January 1949

Justice in Search of a Handmaiden

James Alger Fee

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

Part of the Law Commons

Recommended Citation

Available at: https://scholarship.law.ufl.edu/flr/vol2/iss2/1

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.
JUSTICE IN SEARCH OF A HANDMAIDEN

JAMES ALGER FEE

INTRODUCTION

It has been a maxim that procedure is the handmaiden of justice.¹ For a long time the effective help of procedure has been lost through devious paths. Justice is again on the point of rediscovering this efficient aid.

I purpose to demonstrate that pretrial conferences are necessary for efficient disposal of controversies which arise under modern business conditions in a jurisdiction where there is already a comprehensive system of modified common law pleading. This will be done as simply as possible, as a lawyer speaking to lawyers.

The discussion will cover only the strictly limited field of formation of issues before trial. Except as required for discussion of such formulation, no attention will be paid to the modern development of discovery, compass of the action, joinder of causes or persons, counterclaims, third party intervention or joinder, new trial and appellate practice, merger of law and equity, summary judgments and declaratory judgments. In this discussion there is no disposition to crusade, nor is there any disposition to engage in the controversy over the merits and demerits of rules of common law, code, federal and notice pleading which has raged for many years. In these polemics I intend presently to bear no part.

The elan of the profession will clothe these torn fields with a profusion of growth day by day so that the ravages will be concealed and erections, new and old, will be covered up and twined around. Economic conditions and necessities, as Hathi and his sons of the Second Jungle Book, will let the riotous growths in upon the rigid structures of legislation and rules. I simply point out that there are accepted and efficient methods of controlling the growth by which excrescences can be cut off and the whole adapted to the adornment and use of industrial communities. The disuse of such methods has caused our difficulties.

It must be remembered that common law pleading was developed by lawyers and judges for the specific purpose of presenting the ultimate issue to a jury. Whether a device in the procedural field will work or not, therefore, depends not upon whether some authoritative officer or official body can be prevailed upon to impose the use thereof upon the profession, but whether or not the use is in accordance with the necessity of the lawyers and the demands of the litigants. This principle has often been overlooked by the leaders of the bench and bar. Conspicuous incidents which indicate this tendency are found in legal history. When the industrial revolution had moved lawyers to revolt against technicalities of the ancient common law pleading and to use the general issue extensively so that trial could be had upon the merits rather than in some blind alley of pleading, the judges, under the pressure of leading lawyers, attempted to enforce special pleading by fiat. This led to the adoption of the Hilary Rules.\(^2\) No worse mistake was ever made. The forces which were moving prior to the attempt gathered weight and completely over-turned the formalistic interpretations,\(^3\) and thereby also abandoned for the time being clear definition of issue.

In quite the reverse situation, the framers of the American code system of civil procedure were impressed with the idea that all previous learning could be cast aside and pleading could be reduced to a few simple rules which the lawyer could carry in his pocket.\(^4\) The books are full of the reports of this failure to follow the customs and tendencies which the lawyers themselves set. A rule or statute may modify or control procedural growth, but the practice is the growth.

In order to determine whether an expedient fits into the practice, there must be an analysis of the problem of the lawyer. Under modern conditions, the lawyer is not performing his function in the preparation of a cause unless he uses all devices to discover the ultimate issues in controversy and reduce them to certainties before trial. For him this necessity exists no matter what system of pleading is in use. The rules of pleading, under whatever system, are only guideposts, and in loose sys-

\(^2\)Regulæ Generales of the Hilary Term, 1834, adopted by the Judges of the Superior Courts of Common Law at Westminster, pursuant to the statute of 3 & 4 Wm. IV, c. 42, §1 (1833).

\(^3\)Cf. Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725 (1926).

tems these guideposts are absent. In such a field the practitioner must be guided by training and instinct, as were wayfarers in former times on the Mojave or the Sahara. Under whatever system of rules, the ascertainment of the points of difference is of necessity for the lawyer if he is to arrive at the ultimate goal of a just solution of the controversy favorable to his client.

It will be apparent that rules and statutes are either restatements of the best procedure of lawyers or are limitations placed upon these tendencies. Pleading tendencies developed naturally, and it has only been in comparatively recent times that drastic limitations have been placed by rule and statute upon the natural growth. Rules which attempt to regulate procedure fall under this rubric. Whether or not these customs of lawyers are given the sanction of rule or statute makes no difference. Although practice must conform to formal requirements, it is still governed by the drive of the profession. The pleader is governed by the rules and statutes as to practice, just as a golfer is governed by formal rules of the game; but in neither instance do these rules limit native ability or skill in accomplishing the respective desired results.

It will be discovered that there are certain guiding principles:

(1) Before a dispute can be settled, the points of differences must be discovered.

(2) In all legal systems this is done by what are called "the pleadings."

(3) The art of the lawyer consists in discovering the facts and principles of law applicable thereto.

(4) Whatever the system of pleading, the necessity of the lawyer to discover the issues before trial exists.

In order to proceed to the conclusion that pretrial conferences are necessary, there must be a starting point. This will perhaps be no more valid ultimately than the Cartesian "I think, therefore I am," or the axiom of Euclid, "A straight line is the shortest distance between two points," both of which might be demonstrated to be unsound when abstracted from the matrix. But the establishment of points of dispute and the orientation thereof is an art. It cannot be reduced to a syllogism, but a framework of logic tends to clarity of thinking. The proposition, from which it is proposed to make a beginning here, is necessary if there is any sense to proceedings before actual trial. This proposition may be loosely stated:

In all differences between people, no solution can be found which is logically and emotionally satisfying to them and to the community unless someone has found wherein lie the points of disagreement.
Of course, this is a statement of a rule that applies generally. In an abstract field, such as formal debate, the disputants attempt to clear the ground by agreeing to as many facts and propositions as are possible and stating clearly questions still remaining. In legal controversies, the points of difference may be explicitly set out by the lawyers before actual trial, or may be chosen from the whole field of conflict by the trial judge upon instruction to the jury or when he decides the cause, or by appellate judges upon review. All important legal systems, however, have some place where there is an attempt to give some notice to the opposite sides and the court as to what the points of dispute will be.

Judge Clark says:  

"Before any dispute can be adjusted or decided, it is necessary to ascertain the actual points at issue between the disputants."

The discovery of the points of dispute and statement thereof is an art, as noted above. Lawyers set the customs and canons of the art of pleading. Once he has mastered the technique of the art, the real pleader can adapt himself to the formal limitations of any system. If an individual has never mastered the art, it is as if one tried to explain the mystery of color to a color-blind person. Whatever the rules, the pleading will still be done by lawyers.

