

THE JUDICIAL COUNCIL AND THE RULE-MAKING POWER: A DISSENT AND A PROTEST

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In 1947 the New York Judicial Council, after careful consideration, tabled a proposal submitted to it by the New York County Lawyers' Association to empower the Court of Appeals to prescribe civil procedure by rules, subject to modification by the legislature. The Council said:

"The basic consideration which influenced the Council's decision to table this proposal was a recognition of the general consensus of opinion that the present system of civil procedure presently employed in New York State works very well. No general demand for a change was found to exist. . . .

"It is believed that the present practice of eliminating procedural problems only after unhurried study and consideration by the Council, publication of its research in a printed form, and consideration and evaluation by the Bar Associations and Legislature, is a sufficiently satisfactory method of dealing with procedural problems at this time and is justified by the results. That New York possesses one of the most efficient systems of civil practice in the country is generally conceded. Nonetheless, if future developments indicate a need for change of the basic method by which the State's civil procedure is to be formulated, the Judicial Council will reconsider the tabled proposal."¹

To this all-inclusive statement we feel it necessary to offer a dissent and to add a protest that the Council should have brought itself to the point of uttering it. For it seems to us that the quoted words contain about as many errors as can well be compressed into so brief a space.

It is with great regret that we express this adverse judgment. The Council has done much fine and little-heralded work on behalf of procedural reform. We have been glad to recognize this fact in the past² and hope to have occasion to do so again in the future. From the human point of view, as even an outsider to the State can recognize, there must undoubtedly have been a strong urge to, and doubtless practical political considerations for, the conclusion that this particular hot potato should not be the Council's dish. One knows, for example, that the Council has been under sufficient fire so that a governor's veto has been necessary to preserve its very existence. The reasons for such a recompense for devoted public service are hard to fathom from our distance; whether this may be due in part to a lack of forthrightness in reform leadership, as the present incident suggests, with resulting forfeiture of some vitally necessary militant support, may only be guessed. We mention these potential political pressures not to appraise them, since we are in no position to do so, but merely to show recognition of their existence. Having stated them, having even conceded their power,

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1. THIRTEENTH REP. N. Y. JUD. COUNCIL 55, 56 (1947).

2. See, e.g., Clark, *Review of Ninth and Tenth Annual Reports of the Judicial Council of the State of New York*, 44 COL. L. REV. 457 (1944).

we must still remain of the view that a uniquely important Judicial Council cannot afford to sacrifice its role of leadership, no matter what the cost. Far better, it seems to us, is it for such an organization to go down fighting than to depart from, nay desert, all its natural friends. For it is indeed a blow when such a body declares to the countless numbers of those over the years who have steadfastly sought improvement in an unsatisfactory practice to be told with such seeming authority of a "general consensus of opinion" that the present system "works very well" and that "New York possesses one of the most efficient systems of civil practice in the country." One is torn between amazement at the statements and sorrow because of their source from the official leaders of reform in the State.

Nevertheless we must take the record as we find it. For better or for worse, the Council has now committed itself with an explicitness which cannot be misunderstood in the quoted statements. It is for those of us who have not lost hope for the dawn of a better day in New York procedure to swallow our disappointment as best we may and to proceed to the clear refutation of this statement which we firmly believe the record shows. The Council places its case objectively on the consensus of public opinion and subjectively on its own judgment of the intrinsic worth of the present system of legislative control. So we must face both of these standards. We propose therefore to consider the "consensus" of *informed* opinion, so far as it is ascertainable, and then to discuss the intrinsic worth of the system. In so doing we shall rely heavily upon what seems to us the teachings of experience, notably the revealing experience of the Council itself. To anticipate, we submit that the Council's continuous and praiseworthy attempts to secure enactment piecemeal in this State of the recognized best modern practice constitute a convincing demonstration that New York as yet does not have "one of the most efficient systems" in the country; while the tortuous course of the Council's recommendations, as compared with the experience of other states (our neighbor, New Jersey, as a prime example), affords a like demonstration that it does not have the best method of improving the system.

THE CONSENSUS OF OPINION

To resort to the verdict of public opinion is, it must be conceded, to look to a somewhat vague deity, of indefinite judgments so far as this subject is concerned. We do not understand that Dr. George Gallup has sampled this field, even if his returns are to be accorded judicial acceptance. But even on the bare published record the Council's assertion seems against the available evidence. We have tried to keep abreast of published material in this field and we find support for the assertion in only an earlier bar committee report and, to a certain extent, in the discussion by a single student of reform methods—references which we shall consider more in detail below.³

3. The State Bar Committee Report, 69 N. Y. ST. B. A. REP. 351-367 (1945), and the article by Professor Rothschild, *Reformulating the Jurisdiction of the Court of Appeals*,

Against this limited authority must be placed the weight of the numerous and distinguished groups of bar associations, scholars, and lawyers who have taken the opposite view and whose statements we are about to examine. One must indeed wonder where the Council found the basis for its conception of the *conceded* superiority of New York practice.

The value of leadership. Before we turn to the weighty opinions of those who have studied the situation over the years, we should consider the kind of authority which is to be regarded as persuasive in these fields. Even without a professional referendum, we are willing to acknowledge the strong probability that a majority of present practitioners, if called upon to vote, would favor retention of the present system without substantial change. Such, indeed, is so usual a result in all jurisdictions that we can accept it as a truism; the rank and file of the bar will always work for the practice it knows, will, indeed, view with suspicion, if not active dislike, a system even in smooth operation next door across those imaginary, but sharp, lines which divide states.⁴ Reform has always come, must always come, from the students and leaders, not those whose horizons are limited by their office walls or at most by the walls of the nearest courtroom. This the Council must have realized, or it itself would not have been in existence or would not have the record of accomplishment it has. The indicated point of view proves too much; the opposition made to the Council's reforms, whether at long last overcome, as in the case of its proposals for joinder of actions, or still triumphant, as with respect to discovery, shows that if the Council must wait for uniform or majority bar approval for its proposals it had better disband at once.

This point is so crucial to all procedural reform that we must stress it. In the authoritative account of the English struggle for procedural reform by Professor Sunderland,⁵ we have the demonstration of how for nearly a hundred years the inspiration for that wholly necessary improvement came largely from lay sources, following the original leadership of Jeremy Bentham. In New York the choice in 1920 between the advanced Rodenbeck

¹³ BROOKLYN L. REV. 14 (1947), here referred to are discussed *infra* notes 79-81, 84, 93 and accompanying text.

⁴ The classic example is the study in MORGAN ET AL., THE LAW OF EVIDENCE c. 3, and App. A-D (1927); lawyers of New York, Connecticut, and Massachusetts, questioned with respect to the three strikingly different attitudes toward the admissibility in evidence of declarations of deceased persons, all believed firmly that only the attitude of their own jurisdiction was sound. *Dellefield v. Blockdel Realty Co.*, 128 F.2d 85, 93 (2d Cir. 1942); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 338-341, 572, 573, 589 (1949). And see Chief Justice Vanderbilt's apt statement, *id.* xvii: "One of the strangest phenomena in the law is the general indifference of the legal profession to the technicalities, the anachronisms, and the delays in our procedural law." See also Fowler, *A Psychological Approach to Procedural Reform*, 43 YALE L. J. 1254 (1934); Lord Chorley, *Procedural Reform in England*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 98-102 (1949); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VANDERBILT L. REV. — (1950).

⁵ Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926).

Code and Rules and the Civil Practice Act was hardly doubtful so far as the rank and file of the bar was concerned, notwithstanding continuous criticisms of the latter in the State Bar Association.⁶ The loss to the State in this unfortunate choice is even now only partially understood.⁷ The outstanding reforms of modern times in the federal system occurred only after the most extended and devoted support by leaders of the bar, undoubtedly finally aided legislatively by the spirit of change engendered by a political overturn.⁸ True, acceptance of the federal rules was greatly aided by the careful attention of the Advisory Committee to suggestions from the bench and bar which it solicited and awaited.⁹ This was a method tending somewhat to approach solicitation of professional opinion; but it was happily far from a general referendum. For it more or less automatically reduced the area of responses to those who had at least a warm interest in the matter. In actual fact it tended further to limit the responses to those who had some actual knowledge of the problem, and in consequence a large number of informative letters and studies were received. In total effect, therefore, they added to the sound and substantial pressure for improvement.¹⁰ Even the new Constitution of New Jersey—finally approved by the electors after earlier failures—owes the inspiration of its judicial reform to individual leadership.¹¹ The truth of the matter is that the lawyer in active practice is too

6. According to the JOINT LEGISLATIVE COMMITTEE ON THE SIMPLIFICATION OF CIVIL PRACTICE 27 (1919), there was "almost uniform general disapproval" by the bar of the moderate and now thoroughly accepted reforms of the Rodenbeck Code. Only a negligible number of lawyers even bothered to respond to the Committee's questionnaire. Clearwater, 43 N. Y. ST. B. A. REP. 144-5 (1920). The support of the State Bar Association for the Rodenbeck Code, and its disapproval of the Civil Practice Act, are found in its reports from 1916 on, and especially 44 N. Y. ST. B. A. REP. 420 *et seq.*, 441 *et seq.*, 525 *et seq.* (1921).

