. See, e.g., INST. OF JUDICIAL ADMIN., COURT ADMINISTRATION — 1959, 1-81 (1959).
into effect at the beginning of this year after a ten-year struggle, with a single state-supported and professional circuit court system supplanting all the heterogeneous town, city, borough, and justice-of-the-peace courts previously existing.\(^{26}\) In New Jersey there has been desirable integration at the higher level of courts, although integration at the minor court level has so far failed of passage. And notwithstanding some discouraging defeats in the legislatures and at the polls, measurable advances in court organization appear to have been achieved in several states, including Arizona, Colorado, Illinois, Iowa, Maine, New York, South Carolina, Tennessee, and Wisconsin.\(^{27}\) I believe the movement is now so powerful as not to be checked and that another decade will show striking progress.

In California the movement for court simplification was led by the Judicial Council under the chairmanship of the distinguished Chief Justice Gibson. It led to a real measure of progress in 1950, when, as I have been informed, the number of courts at all levels was reduced from some 768 to 437, with a present total of 843 judges.\(^{28}\) While there was a very considerable gain in simplification and coordination, particularly of the numerous municipal and justice courts, there would seem to be much remaining to be done. The great Superior Court of Los Angeles County, with its 102 judges — soon, I understand, to be increased by perhaps 27 more — is a happy illustration of how a large court can function efficiently under a strong directing head.\(^{29}\) It would seem that at least a very considerable unifying of the municipal courts and a reorganization of the justice courts to make them more professional would make for better judicial administration.\(^{30}\)

These are the two major steps indicated for the most immediate and rewarding progress. But of course they should be accompanied by other and natural measures of efficient provision for effective law

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\(^{27}\) See, e.g., 43 J. Am. Jud. Soc'y 24, 27, 58, 59 (1959); 44 id. at 27, 118 (1960), 44 id. at 184, 186, 195 (1961); Conn. Inst. of Judicial Admin. Rep't to Legislative Research Comm. of Maine, A District Court for Maine 1-54 (1961).

\(^{28}\) These latest figures were supplied me by the UCLA Law Library staff, to whom I am greatly indebted. See also Holbrook, A Survey of Metropolitan Trial Courts — Los Angeles Area 21 (1956).


\(^{30}\) See the important recommendations in Holbrook, op. cit. supra note 28, at 376.
administration. There must be additional judges, courtrooms, and courthouses to care for the population explosion we are now witnessing. There must be the development of better facilities in the courts; in particular the method of electronic sound recording promises new and unusual improvement in the reproduction of the trial for appellate purposes. And I am convinced that careful study must be made of the effective use of the jury — not the present blind obeisance which makes it more a threat, and an expensive one, to be used as a settlement club than a useful trial adjunct in fact finding, as is its real function. This would lead me to a fascinating subject where, in my judgment, the lawyers and their insurance associates have been remiss in fighting new ideas which are necessary and worthwhile, namely, the disposal of auto accident claims in the future. With ten million victims a year, one hundred thousand fatalities, lost wages and expenses of five billion dollars, and a total economic cost in excess of fifteen billion, we cannot hope to provide enough courts and juries to sit and wait while the parties evaluate their cases for the purposes of settlement. I have long been of the view that for social reasons affecting the victims these claims should be subject to some better basis for testing than the outmoded concepts of negligence and contributory negligence. I do not believe reform here can be postponed many decades more.

What a fertile field, where improvements already accomplished serve to highlight the need for more! And what vistas of public and personal service for the young people now coming to the bar! I envy you from the bottom of my heart; but I congratulate you on the opportunities opening before you, which I am confident you will seize.