Upon analysis of the problem of the lawyer, the conditions under which he practices his art will be plain. He must find the issues. In choosing a course of action with regard to obtaining all that to which his client is entitled, the lawyer must analyze his own processes to that end. In order to prosecute or defend a law suit, the lawyer must attempt to forecast the action of the court: (1) he must postulate a certain state of facts which will be accepted as bases for decision by the tribunal; and (2) he must assume that the court will follow a rule of law, or at least a definite course of action, with reference to these established "facts." In order to have a basis for contentions as to "facts," the lawyer must interview his client and witnesses and examine all documents which have any relation thereto. In order to forecast judicial action, he must draw on the precedents and his own knowledge and experience as to the reaction of courts in the past.


In fact, one of the chief problems of the inexperienced lawyer is to segregate the facts indicative of legal consequence from those which have none. The ability to analyze a fact situation with regard to judicial connotation is the result of the training and experience of the lawyer. Lawyers vary in this ability. In all systems there are good and bad pleaders. The most successful possess it in a high degree. The skillful have advantages over those who have not natural ability or training. The reason the lawyer is hired by the layman is because he can analyze a fact situation and so present it to the courts. If this were not the case, the layman would not need the lawyer. The profession would disintegrate. Wigmore points out that the existence and perpetuation of an organized system of law and justice depends upon the continuous presence of a strong, well educated and highly trained professional body who administer it.\(^7\) For it must be agreed by everyone that a mere collection of facts which has no importance in a judge's view cannot lay the foundation for any relief. Someone must find a guiding star of legal character and leave to one side all entangling facts of extraneous circumstance.

After the lawyer has found what the facts are which have implications as to judicial action, then his next problem is, first, to present these to the court and, second, to meet the situation which the other party there develops. Anyone who has had experience listening to stories of clients knows that, from his acquaintance with the rules of substantive law or, to put it in the picturesque language of one of our jurists, with his acquaintance with what the courts will do, the lawyer must pick and choose those facts which will lead him to the appropriate result. This result is the relief which he believes the court should give. In order that the lawyer may obtain relief by action of judges for a person who has suffered a wrong, there must be some statement to the court, so that basis may be laid for judgment. Unless definite notice be given to the opposite party, it would be not only unfair but impossible to frame a final judgment. This feature gives overwhelming weight to the common law rule that the judgment must be founded on matters contained in the record. Second, where there is an appearance for the other side, the lawyer for the moving party knows that there is to be resistance. He is then upon notice that either the opposite party does not accept the alleged "facts" or does not believe that the judicial action will be that contemplated by the movant, or that there may be another set of "facts" which may call

---

\(^7\) Cf. 3 Wigmore, Panorama of the World's Legal Systems 1129 (1928).
for application of other rules of law. Unless he is entirely inexperienced or naive, the lawyer will not assume that he knows all the "facts" underlying the transaction, and he will not assume that he knows all the theories of law which lie at the basis of defense. It has been drummed into our ears for so many decades that all our ills are to be traced to pleading and technicalities therein that, as in the case of "Emperor Jones," in Eugene O'Neill's play, the drums are apt to destroy our sense of direction and we may wander in an illogical circle with fearful consequences.

This does not mean that this is a palliation or a defense of any court which renders final decision upon a technical issue which has no relation to the facts or to justice between the parties. But when there is an attempt by pleadings to shape the issue, neither the lawyers nor the trial courts should be castigated for technicality. The younger lawyers have been so much affected by this criticism that they hesitate to discover the contested facts until embroiled in trial.

There are three reasons why the natural techniques of the lawyers are now learned only after long experience. First, emphasis as above noted has been laid by critics upon failure of justice by reason of hypertechnicality rather than on failures of justice by reason of ineptness and inadequacy. Second, the law schools have disclaimed the ability to teach pleading and practice. Third, there is generally no period of apprenticeship in which the beginner can be trained. The result has been good in the respect that emphasis has been removed from fighting out moot issues of pleading. The result has been bad inasmuch as the inexperienced lawyer and the layman feel that there is no necessity to discover the issues and state these exactly before trial. Moreover, any attempt to proceed scientifically has been described as a nostalgic hankering for an outmoded and archaic technicality. This tendency slurs over the imperative necessity for the discovery of the contentions and definition of the issues. The tyro will discover this necessity after experience has seasoned him. As the French say, "By much hammering one becomes a blacksmith."

This discussion does not mean that the bar fail to formulate the issues today. It means that the more experienced practitioners are able to protect themselves in such a situation, where the inexperienced are not. Pleading by laymen and inept attorneys, contrary to a highly publicized con-

---

cept, weights the scale unduly in favor of expert barristers at trial. If the causes of inadequacy are suggested and the development of methods of correction is outlined, the profession will not fail.

The result of these attitudes, tendencies and lack of training has been that practice in certain respects has seriously deteriorated. This is particularly notable in the matters of pleading. Motions and demurrers are not used, as these formerly were, to mold the controversy in understandable form. Instead of really trying to find out what the issues are, there has been a tendency to conceal the points of issue as far as possible, with the hope that somewhere, either in the trial or appellate court, advantage might be obtained by surprise. There is a tendency of the parties to file motions and demurrers or motions to dismiss and submit them without really calling to the court's attention the points involved, for the purpose of having them overruled and thus having the point saved for appeal.

This tendency to submit for decision without having a clear understanding of the issues is only to render "confusion worse confounded." Orderly presentation is the essential to all proper understanding by counsel and court. As Burke says, "Good order is the foundation of all good things." His presentation of the case against Warren Hastings, while it took account of all the emotional elements and of the imponderables, was almost syllogistic in organization. His "Conciliation with the American Colonies" has been a school classic for diagram, thus proving conclusively that, even in political controversy, there is virtue in orderly statement and presentation. As pointed out above, all systems of legal procedure provide some method to allow the lawyer to give notice of what he claims will happen and to obtain some suggestion of what the other party will expect to show.

The thesis here is that the more clearly the opposite parties know what the claims are as to "facts" and as to theories of relief, the more chance there is for a fair trial and presentation of the matter to the triers of fact, the less chance there is for the development of false and hidden issues for which either one side or the other is unprepared, and the less chance there will be for the trial or appellate court to choose an issue for final determination which the parties have not chosen as vital. No easy mode of solution is proposed here. Controlling the issues presents a like problem to the riding of a bucking horse. Each case is different. The approach must depend upon all the factors involved. Lack of comprehension of the problem leads to at least temporary failure. But the situation must be met.
I. CRITICISM OF MODERN COMMON LAW PLEADING

But it may be objected in some jurisdictions that there is still maintained in such state a complete system of common law pleading, which has been modified to meet the needs of the people and the economic conditions and with which the bar is satisfied. The requirements of order are thus met, it is said. The issues are formulated in the traditional method. The strongest advocates of retaining such a system believe that, if trial judges enforce the rules of pleading and lawyers use its well-filled armory of expedients, the problem will be solved.