7. See, e.g., Flynn, *Regulating Procedure by Rules of Court*, 26 CORN. L. Q. 653 (1941); and note the example cited below of the advanced rules for joinder of actions then presented, note 60 *infra* and accompanying text. The State Bar Association, which had been firm in its support of the Rodenbeck Code, note 6 *supra*, considered asking the governor to veto the Civil Practice Act, but eventually acquiesced despite the warning of Judge Rodenbeck against such a sacrifice of principle. *Proceedings of Annual Meeting*, 44 N. Y. ST. B. A. REP. 532, 544 (1921). That half a loaf is often far worse than none is one of the great lessons to be learned by the procedural reformer. Clark, *Dissatisfaction with Piecemeal Reform*, 24 J. AM. JUD. SOC. 121 (1940).

8. 1 MOORE'S FEDERAL PRACTICE 6-11, 23-5 (1st ed. 1938); *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A. B. A. J. 97-104 (1938); Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 145-8 (1948). The frequent citation herein of the senior author's articles and particularly his text on CODE PLEADING perhaps calls for some apology; in extenuation we can say only, first, that they afford convenient epitomes and collections of authorities too extensive to be set forth at length here and, second, that one of our most successful procedural leaders has admonished that "judicial reform is no sport for the short-winded." VANDERBILT, *op. cit. supra* note 4, at xix.

9. Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 79 (1949); Clark, *A Striking Feature of the Proposed New Rules*, 22 A. B. A. J. 787 (1936); Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A. B. A. J. 521 (1942).

10. The valuable letters and studies received from the lawyers and judges whose criticism the Advisory Committee solicited show that stimulus for procedural reform can be organized, contrary to the view of the state bar committee discussed *infra*.

11. Harrison, *Judicial Reform in New Jersey*, 22 STATE GOV. 232 (1949); English, *State*

much an interested party to any suggestion for change in the system he has mastered and made part of his capital assets to be a final judge of its social desirability.

The leadership opinion—New York. Hence the caliber and quality of the authorities relied on become of pre-eminent importance in any consideration of the sort to which the Council has led us. Here the direct demand for change has support of truly formidable character. For only recently the New York County Lawyers' Association, the Association of the Bar of the City of New York, the Citizens Committee on the Courts, and the New York State Committee of the American Bar Association on Improving the Administration of Justice joined in a notable report urging the transfer of rule-making power to the courts at the very time the proposal was before the Council.¹² They have been joined by the Bar Associations of Brooklyn and of Bronx and Nassau counties.¹³ This was in fact the position of the State Bar Association at an earlier date,¹⁴ even though, as we shall consider below, the majority of a single committee more recently took a different view.¹⁵ Moreover, the roll of distinguished names bringing truly expert experience to a consideration of the problem is unusual. We need only refer to such eminent lawyers, scholars, and judges as Irving Lehman, Bruce Bromley, Bernard L. Shientag, Harold Medina, Roscoe Pound, and William D. Mitchell as examples of the authorities cited throughout this article to prove the point.¹⁶

Further, the voice of expert experience condemns the New York system as "the most complicated, rigid and difficult procedural system of any state of the union,"¹⁷ "cumbersome and outmoded,"¹⁸ "the outstanding example of the deficiencies of statutory codes of procedure,"¹⁹ or, inclusively, merely "very unsatisfactory."²⁰ As often pointed out, the Civil Practice Act is al-

Courts: New Jersey Reorganizes Its Judicial System, 34 A. B. A. J. 11 (1948); Harrison, *New Jersey's New Court System*, 2 RUTGERS U. L. REV. 60 (1948); *Rules for New Jersey Courts: Bar and Public Assist Judicial Rulemaking*, 34 A. B. A. J. 445 (1948).

12. Memorandum on Proposal to Empower the Court of Appeals to Make Rules of Procedure for the Courts of the State of New York, 2 THE RECORD 12 (1947).

13. Mitchell, *supra* note 9, at 81.

14. *Proceedings of Annual Meeting*, 57 N. Y. ST. B. A. REP. 157-88 (1934).

15. The report cited *supra* note 3 and discussed *infra*.

16. Medina, *Current Developments in Pleading, Practice and Procedure in the New York Courts*, 30 CORN. L. Q. 449, 465 (1945); Medina, *Recent Developments in Pleading and Practice in New York*, 32 CORN. L. Q. 313, 336 (1947); Pound, *The Rule-Making Power of the Courts*, 12 A. B. A. J. 599, 602 (1926); SPECIAL REPORT OF THE COMMITTEE ON COURT RULES OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK ON THE EXTENSION OF THE RULE-MAKING POWER (1933) (the committee included E. J. Dimock, Allan R. Campbell, Bruce Bromley, Charles J. McDermott, Theodore B. Richter, and Lloyd P. Stryker); Mitchell, *supra* note 9, at 80-2; Shientag, *Book Review*, 57 YALE L. J. 155, 158 (1947). For Judge Lehman's position, see Keffe, Brooks and Greer, 86 *or 1100*, 32 CORN. L. Q. 253, 269 (1946).

17. William D. Mitchell, former Attorney-General of the United States, quoted at Flynn, *supra* note 7, at 663.

18. Keffe, Brooks and Greer, *supra* note 16, at 254.

19. Mitchell, *supra* note 9, at 80, referring also to the code as a "monstrosity" and the practice as "affected with a severe case of elephantiasis."

20. Arthur S. Golden, representing the 4th District in a discussion of a proposal to transfer the rule-making power at a meeting of the N. Y. State Bar Ass'n. Mr. Golden said:

together too long, with too much detail and too many traps for the unwary, and with much emphasis on forms and modes of procedure. It is lacking in recognition of the principle that in the administration of justice the enforcement of rules of practice is not the end in view. It lends itself to dilatory methods and litigation and appeals on points of procedure and delay in reaching the merits.²¹ A dramatic summary of these defects is found in the very title "86 or 1100" of a recent outstanding discussion of the problem.²²

The general view. Our appeal so far has been to the voice of experience in New York. Surely, however, the Council will not wish to limit itself to New York alone; its studies on procedural issues have obtained their standing and value because of their careful examination of the best experience everywhere.²³ But when we turn to this authority the evidence is, indeed, so extensive, so varied, and, as we believe, so persuasive as to compel assent. With the federal model as now the outstanding one, we observe the recent striking advances in state procedure to have followed this plan.²⁴ And the organized movements for procedural reform are based upon this as the fundamental tenet, so much so that the Council's pronouncement must appear as uniquely regressive.²⁵

"The present method seems to be very unsatisfactory. We think that we need less laws, better ones, not so many rules and regulations, but those that are quickly and easily enforced." 57 N. Y. ST. B. A. REP. 172 (1934).

21. *Memorandum*, 2 THE RECORD 12, 18 (1947); Mitchell, *Reform in Judicial Procedure*, 24 A. B. A. J. 197 (1938). Cf. Newman, *Book Review*, 24 ST. JOHN'S L. REV. 190, 192 (1949): ". . . the New York system of procedure is too detailed, remitting practice largely to the situation where a lawsuit is a chess game between lawyers, with the judge as umpire and sometimes moving the pieces, rather than a means for dispensing justice."

22. Keefe, Brooks and Greer, *supra* note 16, thus opposing the 86 federal rules to the more than 1100 sections in which the N. Y. Civil Practice Act covers the same ground.

23. In its monographic reports, the Council invariably examines general experience, as indeed it did in its monographs on joinder, note 67 *infra*, and in its very studies on rule-making in its Fifth, Tenth, and Eleventh Reports. The Council might profitably study the valuable survey of the status of the rule-making power in the several states in VANDERBILT, *op. cit. supra* note 4, at 91-145. The distinguished author comments that "the present mode of the regulation of procedure is reported to be unsatisfactory" in New York, and notes significantly that six of the twelve states where this is the case are those in which statutory regulation of the details of procedure in code form is most complete. *Id.* at 140-1.

24. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144 (1948); Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55, 67-70 (1949). The movement is a steadily continuous one; the latest state to adopt the federal rules of civil procedure is Utah, while a partial adoption has occurred in Florida, both effective Jan. 1, 1950. Compare the unhappy results in Missouri, where the court was denied the rule-making power and instead a new Civil Code of a highly conservative and unsatisfactory character was enacted. Atkinson, *Missouri's New Civil Procedure: A Critique of the Process of Procedural Improvement*, 9 MO. L. REV. 47 (1944).