Analysis of Deficiencies

Generally speaking, it will be discovered that any such system is inadequate in two major particulars, each of which arises from failure to define the issues adequately. First, there is looseness in common law pleadings, which permits matters to be tried of which neither party had notice before trial. Second, after trial, a judgment may have to be set aside because the pleadings are inadequate to define the issues concerning which the trial should have been held. No method yet devised has completely cured these failures of function. These occur in spite of the learning of the judges and the skill of the lawyers.

There are recurring criticisms of common law pleading in its modern form which have been dealt with by textwriters. Here, however, it is the purpose to lay stress only upon those which tend toward these two inadequacies just mentioned. These may be specifically enumerated as follows:

1. There is a formalistic approach to the problem of finding the issues. No place is provided for discussion outside the pleadings of the contentions of fact.
2. There is no place where the facts are established by agreement.
3. The questions of fact are never directly stated.
4. The rules of law, for which each of the parties respectively contends, are never explicitly set out or stated. These must be inferred from the allegations.
5. The use of common counts and the general issue leaves the court and the parties with no idea of what the proof will show.
6. The questions of law are not formally promulgated.
7. The documents which are the foundation of most modern law-
suits are not inspected by the respective parties before trial.

(8) No issues of fact and law are made up in order to dispose of preliminary proceedings.

The defects of equity procedure also are notorious. It is true that there fact pleading was brought to a high state and the idea was taken over by the advocates of code pleading. But the different forms of statement, the verbosity and tautology of the pleadings and the use of depositions by interrogatories and ex parte examinations were considerable handicaps to understanding of the issues.

These weaknesses and deficiencies of the present common law system must now be weighed and appraised in the light of modern business requirements.

Lack of Realistic Discussion of Facts

First, in the process of formulation of the issues by demurrers, motions to strike and motions to make more definite and certain, the pleaders are in an unreal world. No facts are established. There is no discussion of actual fact situations. The opponents are shadow-boxing. They are dealing with hypotheses and assumptions. On presentation and ruling of a motion or a demurrer, the assumptions are taken for truth. The allegations may be abandoned. These may never have been susceptible of proof. The result is that the pleader in the first instance attempts to state the "facts" in strong terms in order to escape an adverse ruling on motion or demurrer. He does not only state allegations which can be proved. He distills into them tenuous suggestions and possible inferences. All words and phrases, from which contrary inferences could be drawn, are eliminated. Although both parties may know that the proven facts will not bear out the suggestions, there will be no discussion of such a possibility.

The situation lends itself to concealment and untruthfulness in the pleading. The arguments are formalistic and confined to allegations, although both parties may know that at the trial the proof will refute many of them. Arguments on motions are not conducted in the light of actual facts. As a result, a motion to make more definite and certain will be resisted, not because the true facts are not known to the pleader but only to make the other lawyer do his own investigating. A motion to strike will be resisted, not because the pleader believes the fact to be relevant or material but to slur the issue. No general discussion of all the facts is contemplated. Each lawyer knows his client's story and his side of the
case. But no attempt is made to lay out the entire background of the controversy. If such a discussion were held, the issues could be made to conform to the actual contentions of the parties.

No Opportunity to Reach Agreements of Fact

Second, the common law only establishes legal principles by deciding the facts. Until the facts are proved or assumed, there can be no decision of a question of law. In common law procedure, there are two ways of establishing facts. These are admission and proof. The latter happens in most instances at trial, and may be disregarded here. Admissions usually are made only in pleadings. As noted above, rulings on demurrers or, as they are called in modern argot, motions to dismiss, do not establish facts. The common law rule prohibits pleading of evidence. The tendency toward sweeping allegation makes the other party extremely cautious. He fears to admit the truth he knows, because the allegation may contain inferences. Even if conscientious, he cannot always tell what was intended by expressions in the other party's pleading. By incautious admission, he may give away a bastion vital to his position where the evidence might uphold it. He must construe the allegation and determine what meaning a judge at some future time might give to the statement, or he must move to have the language made certain, or he must deny and plead a qualified admission in his own phrasing. The "facts" which are stated are described as ultimate. Yet, if the evidence upon which the pleading was based could be stated, the opposite party could safely admit the allegation or deny portions and admit portions. The common law procedure, as modernly used, does not permit the establishment of facts upon which both parties are willing to agree at the beginning of the proceeding or at any place therein. The attempt to establish such facts muddies the issues and stirs up collateral points.

No Statement of Questions of Fact

Third, although there are definite questions of fact which must be determined by the triers of the fact, either judge or jury, there is no definite formulation thereof before final submission. It is very well to say that, since there is definite allegation and denial, the questions of fact are formulated. The indefinite nature of hidden issues of fact destroys any such pretended certainty, since there may be a multitude of questions,
main and dependent. Strict common law special pleading avoided this
difficulty by requiring singleness of issue, and left but one question of fact
for trial. The multitudinous questions of fact in a modern lawsuit are not
anywhere stated in common law pleading.

Contentions of Law Appear Only by Inference

Fourth, in a large degree, indicia as to the rules of law predicated
by the pleader were supplied at common law special pleading by the form
of the action and the plea. Each of these fitted into a definite rule of law
which the precedents supported. This result is also obtained at times by
a strict enforcement of the theory of the pleadings doctrine, either under
the codes or in modern common law pleadings. But there has been very
violent criticism of this doctrine, and in most courts there is a tendency
toward relaxation. Actually, it is this very looseness in the substratum of
the law underlying the pleadings which causes the expense of time and
labor at the trial of the modern lawsuit.

It is true, the common law pleading, whether it strictly follows the
forms of action or not, implies a theory of the pleading. This is an essen-
tial to the proper trial of a lawsuit. Unless a lawyer has some idea or
appreciation of what the legal position of the other side is, he is always
subject to surprise either by the injection of some element which he is not
prepared to meet at the trial or by an entirely different interpretation of
the evidence by the trial or appellate judges. But in many situations the
theories of law are never developed upon common law pleadings now in
use. Innumerable shifts of position legally are possible for either plaintiff
or defendant. The whole field of interpretation of the evidence is left to
trial and appellate judges.