25. Twelve years ago the American Bar Association recommended "That practice and procedure in the courts should be regulated by rules of court; and that to this end the courts should be given full rulemaking powers." 63 A. B. A. REP. 523 (1938). Complete supervisory rule-making power over procedure has been expressly entrusted to the courts by the constitution or statutes in fourteen states: Arizona, Idaho, Indiana, Maryland, Michigan, Missouri, New Jersey, New Mexico, North Dakota, South Dakota, Washington, West Virginia, Wisconsin, and Wyoming. In nine additional states the court of last resort has been given complete rule-making power in civil proceedings only: Colorado, Delaware, Florida, Georgia, Iowa, Minnesota, Pennsylvania, Texas, and Utah. VANDERBILT, *op. cit.*

THE INTRINSIC SUPERIORITY OF THE NEW YORK SYSTEM

Notwithstanding this unanimity of view on the part of those best in a position to judge, we certainly should not ask the members of the Council to go against their own inner convictions as to what should be desirable for their constituents. No matter how high the authority, we do not propose to rest upon that; our efforts up to this point may be considered therefore more as directed at the Council's easy reliance upon a, to our minds, non-existent consensus of opinion, rather than a constructive argument on its own premises. Now we must turn to the latter.

Is the New York system one of the country's most efficient? To those of us who have long struggled in the procedural field and have found in New York our most striking examples of what ought not to be, the Council's conclusion here is not the least startling of the several advanced for its present retreat. During many years of teaching in this field, the senior author hereof was always able to find convincing examples of how not to do things procedurally from New York. Indeed, reform would have at any rate a single disadvantage in destroying a rich field of potential horrible examples. True, many forward-looking procedural decisions can also be found in New York. But the fact that so many divergent precedents can exist side by side in one jurisdiction is an added burden imposed by the New York system. It is not even certain in its technicalities; for it is a settled precept that local precedent may be found in the published reports for any procedural principle, even the most divergent. So in the senior author's text and casebooks, New York examples are profuse.²⁶ The first edition of his text on Code Pleading, published in 1928, may well be thought a treatise on avoiding New York practice with examples; while the second edition of 1947 has the added feature of showing how to do things procedurally with federal examples. The material cannot all be incorporated herein. We must content ourselves with some general references, such as to the sad history of discovery here,²⁷ while we state at more length some selected and particularly illumi-

supra note 4, at 94-5. See the statement of the Montana supreme court: "It is a most serious reflection upon our legislation that the ablest attorneys in this state—men of great learning and wide experience—cannot understand the complex rules of procedure provided in our Civil Practice Act. But so long as legislative assemblies fix, by hard and fast statutes, mere rules of practice, this condition will continue." *Stephens v. Conley*, 48 Mont. 352, 367, 138 Pac. 189 (1914).

26. Cf. Brandis, 11 *FORDHAM L. REV.* 122 (1942), reviewing CLARK, *CASES ON PLEADING AND PROCEDURE* (2d ed. 1940), as collecting "horrible examples" of "waste motion in the legal process."

27. The federal system of discovery has been long recommended by the Judicial Council and other informed groups, see *FOURTEENTH REP. N. Y. JUD. COUNCIL* 67-69 (1948), giving citations to its several earlier recommendations and supporting studies, and compare *FIFTEENTH REP. N. Y. JUD. COUNCIL* 63, 229-240 (1949); the reform is long overdue both because of its intrinsic worth and because of the particularly strange conflicts between departments. The well-merited, though unfortunately limited, extension recognized in *Marie Dorros, Inc., v. Dorros Bros.*, 274 App. Div. 11, 80 N. Y. S.2d 25 (1st Dep't 1948)—thus compare 48 *COL. L. REV.* 951 (1948), 17 *FORDHAM L. REV.* 288 (1948), and 24 *N. Y. U. L. Q. REV.* 221 (1949)—is taking hold slowly in that important department; thus see *Ecco High Frequency Corp. v. Amtorg Trading Corp.*, App. Div. , 93 N. Y. S.2d

nating bits from the local history. Even this will fail to give the full flavor of the entire situation, for this analysis is too limited to subjects of pleading proper to do full justice to all the problems of practice and of appeal and their far from adequate solution.²⁸ Nor does it consider perhaps the most basic problem of all, that of the court structure itself and the modern movement for the integrated court to take the place of all the strange diversities so explicitly illustrated in New York.²⁹ But since the Council has recently tackled the problem at least as to the New York city courts, and, according to newspaper reports, is supporting court integration there, we have finally a beginning on this major undertaking.³⁰

The two examples we have chosen for detailed discussion are the union of law and equity and the joinder of actions.

"*Law and equity in New York—still unmerged.*" The most fundamental, far-reaching, and generally accepted feature of the Field reform of 1848 was the union of law and equity. In state after state this reform has gone into effect without major difficulty or substantial question or discussion.³¹ In the federal system, where this was long thought to present a constitutional problem, it has proved one of the most smoothly operating and least questioned of the rules. This is not to say that questions of serious import in application, such as the right to a jury trial, may not arise in particular instances; with such an important right and the varieties of new problems which may arise as to it, it is not strange that cases do arise, but

178 (1st Dep't 1949), one judge dissenting, and *Mutual Life Ins. Co. of New York v. Tailored Woman, Inc.*, 276 App. Div. 144, 93 N. Y. S.2d 241 (1st Dep't 1949), one judge dissenting. Note should be taken also of certain experiments with pre-trial conferences which the Council has approved. FIFTEENTH REP. N. Y. JUD. COUNCIL 80-2 (1949), FOURTEENTH REP. N. Y. JUD. COUNCIL 69-71 (1948), citing earlier recommendations and supporting studies. On the other hand, the Council would extend the verification of pleadings and the use of bills of particulars against the settled federal view. Thus compare FOURTEENTH REP. N. Y. JUD. COUNCIL 66, 67 (1948), with FED. R. CIV. P., 11, 12 (e); CLARK, CODE PLEADING 216 n. 17, 341 n. 152 (2d ed. 1947).

28. Part VI, Trials, and sections of Part VII, Judgment, and Part IX, Appeals, of the Federal Rules of Civil Procedure. Some of these provisions do already appear: reservation of motion for a directed verdict, N. Y. CIV. PRAC. ACT § 457-a; exceptions in substance, N. Y. CIV. PRAC. ACT § 446; alternate jurors, N. Y. CIV. PRAC. ACT § 449-a. A worth while attempt has been made to provide reform for the matter of appeal, but without success as yet. Nims, *Report to the Judicial Council of the State of New York on Shortening Records on Appeal in Civil Cases*, ELEVENTH REP. N. Y. JUD. COUNCIL 411 (1945), 16 N. Y. ST. BAR BULL. 139-157 (1944), 28 J. AM. JUD. SOC. 73-82 (1944), 4 F. R. D. 153.

29. See POUND, ORGANIZATION OF COURTS 273-294 (1940); Vinson, *The Business of Judicial Administration*, 33 J. AM. JUD. SOC. 73, 9 F. R. D. 185 (1949); Parker, *The Integration of the Federal Judiciary*, 56 HARV. L. REV. 563 (1943); VANDERBILT, *op. cit. supra* note 4, c. 2; "Strengthening the Courts," Chapter IX of the REPORT OF COMMISSION ON STATE GOVERNMENT ORGANIZATION (Conn. 1950), for whom the senior author served as Project Director for the study of the state Judicial Department.

30. N. Y. Times, Feb. 15, 1950, p. 2. The vital need for the reform is well brought out in President Patterson's proposals to the Council on behalf of the Association of the Bar of the City of New York stated in 5 THE RECORD 3 (1950). These proposals appear, however, to have suffered defeat in the legislature. N. Y. Times, March 22, 1950, p. 7.

31. This familiar subject is covered in the usual texts and casebooks; it is discussed at some length, pointing to the New York contrast, in CLARK, CODE PLEADING 78-127 (2d ed. 1947), and see references in the several notes following. An excellent illustrative case is *Barber v. Baldwin*, 135 Conn. 558, 67 A.2d 1 (1949).

their very fewness carries its own significance.³² Only in the mother state of New York, the home of the code union, however, do we find serious difficulty now a century later—so serious as to justify a thoughtful law review note under the arresting title here repeated as our subhead.³³ Still more recently a careful analysis of the entire problem by the distinguished Associate Dean of this School in a recent number of this Review shows the deleterious effect of the New York ambivalence even into the field of law teaching.³⁴

The problem in New York takes its shape in considerable measure from the repetition of an antique solecism that “the inherent and fundamental difference between actions at law and suits in equity cannot be ignored.”³⁵ This unfortunate statement, which hides some truth under a confused and fundamentally erroneous approach, might be dismissed as general nostalgia for ancient days by conservative judges if it were only that. It, however, shows a spirit of regard for ancient forms almost certain to yield unfortunate results when applied to concrete cases. Such, alas, has been the fact. Repetition of these ancient clichés has had a general result of imposing a rigidity and an emphasis upon mere pleading which is wholly unfortunate. And it has led to confusion and error, particularly in two situations, namely with reference to trial by jury and waiver thereof and with reference to claims for the dismissal of an action being brought to the “wrong side” of the court.