Hidden issues of fact may develop because neither side knows upon
what rule of law the other side bases his claim or his defense. Another
factor which tends to this result is that there is no method whereby either
party can state the rule of law for which he contends or upon which he
thinks the fate of the case rests. But there must be some test to solve
problems of materiality, relevance and competency. All of these tend to
establish clarity of issue. A lawyer knows upon what rule, doctrine or
prophecy of judicial action he bases his case. It is true that during the
trial he may be required to shift to a slightly different theory. The trial
judge should be allowed to determine whether the shift is so material that
the other party might have anticipated it. If not, a continuance should
be granted. In any event, the pleadings should be then amended so that all parties know what the shift is. This possible incident of the trial, however, does not excuse either lawyer or the court for permitting a trial to come on without adequate definition of the issues of law by the pleadings before trial. A trial so conducted is like a poker game, not only with the joker but also with the deuces wild. The deficiency to which attention is here called is that common law pleading, as used in most jurisdictions, provides no place where the contentsions of law on each side are stated before trial. Even if the parties agree upon the underlying rules of law, there is no method of ascertaining the agreement from the pleadings. If there are disagreements as to rules of law, these are often not presented until final argument. This is a serious defect. Most lawyers, caught by surprise by a novel legal point in a trial, make an offhand argument and save their lubrications for appeal.

Liberality of amendment, which is permitted in modified common law pleading, does tend to take care of some of the necessary technical rules which might have prevented decision on the merits, such as the rules against departure and variance. By persistence, the party could mold the pleadings of the other side so that these would be intelligible and the rules of law upon which these were founded could be discovered. But no procedure is provided whereby this becomes possible without more effort than the lawyer thinks it worth in an ordinary case.

Vagueness of Common Counts and General Issue

Fifth, in common law systems likewise, the common counts prevail. These give no idea as to what the facts may be. The common counts, of course, are invulnerable to demurrers and to motions to make more definite and certain. As a result, while certain facts in such actions might well be agreed upon by the parties before trial, with this manner of pleading no facts can be established until the evidence is all in. In pleading to the common counts, the defendant will use the general issue, and as a result everything will be at large. Upon the proof, the basis upon which recovery can be predicated or denied will depend upon an infinite variety of states of fact of which one party or the other may have no previous notice. Sometimes neither of the parties will know the decisive facts before submission. Hidden and surprise issues then develop at the trial.9

9A local exemplification of the protean forms of the actual matters to be tried, in which the common counts constitute the initial pleading, is found in O'Brien, The
Neither party knows what it is that he will have to meet, and again, instead of having one or two clearly contested issues, the modern lawsuit upon such a basis looks like a battle royal, with each splinter of evidence having to defend itself from every direction. Even in cases in which the devices above noted are not used and there has been an attempt to state the issuable facts, the same tendency still prevails.

A modern instance is illustrative. In one hearing, which happened to be before an administrative body and not before a court, counsel for complainant was given free rein to prove everything his fancy dictated. When it came to the defense, the counsel on the other side started to prove in detail the contrary of every piece of testimony that had been introduced upon behalf of the complainant, whether relevant or material. Upon objection, counsel for defendant explained his position as follows: "Counsel for plaintiff has placed everything possible in this record from the kitchen stove to the four year old dog and the men from Mars. As to each piece of testimony, whether I think it has anything to do with the controversy or not, I am prepared to and will prove the exact contrary. I am going to establish by evidence as to each bit of testimony that it just plain ain't so."

The examiner yielded. As a result, the record became so long and involved the cause was never decided.

This simply shows the danger to be avoided and the responsibility of counsel. Had the lawyer for the defense been less aware of the danger when everyone was proceeding without exact formulation of the issue, he might have been faced with defeat upon the ground that some issue upon which he failed to adduce proof was decisive and that a finding based on some casual remark of a witness or on some stray bit of hearsay was supported by the record and encased in adamant. To lose a case upon a concealed issue which was never disclosed until trial or on appeal, when the just disposal requires another result, is as deleterious to the litigant and the public as to lose it, as did Crogate,10 upon a technicality of pleading which had nothing to do with the merits. These results are possible under modern common law pleading.

No Formal Statement of Questions of Law

Sixth, no statement is made before trial of the questions of law to be settled. This includes another deficiency. Many times the parties at the

---

Common Counts in Florida, 6 Fla. L. J. 151 (1932). The common counts, as this article conclusively shows, do not give "notice" of the contention.

10Crogate's Case, 8 Co. 66b, 77 Eng. Rep. 574 (K. B. 1608).
outset may be in agreement as to the rules of law. If the controversy grows hot, conflicting theories may develop. The failure to state agreements and disagreements as to rules of law is an outgrowth from the failure to state the contentions of law or theories of law which lie at the foundation of the case, to which reference is made above.

No Inspection of Documents Prior to Trial

Seventh, the documents, which are the foundation of issues in most modern transactions, are never brought in court until the trial. Neither side has the opportunity to inspect those which are to be used by the other. Most of the transactions today which are the subject of litigation have been covered by voluminous correspondence and in many instances by other documents. Normally speaking, it is extremely difficult to attack anything which is so evidenced. While it is true that there are various methods of permitting some of these documents to be inspected, such as the rule requiring attachment or inspection at the time of filing the declaration, these expediency are too flimsy to bear the weight imposed upon them. To these, add situations that permit concealment of documents which one party or the other is going to use in his case, such as the rule permitting the pleading of an important document by legal effect. Generally, it will be extremely difficult for one party or the other, unless he has possession of the documents himself, to discover exactly what the writings actually are, except by the use permitted in some jurisdictions of compelling production on deposition or inspection upon rule or as a result of motion.

Lack of Formulation of Issues in Preliminary Proceedings

Eighth, the issues are not formulated in the preliminary proceedings. This final point has nothing to do with the pleadings as such. It relates simply to the disposal of preliminary matters by affidavit or deposition before there is any formulation of the issues. This is not a specific criticism against modern common law pleading, but against all forms of pleading and procedure. In the early stages, before the matter has come to definite trial, such as upon a motion for a preliminary injunction or in the other forms of provisional remedies, there are issues of fact which are tried out at large very often by affidavit,\(^1\) without any knowledge upon

\(^1\)Cf. 2 Moore, Facts §938 (1908): "In his Rationale of Judicial Evidence, Bentham
the part of either of the adversaries as to what the issues of the case are. The result of this is that it leaves these matters entirely within the discretion of the trial judge in the first instance, and later in the hands of the appellate judges, whose idea of discretion may be entirely different.

Likewise, in jurisdictions which permit summary judgment, the use of affidavits to show that there are no real issues is a usurpation of power upon the part of the judiciary. No one can tell whether there are issues or not until the issues are formulated. Before there is any disposition of a cause upon summary judgment or upon the pleadings, there should be a definite formulation of the issues so that everyone can tell whether or not there is an issue of fact. If there is an issue of fact, it should be tried.

II. VESTIGES OF THE COMMON LAW AND THE ENGLISH DEVELOPMENT

The Movement for Reform of Common Law Pleading

When the lawyer is faced with deficiencies in the common law system of pleading and inadequacy to meet the modern business litigation, he will, if sincere, seek some course whereby injustices to his clients may be averted. As a result, there has been a widespread movement to abolish completely customs, rules and statutes and to adopt some mode of proceeding other than common law pleading, preferably one based upon entirely different principles. The lawyers themselves, in practically every jurisdiction where the common law system is in use, are restive and desire a change. In recent years, common law pleading has been abolished or sweepingly modified in states where litigation of business matters is a considerable factor.