As to the first, the assumed rigidity between actions at law and suits in equity has led to a fundamentally erroneous approach to the question of the form of trial now appropriate in New York. It is still assumed that a case is either one all at law or all in equity, instead of the more correct approach, as shown by the code practice generally, that it is the form of separate issues which determines the jury-trial right. Under usual code practice, therefore, there may be simply and properly a jury trial of certain issues in a particular case and along with it a court trial of other issues.³⁶ In New York, however, we have such anomalies as the trial of a so-called equitable defense to a jury, leading to all sorts of narrow distinctions, as an attempted difference between equitable defenses, equitable cross-claims, and the like.³⁷ On top of this we

32. See in general the reference in note 31 *supra*, also note 36 *infra*.

33. Note, *Law and Equity in New York—Still Unmerged*, 55 YALE L. J. 826 (1946). As Justice Shientag succinctly says: “The trouble in New York, for the moment, is that it does not seem to have given full effect to the jurisdictional and procedural consolidation of the two systems.” SHIENTAG, *MOULDERS OF LEGAL THOUGHT* 149 (1943).

34. Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE L. REV. 186 (1949), containing penetrating criticisms of New York precedents and concluding that separate courses in “equity” must still be retained in New York law schools.

35. *Jackson v. Strong*, 222 N. Y. 149, 154, 118 N. E. 512 (1917). See CLARK, *CODE PLEADING* 78-90, 113-122 (2d ed. 1947); Clark, *The Union of Law and Equity*, 25 COL. L. REV. 1 (1925). And see note 44 *infra*.

36. *E.g.*, *Ring v. Spina*, 166 F.2d 546 (2d Cir. 1948), *cert. denied*, 335 U. S. 813 (1948); *Bruckman v. Hollzer*, 152 F.2d 730 (9th Cir. 1946); *Barber v. Baldwin*, 135 Conn. 558, 67 A.2d 1 (1949); Pike and Fischer, *Pleadings and Jury Rights in the New Federal Procedure*, 88 U. OF PA. L. REV. 645 (1940).

37. *Susquehanna S. S. Co. v. A. O. Andersen & Co.*, 239 N. Y. 285, 146 N. E. 381

find also the now antiquated rule of the original code that waiver of jury trial could be manifested only by some affirmative action; and consequently even a complete trial, as before a referee, may turn out not to constitute a waiver.³⁸ In a congested metropolitan area such as New York City, such a rule by its very confusion and uncertainty, as well as its unnecessary additions to the jury calendar, leads to the breakdown of that calendar and consequent denial of justice to poor and deserving litigants. Here there has been natural pressure for the adoption in New York City of the generally current rule in this country and in England of requiring prompt claim of jury trial by a litigant desirous thereof in a proper case on pain of waiver for failure to make the claim.³⁹ The slowness with which this simple rule has made its way in New York—where it is still limited to the four counties of New York City—⁴⁰ is a showing of the antiquated methods of procedural development in that state; it is also an illustration of the clashing interests between metropolitan New York City and the rest of the state, which so vitally affects all procedural advance in the state, as we point out below.⁴¹

Even more formalistic is the other problem in its frank assumption of the continued existence of two separate "sides" of the single court, though these were abolished in the code reform of over one hundred years ago.⁴² Application of this formalism depends on a narrow construction of the original code provision still retained in the Civil Practice Act that "where there is no answer, the judgment shall not be more favorable to the plaintiff than that demanded in the complaint."⁴³ A technical construction applying

(1925). The decision is criticized in Clark, *Trial of Actions under the Code*, 11 CORN. L. Q. 482 (1926); Rothschild, *New York Civil Practice Simplified*, 26 COL. L. REV. 30, 33 *et seq.* (1926); McKenna, *Trial by Jury under the Federal Rules*, 29 GEO. L. J. 88, 102 (1940); Walsh, *The Growing Function of Equity in the Development of Law*, in 3 LAW: A CENTURY OF PROGRESS 139, 162 (1937). But see Moreland, *Equitable Defenses*, 1 WASH. & LEE L. REV. 153 (1940); 25 COL. L. REV. 630 (1925).

38. *Jackson v. Strong*, 222 N. Y. 149, 118 N. E. 512 (1917); N. Y. CIV. PRAC. ACT § 426 (1)-(4), repeating without change CODE CIV. PROC. § 1009. A rule of court providing for waiver for failure to make claim within a specified time is invalid, as inconsistent with the code provision. *Moot v. Moot*, 214 N. Y. 204, 108 N. E. 424 (1915).

39. FED. R. CIV. P., 38, 39. See James, *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L. J. 1022 (1936). Similar state provisions and other discussions of this practice are collected in CLARK, CODE PLEADING 98 n. 59, 115 nn. 105, 106 (2d ed. 1947).

40. N. Y. CIV. PRAC. ACT § 426 (5). When this section was first added in 1927 it was limited to only two counties and to actions for a sum of money or to recover chattels. It has since been revised gradually to include all metropolitan counties and all jury actions. See ELEVENTH REP. N. Y. JUD. COUNCIL 247-60 (1945). This innovation has been said to be "sound in principle" and effective in reducing the congestion of the jury calendar. *Bartless v. Pino-Lytol Chemical Co.*, 39 N. Y. S.2d 355 (1942), *aff'd*, 266 App. Div. 684, 41 N. Y. S.2d 220 (2d Dep't 1943).

41. See pp. 367-368 *infra*.

42. It is well to recall the terms of the original merger provision, *viz.*, "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action." N. Y. Laws 1848, c. 379, § 62.

43. N. Y. CIV. PRAC. ACT § 479. Cf. FIRST REP. COM'RS ON PRAC. AND PL. § 231 (N. Y. 1848); N. Y. Laws 1848, c. 379, § 231.

this restriction to all cases where a formal "answer" has not been filed has allowed a defendant to demur under the earlier practice and now to move for a judgment on the pleadings, on the ground that equitable relief is demanded when there is adequate remedy at law and vice versa.⁴⁴ It would have been a sounder construction, in line with the intent of this code provision, to limit it to cases where the defendant had really defaulted in appearance, as held in various code states and definitely settled in the federal rules.⁴⁵ Even on the more technical view there was no occasion to dismiss the case on the basis that there were still two separate courts; it should at least have been continued on the proper "side," as some New York cases held, with others contrary and the whole thus left in indescribable confusion.⁴⁶

That such a situation can exist as to this fundamental proposition, at this late date and with the many available examples of effective solution of the problem, is surely a reflection on New York procedure. Up to 1949 the Judicial Council had not tackled this proposition.⁴⁷ Perhaps it was well advised to avoid it, since fundamentally the error is in the philosophy originally adopted by the New York courts of the "cold, not to say inhuman, treatment of the infant code" and still continued more or less with conflicting philosophies in the New York courts.⁴⁸ What is needed is of course an entirely new spirit toward procedure and the technical rules of special pleading or otherwise. One of the great benefits of modern rule-making has been the development of just that spirit, both in the bench and in the informed portion of the bar; and it is just that, as we point out below,⁴⁹

44. This narrow view is taken in *Nelson v. Schrank*, 273 App. Div. 72, 75 N. Y. S.2d 761 (2d Dep't 1947), offering an extensive review of the authorities in both the majority and dissenting opinions. See also CLARK, CODE PLEADING 87 n. 36, 265-9 (2d ed. 1947); Kharas, *supra* note 34, at 188-91; Note, *Law and Equity in New York—Still Unmerged*, 55 YALE L. J. 826 (1946), comparing the unfortunate decision of the First Department of the Appellate Division in *International Photo Recording Machines v. Microstat Corp.*, 269 App. Div. 485, 56 N. Y. S.2d 277 (1st Dep't 1945), with the more natural and less technical result which the Second Department reached on very similar facts in *Atlantic Metal Products v. Minskoff*, 267 App. Div. 1002, 48 N. Y. S.2d 436 (2d Dep't 1944), *aff'd per curiam*, 295 N. Y. 566, 64 N. E.2d 277 (1945).

45. FED. R. CIV. P., 54(c). Although this rule has been attacked as not supported by any code, Edmunds, *New Federal Rules of Civil Procedure*, 4 JOHN MARSHALL L. Q. 291, 302, 313 (1938), its essence may be found in the code provisions of a dozen or more states. See CLARK, CODE PLEADING 266-7 (2d ed. 1947).