Arguments for Alternative Solutions: Abolition or Modification

Those who advocate retention of the present system argue that the bar were trained in the language and literature of the common law. All the textbooks explaining the substantive law were and are today grouped in chapters which are explicative of some form of ancient action. The most modern of texts, encyclopedias and digests still carry them. The structure of society as a whole, and especially the worlds of capital and labor, are founded upon these stones of the ancient writs.

characterized ex parte affidavits as the 'most miserable species of evidence.'” Cf. 5 Wigmore, Evidence §1384 (3d ed. 1940).
Whether we like it or not, they say that all the substantive law in America is still ruled by concepts which developed around the forms of action. Many practitioners accept this and, in dealing with real property, go to great lengths in searching ancient books concerning contingent remainders, as explained by Fearne, or tenures, as set out by Coke and Littleton, or argue for the edification of a modern court the application of some obscure precedent of the middle ages. On the other hand, motivated by the philosophy upon which the precedent is based and the modern condition under which it is sought to be applied, they rail against the technicality involved in finding out exactly the point of dispute between the parties.

It may be accepted as true that the practice at the bar of this country springs from common law roots. Therefore, the lawyers must have a background, for better or worse, in the common law. Their training is not lost by any revolution, political or economic. It is a part of their being. The doctrines of Confucius have pervaded the training and the thought of China for centuries and have outlasted revolution and dynasties. So it is with the lawyers of America. The modes of thought about rights and wrongs which pervaded the outworn feudal land system of England govern our thought today.

Notwithstanding the fact that most practitioners, writers and judges recognize that the substantive law has a common law foundation, when it comes to procedure some of them damn common law pleading as if it were the root of all evil. They would abolish it root and branch. But no one has ever questioned the fact that common law special pleading was the most highly effective instrument ever devised for isolating a single issue against a background of the common substantive law, which had developed around the forms of action. Therefore, a great many lawyers and writers glorify this mode of proceeding as the acme of perfection of logical isolation of questions of law and fact. But the historical facts prove that this system frustrated its own purposes. It finally arrived at the point where the common lawyers played it as a game and forgot the ends for which it was originally devised, namely, the working out of justice between the parties.

Holdsworth says:12

"... under the regime of the system of written pleadings, its main principles had been developed by decided cases, and by the skill of

129 History of English Law 279 (1938).
the pleaders, into so logical, so scientific, and so technical a system, that they had lost touch with the illogical facts of life, and with the practical needs of litigants."

Modification as Developed in England

The result of this lack of restraint was that, when the Industrial Revolution caused a reform in medieval modes of thought, strict special pleading was discarded in the country of its origin. After some half-century of groping, a system of pleading was then adopted in England which discarded the technicalities but retained the spirit of the ancient system. Holdsworth says:13

"Our modern system of pleading endeavours, not unsuccessfully, to combine the brevity and the simpler forms of the common law, with the equity principle of stating facts and not the legal conclusion which the pleader puts upon the facts."

And again:14

"Its strong points still live, not only in our modern system of pleading, but also in the principles and rules of the common law itself; for, as I said in an earlier volume, it was under its regime that these principles and rules were developed. It is therefore true to say that, 'until the whole system of English law shall be recast and codified,' some acquaintance with the old learning 'will be indispensable to all who wish to be sound common lawyers'; since, 'without it a great deal of quite recent authority will remain obscure, and, the old books in a great measure unintelligible.'"

Revival of Oral Pleading by the "Summons for Directions"

As a result, the English development has been a modified form of common law pleading. But it was discovered that, although the Hilary Rules had to be abandoned not on account of demerits but because of the extreme technicality of the application thereof, the modification led to such looseness that expedients were required to prevent injustice. Since

139 id. at 407.
149 id. at 334-335.
the English Bar has had greater continuity of experience, because of the
method of training of lawyers and the resistance to criticism, the character
of the expediency of it is of great interest. The genius of English lawyers in
retaining the spirit of the past and applying antique devices in the solu-
tion of present difficulties is well known. Apparently, here there was a
reversion to the procedure of the common lawyers before the advent of
written pleadings. The experiments in that country with summons for
directions and like devices have been pursued in order to supply in some
less formalistic fashion the losses of certainty and definiteness caused by
the abandonment of the system exemplified by the Hilary Rules. Grave
technical difficulties have arisen in the use of this device, but in general
these seem to have been largely defects of administration.

It must be conceded by all that the spirit of a language and of legal
institutions is all-pervading and ubiquitous with the people who use them.
The grammar and the rules of practice are but crystallizations of usage.
Modes of thought are molded by grammatical usage. Substantive law is
given form by forms of procedure. The language of Canterbury Tales and
the Areopagitica is English, as is that of Uncle Remus, Ulysses or a deci-
sion of the Supreme Court. Essentially, the same rules of grammar con-
trol. We need not use the archaic forms in order to appreciate the spirit.

As the English legal experience shows, the practice will conform to
the education, training and spirit of the lawyers, modified by the prob-
lems which they must meet and by the temper of their clients, which
reflect local economic conditions.

Pleading under the present English system is governed by the spirit of
the ancient procedure. In this country, under modified common law sys-
tems, under the codes and even under the federal rules, modes of pro-
cedure are similarly controlled. The adoption of an expedient in England
is of value in appraising what the course should be in this country, especi-
ally in jurisdictions which maintain common law pleading. In fact, sug-
gestions from that experiment have affected the course of development
here. As far as can be discovered from the literature, those same objec-
tives which are sought by the summons for directions in England are, as
it will be found, attempted in American courts in pretrial conferences.

III. DEVELOPMENT BY LAWYERS OF PRETRIAL TECHNIQUES OF THEIR
OWN, CORRESPONDING TO THOSE USED AT EARLY COMMON LAW

The clock cannot be turned back. Because of the tradition of for-
malistic and technical construction without regard to the ends of justice,
the Hilary Rules cannot be reinstated. But equally, the quest for exactness of issue cannot be abandoned.