46. See the authorities cited in note 44 *supra*.

47. It has, however, included "Completing Fusion of Law and Equity" in the list of subjects under consideration in its 1949 report, FIFTEENTH REP. N. Y. JUD. COUNCIL 13 (1949).

48. The quotation is from Chief Justice Winslow's famous opinion in *McArthur v. Moffet*, 143 Wis. 564, 567, 128 N. W. 445 (1910). "The first of [Field's] reforms, the fusion of law and equity, was to be accomplished by the elimination of distinctions in pleading resulting solely from the way in which equity jurisprudence had developed. Only deeply entrenched prejudices could oppose such a reform. Such prejudices have been found, however, not only at the Bar, but also at the Bench, and the New York courts have been notoriously adept in finding ways of utilizing their ancient learning at the cost of thwarting legislative efforts at procedural simplification in this direction." Newman, *supra* note 21, at 190.

49. Pp. 360-361 *infra*.

which the Judicial Council, by its condemnation of new procedures, is giving up all attempt to arouse. Even so, certain modest changes in the rules, which elsewhere have facilitated the easy operation of a successful practice, would make much more difficult the continuance of the antique philosophy. These are, quite obviously, adoption for the whole state of the provisions as to jury waiver upon failure to make claim therefor, now at last in force in New York City, and adoption of the rule limiting recovery to that demanded in the complaint only to the case where the defendant defaults of appearance. In addition, of course, modern rules, the rules for general and simplified pleading and for free joinder and consolidation of actions, would emphasize and supplement this approach.⁵⁰

Joinder of actions in New York. Important as it is, the topic just considered may not be as valuable for illustrative purposes because it has hitherto been avoided by the Council as one where the Council has had so long a struggle to achieve comparative success. In the one other field where quite clearly procedural reform has been most usual, desirable, and easily obtained, it has taken three decades and several false starts now at length to secure the practice which was originally intended on the successful English model. To us this bit of history speaks volumes against the supposed efficiency and utility of the system which the Council is now so determinedly supporting. Even the errors discovered here in the process should have been avoided, since they had already occurred and been corrected in the English reform in 1896.⁵¹ Indeed, locally, the situation has afforded almost a comedy of errors even from the initial Field Code of 1848 down to the final and, it is hoped, complete reform of 1949.

The codifiers of 1848 asserted that they were adopting the simple and effective equity rules of joinder for all actions.⁵² Unfortunately they did not have the full courage of their convictions; in addition, they made what now seems like one egregious mistake. They did provide for seemingly wide joinder of parties, but were curiously more restrained in what would seem the less complicated situation, affecting only two opposed parties, of joinder of causes of action. Here, as a kind of hang-over from the old system of forms of action, the codifiers provided for confusing and technical divisions between classes of causes of action—which have varied in the states from six to twelve or fourteen in number—based on the old forms supplemented by a sort of equity catchall of causes “arising out of the same transaction or transactions connected with the same subject of action.”⁵³ With respect to parties the original provision was for joinder of all persons “having an in-

50. See CLARK, CODE PLEADING 225-45, 369-72, 389-92 (2d ed. 1947).

51. For this history in England, see notes 57, 58 *infra* and accompanying text.

52. FIRST REP. COM'RS ON PRAC. AND PL. 124 (N. Y. 1848).

53. N. Y. Laws 1848, c. 379, § 143, later N. Y. CIV. PRAC. ACT § 258. See also the many other state statutes of a similar sort, collected in CLARK, CODE PLEADING 441 n. 20 (2d ed. 1947).

terest in the subject of the action, and in obtaining the relief demanded."⁵⁴ Here the error was in the use of "and." Previous equitable rules had stressed either one or the other of these two requirements; but both being usually present, the chancellors had found no difficulty in upholding joinder.⁵⁵ By an unfortunate transference of ideas, "or" became "and" in the code. The result was the unfortunate double-barreled requirement which, so far as it required a joint interest in the relief, was almost impossible to apply in the case of claims for money damages. The resulting confusion is well known.⁵⁶ Meanwhile in England the rules under the Judicature Act had provided for wide joinder; but when the House of Lords held the provisions not applicable to joinder of causes,⁵⁷ the rules were promptly expanded in 1896 to their present form⁵⁸ with such eminently satisfactory results that they have since been the model for American reform.⁵⁹

Rejecting the forward-looking rules proposed by the Rodenbeck Board,⁶⁰ the Assembly in the Civil Practice Act did try to follow the English model by accepting its test of "a common question of law or fact" for joinder of parties plaintiff.⁶¹ It overlooked, however, the interconnection of joinder of parties and joinder of causes, even though the English experience should have made this clear. So it continued the old requirement restricting joinder of causes only to certain specified classes.⁶² A not wholly unexpected, though not necessary, consequence⁶³ occurred in 1925 when the Court of Appeals, Cardozo, J., dissenting, held in the notorious case of *Ader v. Blau*⁶⁴ that the limitation upon joining causes of action overrode the later provisions for joinder of parties. To reach this result the court not only had to overlook the historical developments noted above, but had first to make a narrow restricted definition of cause of action, stressing distinctions of legal rights rather than factual events or transactions. Not unnaturally this decision has always been the subject of uniform criticism,⁶⁵ but the legis-

54. N. Y. Laws 1848, c. 379, § 97. Similar phraseology appears in many of the other state codes; for the citations see CLARK, CODE PLEADING 365 n. 72 (2d ed. 1947).

55. E.g., *Brinkerhoff v. Brown*, 6 Johns. Ch. 139 (N. Y. 1822); *Ballou v. Inhabitants of Hopkinton*, 4 Gray 324, 328 (Mass. 1855); CLARK, CODE PLEADING 355-7 (2d ed. 1947).

56. It is well illustrated by opposing cases such as *Gray v. Rothschild*, 48 Hun 596, 1 N. Y. S. 299 (1888), *aff'd*, 112 N. Y. 668, 19 N. E. 847 (1889), and *Bradley v. Bradley*, 165 N. Y. 183, 58 N. E. 887 (1900).

57. *Smurthwaite v. Hannay*, [1894] A. C. 494.

58. English Rules under the Judicature Act, Order 16, rules 1-5, Order 18, rules 1-5; *Payne v. British Time Recorder Co.*, [1921] 2 K. B. 1; *Thames v. Moore*, [1918] 1 K. B. 555; *Universities of Oxford and Cambridge v. Gill*, [1899] 1 Ch. 55; *Bedford v. Ellis*, [1901] A. C. 1.

59. As in the federal courts and some seventeen other American jurisdictions.

60. See 1 REP. BOARD OF STAT. CONSOL. Rules 180, 181 (1915).

61. N. Y. CIV. PRAC. ACT § 193.

62. N. Y. CIV. PRAC. ACT § 258.

63. See Comment, 32 YALE L. J. 384 (1923).

64. 241 N. Y. 7, 148 N. E. 771 (1925).

65. Citations to the wealth of critical comments are collected in CLARK, CODE PLEADING 439 n. 16 (2d ed. 1947).

lature ought in fairness to share the blame with the court for a confusion which a moderate amount of care would have prevented.⁶⁶

From its conception the Judicial Council has attempted to reform this situation. At an early date it presented at once a persuasive monograph wherein it pointed out the unfortunate consequences of the Civil Practice Act, criticized the Ader case, and recommended a change in statute.⁶⁷ This was adopted by the legislature in 1935.⁶⁸ This was one step forward, but only one. It apparently was not appreciated at once that the spirit of this change involved also the broad filing of a counterclaim. So the Council recommended this change;⁶⁹ and it, too, was adopted by the legislature in 1936.⁷⁰ Various further steps were needed in bringing the party-joinder rules covering such matters as intervention and impleader up to date, as we have noted in a footnote.⁷¹ Notwithstanding all these step-by-step changes, there was required a Court of Appeals reversal of a lower court decision in New York in 1947 to recognize that at length the New York joinder provisions had been reformed and the Ader case completely blotted out.⁷² Thereupon the Council recommended the complete adoption of the federal principles of joinder, which, as we understand, met with some professional opposition notwithstanding this history. We have previously referred to this all too natural reaction in the profession and desire to recapture the past which has already been so substantially rejected as to make retreat impossible. Even with the first steps taken in 1920, the past was gone and full adoption of the new principle, following the English model which was being looked to, should have been had at once. In any event, the legislature in 1949 adopted the recommendations of the Council for the full federal reform; and New York finally caught up with its own program.⁷³

Such is the course of procedural reform which the Council now views with such favor.