A modified form of common law pleading may retain the background and the techniques of the older scheme of solving the lawyer's problem. But a jurisdiction which retains common law pleading in modified form would not escape the problem imposed by modern business conditions. Within recent years the progress of economic changes has been such that the litigants are extremely restive under the delays and improper results obtained by lawyers at trials. The clients at this time are efficient businessmen. They look at the results to be attained rather than the methods of obtaining them. A business agent of a union or a president of a modern corporation, who will sit down and in negotiation lasting a few minutes or a few hours enter into a deal which involves profit or loss of millions of dollars and who can have his lawyers, and the lawyers on the other side, draft, approve and have executed a contract covering such a transaction, does not brook with patience the months of delay which flow past when he attempts to obtain satisfaction for a breach of the same contract. Just as the ancient system of pleading was discarded because it failed to meet the desires and ends of the community and failed to keep progress with the industrial revolution, so modern business conditions require that a progressive bar make use of all devices to cure deficiencies such as those above indicated if they exist in the system in use. Perhaps this may be done by an entirely new set of rules which discard the verbiage and attempt to shake off the accustomed practice. It is the purpose here to suggest that, if the present statutes or rules of any state which has common law pleading are retained, the practice may be adapted to a sound and comprehensive definition of the issues by use of certain techniques which are available to the bar without any radical change in the formal rules now prevailing.

Resistance of the Bar to Change

Very often the bar is hesitant to make a revolutionary change in the practice. There is, of course, sound basis for this hesitancy. After a long period of time, when a practice has grown up, it fits not only into

It had been encumbered with obsolete learning and had been terribly abused by the ingenuity of pleaders during centuries of adroit manipulation. The abuses were not, I think, organic, and much had been done to remedy them; but the system had fallen into discredit, and had become the scapegoat for the sins of the profession." Crackanthorpe, The Uses of Legal History, 19 A. B. A. Rep. 343, 361 (1896).
the substantive law of the state, but to a certain extent into the manners and customs of the people and the practices of the business communities. Therefore, any such changes should not only conform to local conditions, but should follow courses which are historically available.

It must be noted that the difficulties of common law pleading in the modified form lie not so much in what can strictly be called technicalities, but in the deficiencies in fulfilling the objectives for which it was created.

The common law pleading was based upon the essential proposition that the issue was picked by the parties and that it must be definite and certain. Likewise, the issue was always stated in an intelligible form and remained as a guide through further proceedings. There cannot be a decision until a definite state of facts is established and a rule of law applied to the facts so determined. The practitioner today is guided by these principles.

If we analyze the criticism of the techniques of lawyers in the preparation and trial of cases, as has just been done, we find that the delays which test the patience of the business man are caused by fear that the case will not be tried upon the proper issues. This fear is based upon the fact that the attorneys often try cases without ever finding out until the trial what the issues are. This even proceeds further. Many times they do not find what the issues are until they begin to brief the case for appeal. As noted above, sometimes the appellate courts help them out of the quandary by finding new issues about which neither of the parties has thought. This situation has developed from the fact that in many instances the preparation of the written pleadings has been left to juniors.

Furthermore, a great many of the arguments which tend to formulate the issues have been presented by lawyers who have nothing to do with the trial of the case. As a result, the barrister has more and more been isolated from what is actually the most important feature in the trial, namely, the formulation of the issues. More and more, the barrister has tended to rely upon the breaks of the trial and his ability to think on his feet than upon the issues made by the pleadings. Many times during the course of a trial, the lawyer on one side or the other gets his greatest surprise when he finds what the pleadings require. These tendencies are the result of the fact that, while at strict common law pleading the more astute lawyer could prevail by following the course of pleading, under the modern modifications the issues cannot be adequately framed. Therefore, instead of depending upon this method, the lawyer often now relies upon concealment of the facts and the legal points until he has his opponent fairly committed at a trial.
These difficulties would have been eliminated and the lawyers themselves would have worked out a method of finding the issues in definite and dependable terms if it were not for fear. Strict common law special pleading was abused to the point where it became so technical that a slight misstep would cause the loss of the case, entirely irrespective of the facts. The lawyer who so lost a case lost on account of professional incapacity. In loose systems, the longer the essential issues remain undefined, the more the astute practitioner, by keeping the aces up his sleeve, feels that somewhere during the trial or on appeal he may take advantage of surprise. He fears to say what the real facts are or even to state his contention. Often he feels that his opponent may not be able to bring technical proof of what he actually knows are the real facts. If he makes admission thereof, he will lose an advantage. If a method of standardizing the informal procedures has been found so that the controversy can be defined without danger except from the facts themselves, the bar may save the judicial system from just criticism by making use of them.

Various Pretrial Techniques Developed by the Bar: Informal Discussions Out of Court and Arguments on Motions or Demurrers

On the other hand, the lawyers themselves have developed techniques in protecting their clients which serve the purpose of correcting the defects of pleading above enumerated. In many jurisdictions—usually it is true outside of the metropolitan centers—lawyers seek opportunities, either before or after the course of pleading has been completed, to enter into informal discussions and thereby narrow the issues. These occasions arise upon the argument of motions or demurrers and on the taking of depositions or at other court appearances. At times, motions or demurrers are used for the purpose of obtaining admissions of salient facts or verification of the issue of law. Normally speaking, these discussions take place in court; but, at many bars where counsel are well acquainted with each other, these may take place almost anywhere. Suggestions that certain allegations cannot be proved are often so made. Also, demands that proof ought not to be required as to certain obvious facts are advanced. Very often, too, agreements as to the existence of certain facts are demanded and made. Again, at arguments upon demurrers or motions, the whole legal background of the case and the contentions of each party may be discussed. The statement of what the evidence will show on such occasions or what the evidence will be is not unusual. Clarification of the
language of a pleading is often so obtained. Documents whose existence has been denied may be produced for inspection.

Depositions and Trial-Briefs

Of course, after issues are formulated by processes of pleading, the taking of depositions will further narrow and define the issues and explicitly set out the contentions of the parties. In many jurisdictions, there is a practice, whether enforced by rule or not, that trial-briefs be served and filed before the commencement of the trial. The judges at times discuss questions raised in the trial-briefs, interrogate counsel, and thus discover whether certain allegations are contested and whether there is a disagreement as to legal points. Thereby they bring about a further sharpening of the issues before any evidence is introduced. By the trial-briefs alone, moreover, the situation can be brought to almost complete clarity. There the facts which may be denied in the pleadings are informally admitted. The theories of law, both of attack and defense, are set up and the contentions of the parties given severe delimitation. These practices are widespread and result from the pressure of business men for early disposal of contested cases so that the balance sheets of profit and loss may be made out. At present, business firms do not desire to keep ledgers in which litigated items of doubtful value are held in suspension. This pressure is tending more and more to require that lawyers adopt these informal practices for making up the issues if no better devices can be found.

Evolution of the Pretrial Conference

When these practices had arrived at the point where they were concluded in open court with the aid and supervision of the judge and were carried out by matters of record binding upon the parties, such as admissions or amendments to the pleadings, so that their results were made effective in simplification of the issues and stabilization of admitted facts, such practices actually became pretrial conferences in the most acceptable form. As such, they preserved the principle of party presentation, but permitted the definition of the issues without technicality.