66. Notwithstanding this inept draftsmanship, however, the result has been avoided in three states which made the same interpretation as that of the New York lower courts overturned by *Ader v. Blau*, 241 N. Y. 7, 148 N. E. 771 (1925); these were California, South Carolina, and Wisconsin, while North Carolina reached the same result as did the *Ader* case. See citations, CLARK, CODE PLEADING 439 n. 15 (2d ed. 1947). Unfortunately the drafting difficulty was not perceived and is continued in the new South Dakota rules. S. D. Sup. Ct. Rule 113 (1939), S. D. CODE § 33.0916 (1939).

67. FIRST REP. N. Y. JUD. COUNCIL 44 (1935).

68. N. Y. LAWS 1935, c. 339; N. Y. CIV. PRAC. ACT § 258, as then amended.

69. SECOND REP. N. Y. JUD. COUNCIL 117 (1936).

70. N. Y. LAWS 1936, c. 324; N. Y. CIV. PRAC. ACT § 267 as amended.

71. ELEVENTH REP. N. Y. JUD. COUNCIL 341, 370-95, 401, 409 (1945); TWELFTH REP. N. Y. JUD. COUNCIL 192-218, 223, 231 (1946); N. Y. CIV. PRAC. ACT § 193-a, added by LAWS 1946, c. 971; N. Y. CIV. PRAC. RULE 54.

72. *Great Northern Tel. Co. v. Yokohama Specie Bank*, 297 N. Y. 135, 76 N. E.2d 117 (1947).

73. N. Y. LAWS 1949, c. 147; N. Y. CIV. PRAC. ACT § 212 as amended. The recommendations and supporting study of the Council are in FIFTEENTH REP. N. Y. JUD. COUNCIL 56-8, 209-40 (1949).

A NEW PROCEDURAL SPIRIT—ARE THERE REAL OBSTACLES
TO ITS DEVELOPMENT?

The success of the federal rules is phenomenal. There is, first, the accomplishment involved in securing their enactment. That so complete a change could have been accepted at all meant the most careful preparation, with consultation of lawyers and scholars throughout the country, so that it was recognized as a good product when it was presented to the Supreme Court. Then, too, the prestige of the Court gave the system an authoritative start. It is obvious that had it been compelled to run the gamut of Congress the inevitable compromises would have meant something quite different in result, even had eventual passage been secured. There is, further, the series of definite accomplishments achieved without question or difficulty by the specific rules: the union of law and equity; the simple, yet direct, pleading; the joinder of actions; the deposition and discovery practice, aided by the pre-trial and summary-judgment rules; the easy method of appeals, to name only the high lights. And there is, finally, the acceptance of the system as a model for the best state court procedure, and the duplication—even extension—of the success in the states which have adopted it. All this is familiar history, even though the Council appears to choose to ignore it.⁷⁴

Outstanding as is this record from the professional and theoretical side, what we have stated is only part of the accomplishment, and, for the long-time point of view, possibly the lesser part. For the greatest gain of all has been the development of a new spirit toward procedure on the part of bench and bar. It is indeed a pleasure to see how the district judges in particular—those who day after day must live with the new system and operate under it—have approached their task with the zest of a new experience, that of making the rules the servant, rather than the master, that of getting court business done simply and effectively. Older judges of vast experience have noted this development with some surprise as well as interest. Indeed, it is so clearly a consequence that any who come into contact with the federal courts cannot fail to notice it.⁷⁵ When we see the same spirit developing in

74. See the recommendation of the American Bar Association, "That the provision of the new federal rules of procedure with respect to the actual trial of cases should be uniformly adopted." 63 A. B. A. REP. 524 (1938). See also VANDERBILT, *op. cit. supra* note 4, at 92-3. The published material on the success of the federal rules and state rules patterned thereafter is too extensive to be cited in any detail; for bibliographies see CLARK, CODE PLEADING 39 n. 105 (2d ed. 1947), and for some particular surveys, see Carey, *In Favor of Uniformity*, 18 TEMP. L. Q. 145, 3 F. R. D. 505 (1943); *The Record of the Courts of New Jersey, 1948-1949*, N. J. L. J., Sept. 1, 1949.

75. Again citation of the cases would necessarily be too extensive. For some particular expressions of views by judges such as Chief Justice Stone, Justice Burton, Judges Chesnut, Hutcheson, Parker, and others, see *Remarks of Chief Justice Harlan F. Stone*, 1 THE RECORD 144, 149-50 (1946); Burton, "Judging Is Also Administration": *An Appreciation of Constructive Leadership*, 33 A. B. A. J. 1099, 1166-7 (1947); Chesnut, *Improvements in Judicial Procedure*, 17 CONN. B. J. 238, 243 (1943); Hutcheson, *Some Observations on the Federal Rules of Civil Procedure and State Rules Adopted by the Supreme Court*, 27 A. B. A. J. 594, 595 (1941); Parker, *Handling A Case Under the New Federal Rules*, 24 A. B. A. J. 793 (1938).

the states we have further proof that this is not accident, but is an expected concomitant of the new procedure.⁷⁶

It is such a development that the Council is deliberately discarding as of no worth for this great state, the original leader and exemplar of code reform. It is not even asking for the impetus which might come from a new legislative code of practice—perhaps soundly so, since the record of such codes of recent years has been so disappointing.⁷⁷ At any rate, it seeks only the piecemeal defeatist approach which was exemplified in the thirty-year struggle for modern rules of joinder. That is the system it now pronounces too fine for change.

We must give the Council credit for courage in its approach. Once it has determined to stick by the ancient ways, it then proceeds to pronounce them indisputably the best, notwithstanding the views of critics and experts and the teachings of experience here and elsewhere. It does not even indulge in a plea in confession and avoidance. Since, however, we wish to explore all angles we have looked for whatever support of the Council's view can be developed on perhaps a less all-out or black-and-white basis. This is rather difficult; for, in spite of the Council's reference to the strong public support for this view, there is actually very little in print to this effect. There are, however, two expressions of opinion which we think can be taken as elaboration of this point of view. One is the report of a state bar committee expressing in some detail the arguments in favor of legislative procedure making and actually cited by the Council in its Report.⁷⁸ Another is the somewhat brief, albeit direct, attack of an experienced practitioner and teacher on the undemocratic nature of rule making upon report of an advisory committee chosen as was the federal committee. These views we shall now consider.

Committee arguments against judicial rule making. In the Report of the State Bar Association for 1946 we find the "Report on Proposal to Empower the Courts of Appeals to Make Civil Procedure Rules for the Courts of this State" by the Committee to Co-operate with the Judicial Council of

76. Again we must refer to New Jersey, *viz.*, *The Record of the Courts of New Jersey, 1948-1949*, N. J. L. J., Sept. 1, 1949, as best evidencing the new spirit toward procedure which reform along the lines of the federal model has engendered. The federal rules have been followed substantially completely in Arizona, Colorado, Delaware, Maryland, New Jersey, New Mexico, and Utah, and to a lesser degree in Iowa, Missouri, and Texas. Substantial features of the federal rules have been incorporated in the rules of Florida, North Dakota, Pennsylvania, South Dakota, and Washington, while individual rules have been adopted elsewhere. VANDERBILT, *op. cit. supra* note 4, at 142. See also Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144 (1948); Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55 (1949); Clark, *Experience under the Amendments to the Federal Rules of Civil Procedure*, in FEDERAL RULES OF CIVIL PROCEDURE 1 (1950 Rev. ed., West Pub. Co.).

77. As in, *e.g.*, Illinois, Iowa, Pennsylvania, and Texas, see CLARK, CODE PLEADING 50-54 (2d ed. 1947); Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEX. L. REV. 4 (1941); Clark, *Dissatisfaction with Piecemeal Reform*, 24 J. AM. JUD. SOC. 121 (1940).

78. THIRTEENTH REP. N. Y. JUD. COUNCIL 55 (1947).

that Association.⁷⁹ As the Council now appears to have accepted that report of the Committee, we may perhaps wonder whether its intriguing name should not have been reversed, for the Council appears to have done the co-operating. At any event the report, signed by ten of a committee of nineteen, is a forceful attack on judicial control of civil procedure and support of legislative action alone. In the course of the report proper or that of the subcommittee upon which it is based appear what may be properly termed all the usual arguments advanced in opposition to rule making, some of them conflicting and mutually destructive. The question of the responsibility of courts for the administration of justice is answered by saying that, so long as the rule-making power lies with the legislature, the sole responsibility of the courts is officially to administer the law as enacted by the legislature.⁸⁰ It is urged that the high court judges have necessarily lost touch with the administration of procedure; that it is harder to stimulate a court into action than a legislature; that the legislature is fully as competent as, if not more so than, the courts to act; that the pressures upon the legislature are not sinister; that delays in the enactment of a procedural statute do not cause serious inconvenience; that the legislature now has the expert assistance of the Judicial Council; and that the courts do not afford ample opportunity to the bar and to the public for the airing of views.⁸¹ In the light of the history to which we have referred, many of these contentions seem curious indeed. With the prime example before us of the New York experience in legislative tinkering, with such defects in the Code as have persisted over the years, some of them involving minor details of wording which could be easily remedied, some showing the delay in campaigning necessary for such reform as the joinder of actions, it would seem that the Committee cannot have examined the New York experience with care in presenting these arguments.