The history of trials in this country shows that many judges also, before the trial of cases and in a very informal manner, have without rule or statute held conferences for some of these same objectives. In some
places where the bar has been extremely progressive, the attorneys have requested the court for such conferences before or at trial, in order that false issues might not develop or that surprises might not deflect the controversy, which each side understands exists. Likewise, attorneys often agree to hold a conference in a particular case, either with or without the presence of the judge. The result of this development out of ordinary practices of lawyers has been that pretrial conferences have been held without any special authority, although not so denominated. Thereafter, in many jurisdictions, a simple rule has resulted in considerable use of the method.

At this point in the development, some courts by rule adopted compulsory pretrial conferences. In many other courts, rules were passed whereby the parties could conduct such conferences or the courts could require them. Pretrial conferences, for the legitimate purposes above set out, have been a matter of slow growth both in England and in America. But there is now a large body of experience which would suggest to advanced practitioners the extent to which such procedures could be used for the purpose of shortening trials and obtaining just results for their clients.

*Pretrial Oral Pleading at Early Common Law*

One of the elements for good pleading of proper issues, which was lost when written pleading developed at common law, is the opportunity on both sides for a complete disclosure. The oral pleading at common law afforded this opportunity for full discussion of both the facts and the law. In some manner this feature, which fell into desuetude at the time written pleadings were adopted, should be restored. This does not mean that strict oral pleading should be restored, but the discussion of the true issues should not be canaled by the written pleadings alone. There should be at the final stage, therefore, some written statement of contentions and issues beyond the formal pleadings, which statement will have been affirmed at the conference, so that a record will remain and all parties and all courts may be advised with certainty what the conflict is about. In a state which retains common law pleading, the backbone of the issues may be present; but a record of further definition by pretrial order is often essential.

While it is urged upon us by some writers that the oral pleading of some types of civil law procedure be adopted, there is but little reference
to the native oral pleading from which the common law special pleading developed. Yet this early system, contrasted with the civil law procedure, was effective, had the same objectives as those which presently prevail, and by opening the field of inquiry escaped much of the unnaturalness of the later method. It is to these first principles of the indigenous system to which return may be had.

Common law special pleading, at its highest development, was entirely based upon written pleadings. The difficulty with oral pleading is the necessity of somewhere formulating the issue in writing so that all parties can be guided thereby. If this preliminary formulation has proceeded upon the proper lines under present common law pleading, thereafter at the pretrial conference the methods of oral pleading can be used to clear up the details, sharpen the issues, and obtain a common understanding as to all points at issue.

As the cavalry maneuvers of Jackson, Stuart and Sheridan, of the Civil War, developed techniques applied in the shifting of armor by Patton and Montgomery and Rommel during the last conflict, so we may find analogy for pretrial conference procedures embedded in the ancient history of the common law. The English practice has made us familiar with an attempted revivification of all these devices. As all who know the Year Books realize, the first pleading was oral, and the literature gathered about the attempt to find the issue rather than, as in the later reports, the attempt to decide the case after the issue had been clarified. The emphasis has thus in our legal history been laid upon both the important divisions of a cause, namely, the finding of the issue and, second, the decision thereof.

Of course, at early common law the declaration was fixed by the writ which issued from the chancellor, and, generally speaking, the discussion relates to the form of the plea and the replication or further pleadings. At first, in olden times, this was confined to oral pleadings, which afterwards, upon formulation, were placed in the roll; but at a subsequent period the written pleadings were brought into court and there discussed between the parties as to the sufficiency and applicability thereof. This second phase is more nearly like the pretrial conference than was the first, because generally the pretrial conference closes the proceedings and is held after all the pleadings and depositions and other preliminary matters are before the court and the parties. Also, now, since the form of action is abolished, the declaration, as well as the plea or answer, comes in for discussion. The weaknesses and vaguenesses of allegation of each pleading, its verbosities and tautologies may also be examined.
These practices of lawyers, when intelligibly carried out, bring us close to the ideal of common law pleading, namely, issues developed by party presentation and formulated of record before the commencement of the trial, so that all parties may know what the dispute is about before there is any attempt to reach a decision. Up to the present time, however, there has been but little effort to find a valid historical basis for the practices. So far as can be discovered, there has been no craftsmanlike attempt to coordinate the practices to insure an orderly evolution.

IV. Application and Explanation of Pretrial Conferences

The artistic development of these ancient methods to blend with the colorings of the modern scene and to maintain the balance and symmetry of justice is within the competency of present day lawyers and judges.

Opening Statements of Counsel

It is submitted that the use of pretrial conference procedure gives full scope to the learning and ingenuity of the lawyer and yet full protection from pitfalls of formalistic pleadings. The results may be freed of technicality. The process is of extreme simplicity. After the course of pleading is completed, the lawyer for the plaintiff will make an informal statement of his case in open court. The lawyer for the defense will make a similar statement of his case also. The court should see that these narratives are not parrot-like repetitions of the allegations, but have local color and detail. If there have been depositions taken, these will also be discussed, since the actual facts are thereby clarified. The attorney will outline the contentions of facts based upon the depositions also. These are, of course, evidentiary in character, and the talk about them gives shading and background for the issues.

Thereafter, the lawyer for the plaintiff will produce all documents which he will introduce at trial. The attorney of defendant will bring in all papers and letters which he expects to introduce.

The process is all-inclusive. The attorney on either side may ask about any claim of fact which he or the other party makes, whether it apparently has any connection with the controversy or not. Any claim of fact advanced can be admitted, whereupon it may be included in the agreed facts. If admitted, the opposite lawyer may still claim that the fact has no legal significance in the controversy. Thereupon, the fact is noted among the agreed facts, but a question of law as to legal signifi-
cance is reserved. If a claim of facts is denied, there is stated a question of fact. A factual claim may be denied and at the same time there may be included a statement that, even if the facts are established, these have no legal significance. In that situation, a question of fact should be noted and likewise a question of law.

Informal General Discussion

One who has experience in the courtroom will perceive that a general discussion will follow, in which many statements as to the facts will be made, blending in with the general situation. Irrelevancies, evidentiary matter, legal conclusions, inferences and deductions will be discussed conversationally. The whole background of the cause will be examined. Since there is a record of the proceeding, there is a guaranty of the truthfulness of the statements. There is the convention that the disclosures limit the issues of fact and law. In practice, there is actually no concealment. The function of the judge is not to compel disclosure, but to see that the pretrial order forecloses trial of issues not previously brought into the field of scrutiny, unless a manifest injustice develops. In the latter situation, the judge grants continuance at trial and holds a renewed conference.