But we must approach these arguments more broadly, because of course they go to the heart of the question, and represent the real background for the Council's action. Naturally some basis can be found by careful selection of examples for these arguments; but a justifiable comment is that they represent a comparison of legislative practice making at its theoretical best,

79. *State Bar Committee*, 69 N. Y. ST. B. A. REP. 351-5 (1946), with report of subcommittee at 355-67. The members of the subcommittee, Messrs. John G. Saxe and Fred L. Gross, were of course elder statesmen of the bar; it seems only appropriate to point out that the surviving member, Mr. Saxe, was deeply committed to the original amendment of the Civil Practice Act in 1920. *Id.*, at 358. The subcommittee shows some annoyance at "the well-intentioned persistency of the Committee on Improvement of Judicial Administration of the American Bar Association (as an auxiliary to which our Special Committee of the same name was created)" to which it attributes the present movement for a revision of the Civil Practice Act and Rules of Civil Practice. *Id.*, at 364. The Special Committee referred to was a very distinguished group of lawyers and judges, see 69 N. Y. ST. B. A. REP. 50 (1946), whose views the Council might well have solicited. See the report cited *supra* note 12.

80. 69 N. Y. ST. B. A. REP. 352 (1946).

81. *Id.*, at 352-4.

with court rule making at its theoretical worst. We think the Council has been misled by this approach in reaching the conclusion it has, and that the sounder way is to try to appraise the possibilities at this moment of time of the two systems. We stress the now because, of course, judicial and political habits do change. It is a matter of history, as we have noted, that procedural reform in England came not from the courts, but largely from the stimulus of laymen. David Dudley Field had to secure the initial great reform which brought this state to early leadership in the procedural field through the legislature, while the judges went far to wreck the system.⁸² But that was one hundred years ago, and we need to consider the situation in the light of the present.

Now the legislative bodies are overwhelmed with tasks which were never dreamed of a century ago, and pressures of all kinds have increased tremendously. Whether or not the legislative process has deteriorated as a whole is not the question before us. Certainly it can hardly be doubted that the opportunity for legislative study of what to date is a minor area of public welfare is now most limited and halting and, as experience shows, is done only in piecemeal and by pressure. While this deterioration has been going on the bar and the bench have at length become profoundly aroused to their responsibilities in judicial administration, and now are taking a proper professional pride in accomplishment. We have just referred to the creation of this spirit of professional execution of careful and original planning in this field. That is now available and being used in the advanced states for court rule making. It is not available and is not used in legislative tinkering with the system. What we must do, as has been so often emphasized in this article, is to look at the experience of this state compared with others. We suggest again that, on these very issues which the Committee has attempted to stress, the experience as between New York, on the one hand, and New Jersey, in particular, Delaware, Maryland, Arizona, Colorado, New Mexico, Utah, and others, on the other hand, not to speak of the federal situation, affords the crowning test of the validity or invalidity of these arguments.⁸³

It should be pointed out that most of the Committee's argument rests on an ignoring of what has come to be the recognized technique for court rule making. In general the courts do not attempt to sit down to formulate rules themselves, and it may be conceded that such a course would not be too successful. The recognized procedure is for the appointment of an advisory committee representing both scholarly and practical experience, which, in turn, is able to acquaint itself with the best views of the profession. With the appointment of an active and vigorous committee we have the full answer to the stressed arguments that the court will not act and that it has not time to act. The court thus has the over-all responsi-

82. See references in notes 5, 48 *supra*.

83. See references in notes 11, 76, 77 *supra*.

bility to proceed in an enlightened way, with adequate preparation by a committee in which it has confidence, before it takes action.

The procedure-substance dichotomy. The Committee makes a further argument, which it terms "much more serious," that "the line between procedure and substantive law has never been clearly drawn and a statute delegating procedural power to the courts will bring a flood of controversy over whether the court has encroached upon the field of substantive law."⁸⁴ Here, too, the Committee has stated a question of importance, but has proceeded to view it from the standpoint of realization of the worst. Again the experience has been otherwise; it even suggests some healthy results from the keeping of these functions and responsibilities somewhat separate.

It is true, of course, that the federal rule-making authority, by the terms of the enabling act, is strictly limited to matters of procedure and practice and that a considerable trend of state legislation is in favor of a like restriction.⁸⁵ There are good reasons for making some general limitation of this kind, although the place where the line should be located may not necessarily require pin-point precision.⁸⁶ It must be recognized that the present trend is to give wide ranges of discretion even in matters of policy—an expression of confidence which the judges themselves view with at least mixed feelings.⁸⁷ The point is that we are dealing with a matter which does not resolve itself into clear blacks and whites, but is one of policy expressing an ideal for a proper division of power and responsibility. And as such it is capable of resolution with some degree of flexibility by a court having sound appreciation of the legislative intent.

This becomes the clearer when we consider the illumination afforded by the approach of the United States Supreme Court to this problem, which appears not yet to have arisen or at least to have presented questions in state practice. The Supreme Court has refused to be forced into the drawing of narrow lines, but has given procedure, from the standpoint of court rule making, a liberal interpretation in the light of the purposes to be achieved,⁸⁸ while on the somewhat corollary question of the application of state law in the federal courts it has expanded substance to include many details often thought of as procedural.⁸⁹ A striking example, of course, is

84. 69 N. Y. ST. B. A. REP. 354-5 (1946).

85. The federal act is 48 STAT. 1064 (1934), 28 U. S. C. § 2072 (Supp. 1949). See Harris, *The Rule-Making Power*, A. B. A. JUD. ADMIN. MONOGRAPHS, SER. A, 5, 13-16 (1942).

86. The effort to limit the court rule-making power to matters of "procedure," rather than of "substance," usually is implemented by requiring rules to be reported to the legislature, which may veto them before they take effect. For the experience with such a device see: MOORE'S JUDICIAL CODE ¶ 0.03 (55) (1949); Clark, *Experience under the Amendments to the Federal Rules of Civil Procedure*, in FEDERAL RULES OF CIVIL PROCEDURE 1, 10-14, 21, 22 (1950 Rev. ed., West Pub. Co.); VANDERBILT, *op. cit. supra* note 4, at 95-99.

87. See, e.g., Clark, *The Dilemma of the Judges*, 35 A. B. A. J. 8 (1949).

88. E.g., *Mississippi Pub. Corp. v. Murphree*, 326 U. S. 438 (1946); *Sibbach v. Wilson & Co.*, 312 U. S. 1 (1941).

89. Three decisions last June illustrate the farthest reaches to date of this tendency: *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949); *Woods v. Interstate*

the reconciliation made of F.R. 23 (b) and state legislation, both restricting or controlling stockholders' derivative suits. A strict dichotomy would say that either the state law or F.R. 23 (b) must go. The Supreme Court, however, in *Cohen v. Beneficial Industrial Loan Corporation*⁹⁰ ruled that the rule itself was a proper regulation of procedure so far as authorization went, but that it, with the federal procedure as a whole, was properly limited by state laws affecting the very question before the federal court, namely the requirement of furnishing a substantial bond to prosecute.⁹¹ This experience shows how even questions of moment and importance lend themselves to an appropriate adjustment on what may now be considered an established technique in a situation of greater difficulty, since it also involves the relations between the state and federal system. The resulting examination of authority has caused, too, a careful appraisal of just what it means and the extent to which its exercise is socially desirable.⁹²

Is reporting by an advisory committee undemocratic? We turn now from the Committee report which seems so much to have shaped the Council's conclusion to another most interesting suggestion which appears to have been less publicized. It is the contention of a distinguished practitioner and scholar, rather briefly expressed, that court rule making on recommendation of an advisory committee is undesirable because of the undemocratic nature of the committee and the resulting bias or limitation of the practice it recommends.⁹³ Obviously this might be a very vital and important defect. We shall discuss it with some care because we think it brings us to important considerations of policy where the balance is with the federal system and where, moreover, the limitations and defects of the Council's own recommended practice are, upon examination, most apparent. This brings us to matters which are not often discussed because they tend to be dismissed as in the realm of practical politics, but matters whose impact is most weighty.

The desirability of expert aid for a court which has assumed the re-

Realty Co., 337 U. S. 535 (1949); and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

90. 337 U. S. 541 (1949).

91. To appraise the importance of these developments of the *Erie* doctrine, compare the very prescient student Note, *Erie R. R. v. Tompkins and the Federal Rules*, 62 HARV. L. REV. 1030 (1949), which appeared before the Supreme Court decisions, with the highly critical view of Keeffe, Gilhooley, Bailey and Day, *Weary Erie*, 34 CORN. L. Q. 494 (1949). See also 35 CORN. L. Q. 420 (1950).

92. Compare the majority and dissenting opinions in *Sibbach v. Wilson & Co.*, 312 U. S. 1 (1941).

93. Rothschild, *Reformulating the Jurisdiction of the Court of Appeals*, 13 BROOKLYN L. REV. 14, 16, 17 note (1947). Amid criticisms of the (then) confusion in New Jersey and of the number of federal procedural decisions and texts, the learned author, who as counsel achieved the procedural triumph of *Ader v. Blau*, 241 N. Y. 7, 148 N. E. 771 (1925), denominates the federal system as one of "buttonhole" pleadings and practice, created, sponsored, and supported by a select coterie of "big business" lawyers, not at all responsive to the "common touch," and the Judicial Council as "a far more democratically organized and representative body than the United States Supreme Court's Advisory Committee."

sponsibility of rule making has been pointed out,⁹⁴ but there is no particular merit in any method of choice so long as such aid may have the immediate confidence of the court and the ultimate confidence of the profession and the public. It may well be that other methods than that of the court's own selection of an advisory committee can properly be devised—methods which might include recommendation to the court by bar associations or other public groups, by the governor and the legislature, and so on. In view of the membership of the senior author in one of the federal committees, it is not appropriate that we comment at length upon the present personnel. It does seem proper, however, to point out, as must be obvious from the record itself, that the Court has always attempted to appoint wholly representative groups, with membership from the profession, from educators working in the subject, from professional organizations interested in law improvement, and from widely separated parts of the country. If the Court has failed to the extent the author implies, it must be an unexpected, and not a planned, consequence, and one which the Court presumably will be perfectly ready to correct upon a demonstration of the error. But it seems proper to question the sufficiency of the demonstration by the mere assertion; indeed, the charge comes somewhat as a surprise, since such criticism as has been uttered has been to the contrary effect, that there has been too much concern for plaintiffs or governmental agencies. This has been shown by some pointed professional criticisms of the discovery and proposed condemnation rules.⁹⁵ We wonder if these criticisms do not thus cancel out to leave the general enthusiasm for the federal system pretty much untouched. After all, too, the questions before the Advisory Committees turn more on expert evaluation of ways of getting court business done than on exploitation of the possible social or political bias of the expert. After all, there is the Court to exercise final responsibility for the drafting, and the legislature as a potential, if rarely to be employed, check on possible excesses.⁹⁶ We therefore assert with some confidence that the point thus advanced is not shown by the teaching of experience.

94. TENTH REP. N. Y. JUD. COUNCIL 166-8 (1941); Harris, *supra* note 85, at 12-14; Medina, *Current Developments in Pleading, Practice and Procedure in the New York Courts*, 30 CORN. L. Q. 449, 465 (1945).

95. As to discovery, the issue was raised as to "lawyers' files," so called; see the criticisms in 32 A. B. A. J. 666, 864, 882 (1946), 33 *id.* 199 (1947), and the brief filed on behalf of the American Bar Association as *amicus curiae* in *Hickman v. Taylor*, 329 U. S. 495 (1947), which was so sharp as to require a reply upon behalf of the committee. As to condemnation, see, e.g., 33 A. B. A. J. 174 (1947), and 34 *id.* 444 (1948), and other references given in Clark, *The Proposed Condemnation Rule*, 10 OHIO ST. L. J. 1 (Winter 1949).

96. We are not disposed to go so far as did Dean Wigmore and deny a final ultimate power to the legislature. Compare Wigmore, *Legislature Has No Power in Procedural Field*, 24 J. AM. JUD. SOC. 70 (1940), and Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928), with Beardsley, *Legislative Regulation of Procedure Not Unconstitutional*, 24 J. AM. JUD. SOC. 115 (1940), and Hibschan, *The Power to Regulate Court Procedure—Is It A Legislative or A Judicial Function*, 7 U. S. L. REV. 618 (1937). The opposing arguments are set forth, with discussion of the relevant cases, in Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L. Q. 459 (1937).

On the other hand, it must be said with some regret, the state Judicial Council is organized on the very basis of political and official position; and its major difficulties, its inhibitions already indicated as to various out-and-out reforms, stem, it is believed, from that source. While it may employ an expert staff, it cannot be an expert body itself. Its members are not chosen on that basis. Included, *ex officio*, in its membership are six committee chairmen and minority representatives from the assembly, the four presiding justices of the appellate divisions of the supreme court, as well as the chief judge of the court of appeals and retired judges or justices who by their former official positions were members of the Council, and a member of the bar significantly to be chosen "from each judicial department." This official and territorial representation thus can only, though it need not, be departed from in the instances of the "two citizens of the state at large" to be appointed by the governor and confirmed by the senate.⁹⁷ Of course it is too large; a heterogeneous group of twenty is not designed to provide expertness in procedural revision. More important is its division to meet the divisions inherent in the assembly itself. Obviously it is designed to reflect and hence to satisfy or placate these deep-seated divergencies. But by bringing them into an area—court efficiency—where they have no proper function, they are given a wider and more distorted power than the ordinary exigencies of American political life require.

What is thus brought into the solution of technical questions is not merely the ordinary pressures of politics and political events. It is something more pervasive and powerful than even these. It is indeed the most single important phenomenon to be consistently observed throughout all the states of this country, namely, the opposition of metropolitan and rural areas.⁹⁸ It is only the more striking in the Empire State, where the towering metropolis of New York City does overshadow all else and the clash between upstate and downstate interests is the more accentuated. That clash, with its important consequences upon the entire economy of the state, is inevitable, not to be complained of more than sultry heat in summer or overplentiful snow in winter. It becomes truly unfortunate when it enters into an issue which should be settled on lines of expert proficiency and efficiency and distorts and confuses the result. The present system which inevitably throws practice problems into this same arena cannot, save now and by chance then, result in a truly desirable and smoothly operating procedure. Thus on the one hand we find the utmost congestion of the New York City trial courts with overworked judges, overcrowded calendars,

97. Laws 1934, c. 128, amended by Laws 1936, c. 231, Laws 1939, c. 7, Laws 1941, c. 9, Laws 1942, c. 241, now N. Y. JUDICIARY LAW §§ 40-48. The direction of the Council naturally changes as the officials change more or less automatically. Four new appointments to the Council are now reported; from their high character one may perhaps hope for a change in the trend we have been discussing.

98. Note its frequent recurrence in the various essays on what is wrong with the government of particular states in ALLEN, *OUR SOVEREIGN STATE* (1949).

and delays of years in adjudication, the multitude of courts and the ill-adjustment of the tribunals to the litigation involved, the many confusing and conflicting procedural decisions which are largely explained by the crowded conditions, the hurry of trials and motions, and the pressure to dispose of cases rapidly on arbitrary procedural grounds or otherwise. On the other hand, we observe the slower and more even tempo of the upstate courts, their leisurely and more balanced attitude toward pleading problems, or calm judicial sea unrippled by the press and stir of the metropolitan area. The comparison is not fair; it cannot be unless one considers that these latter courts have time for fairly-fought procedural battles, while the former have not. And yet when a reform from England, New Jersey, or the federal system is suggested to relieve the intolerable burden upon the metropolitan courts, the matter soon resolves itself—just as this ultimate question of procedural control is doing—in terms of the political division of the state. That means, by and large, either the end or the subordination of the expert approach; each protagonist must remain true to his supposed allegiance upon the more important and all-pervasive issue.

These pressures are of course legislative pressures; they explain why so many of the Council's even simpler proposals for reform have taken so long to reach fruition. And they make it doubtful whether the Council from its nature as at best only an adviser of the body with power could be more than a minor adjunct—less powerful in fact than a committee or committee counsel—to oppose such pressures as may divorce procedural reform from its proper objectives. But it seems doubly unfortunate when these pressures are carried over by the governing law itself into the body which is intended to embody procedural leadership. The result is necessarily a cross-sterilization of effort on the part of the membership and a concentration of expert activity in the subordinate staff, who, however devoted, cannot take the place of the Council and incur criticism, rather undeserved, by being thus forced by the pressure of circumstances to appear to do so. In short, the New York experience shows that a judicial council, organized according to the prevailing political division of the assembly itself, cannot be looked to for determined leadership in procedural reform which may run counter to the views of the legislature. It must be more the adjunct or corollary body to support at best reforms which have been originated and developed elsewhere. And that, we think, is the real explanation of this unexpected and surprising report which we have criticized at so much length. If court control must remain thus limited and subordinated, then we fear that New York is destined to stay long in its present state of procedural darkness.