Judicial Admissions and Issuable Facts

At this inquisition, under general supervision of the court, it will be discovered that a single fact or certain states of fact will crystallize, upon which both parties are in agreement. When the parties are agreed and the agreement stated in open court, a judicial admission is of record and the fact is established for all purposes. It cannot be thereafter controverted. Very often, and indeed generally, an "ultimate fact" will not be so established, but will be matter from which inferences may be drawn as to an "ultimate fact." The more of such facts which are so established, the narrower and the more definite become the issues of fact. It will be obvious that, if the process goes far enough, all facts may be stipulated and only questions of law will remain. Such a denouement is time and again a by-product of the conference.

It should be said here that no pressure should be brought judicially to require admissions of any allegations of fact which are not obviously true. But it is permissible for the judge to ask the lawyer who insists upon a denial whether it is his intention to introduce proof to controvert the
allegation. Often the existence of a corporation is denied simply because the lawyer does not have the proof in his hands. If he is asked whether he will introduce proof to the contrary, the answer will generally be in the negative. The court may then insist that counsel inform himself and either admit incorporation or deny and introduce affirmative proof to the contrary. Usually, however, the lawyers should only be asked to admit or deny.

But it is objected that this is exactly what the lawyer does when he draws a written pleading. This is true. There is no departure from the guiding principle of strict common law pleading in this respect. The distinct advantage is that, in practice, the admissions of uncontested facts are actually made. The attorney in court, in the presence of the parties, the other attorney and the judge, and in general discussion, does agree to states of fact which he knows no ground to contest. In the open forum, he cannot hide behind the vagaries of language. Besides, the evidentiary facts are stated and agreements are made thereon. These ends can be accomplished in the great majority of cases, at a single session of court, without the delays of attempting to obtain admissions or agreements as to facts by interaction of motions and redrafts of pleadings.

While certain facts have been irrevocably agreed upon, there generally will be allegations on each side as to facts which are not admitted by the other. Each side will delineate in concise fashion the respective claims of fact or states of fact. These disagreements should be formulated either as propositions or as questions. Here is a very definite gain over any other method of procedure. The very questions, which are to be decided by the triers of fact, can be stated by agreement of the parties under the supervision of the court. These exact questions may be used for a special verdict if the trial is before a jury. If the case is tried before the court, the judge may categorically answer each. The answers thereto, together with the facts agreed upon, will then constitute the foundation for the findings of fact.

Clarification and Construction of Pleadings

This method of complete discussion of the whole evidentiary background serves to escape the failure of the common counts to indicate the issuable facts. The full disclosure of the setting serves also to define other matters which should be set out in pleading. If the language of the complaint is of doubtful implication, the interpretation may be settled by
mutual construction. It may be objected that, if the pleading had been drawn properly in the first instance, there would have been no occasion for all this debate. Perhaps this may be true, but model pleadings in court are unusual in ordinary practice. To arrive at a proper statement by a poor pleader is wasteful of time and expensive.

Documents

The pretrial conference adds most to a widening of the modified common law pleadings, however, in the use of documents. At common law, of course, there were very few documents. Many people could not read, and few could write. But in the modern age practically all business affairs are carried on with voluminous correspondence, and there are mutitudinous documents of every sort: contracts, agreements, letters, deeds and other indicia of the course of the transaction. It is true that these can be obtained by discovery and by other procedures which are known to the present systems; but, all in all, it is extremely difficult to find the pertinent documents by these procedures.

On the other hand, review of documents tends most to canalize the points of dispute. It will be found, in reviewing the whole of the documentary evidence in a case, that most of the points of agreement stand out very clearly and, likewise, generally the points of disagreement. Therefore, this device alone is of tremendous importance in advising both the court and counsel. At ancient common law, there were some references to documents and some special procedures. Notable among these was profert of the deed for oyer. The common law recognized that, if the deed were brought into court and read, settlement of the controversy might follow. This was often the case, as will be noted by a reference to the ancient Year Books. In the present state of affairs, the documents have just as much weight as they had at early common law, and likewise there are more of them. Very often an attorney is taken by surprise when he finds in the midst of the trial some document of which his client has not told him, which may be absolutely decisive upon the point which he is considering as a basis for his case.

All forms of pleading are particularly weak in this regard because, either at common law or under the codes, a document may be pleaded by its legal effect, and indeed in good form should be so pleaded. Obviously, this should be true, because it would be very difficult at most times to set out a great number of documents ipsissimis verbis. This is proper
pleading, then; but there is nothing which advises counsel and the court as clearly as does the display of documents what the main points of issue are. Therefore, an inspection of the documents at pretrial conference will save a great deal of maneuver. Many times it will prevent the lawsuit from going further.

There are several methods in which counsel can apply this rule. The chief is to agree with the other side that all documents pertinent to the case be brought into court at the conference, inspected and marked for identification. The other is that each side bring in all documents expected to be introduced in evidence by them. By agreement, neither will introduce any not so produced for inspection. In many courts, this is enforced at the application of counsel by a rule that documents which are not produced by a party as the basis of his case and exhibited to his opponent cannot be introduced in evidence. This affords an effective bar for failure to disclose. As soon as the documents are brought into court and have been inspected by both parties, the situation is then ripe for admissions and framing of the issues of fact.

Narrowing of Questions of Fact

The final pretrial conference at which the order or stipulation is outlined should develop to the fullest extent the possibility of admissions upon both sides. This does not, of course, mean that any essential position should be jeopardized. Even though the lawyer may realize that it might be difficult for the opposing party to make formal proof of the existence of a corporation or of facts shown by the records of a corporation, which are nevertheless believed by him to be true, or of other like facts such as condition of weather or situations shown by hospital records or other documents of which there is substantial guaranty of truth and in which neither the lawyer nor his client knows of any defect which can be established by evidence, it is proper for each party to concede such matters for the purpose of getting the essential issues clearcut for trial. Of course, many times during this process one side or the other will become conscious of the fact that he actually has but very little controversy left to try. When this is true, it is usually better that the controversy be settled rather than lost outright. But these considerations are for the parties and their lawyers and not for the judge.

By definition of denials, a specification of the exact state of facts set up and denied may be obtained. The questions of fact can thus be suc-
cinctly stated. Many trial judges are not satisfied with a general verdict of a jury, and require special questions passed upon by the jury. Some attorneys desire this also. Here in the pretrial conference these can be formulated in advance of trial.

Admissibility of Evidence

During the inquiry into the facts and claims of fact, it will be noted that incidental conflicts as to competency, relevancy and materiality arise. With reference to documents, authenticity may be doubted; and, even if these are admitted to be genuine, differences as to admissibility at trial will be raised. Note is made of conflicting views. Since no state of facts lays a basis for legal relief unless vitalized by a theory of law, the proponent of the claim of fact or document must state some ground for admissibility. As Justice Holmes wrote:

"The process is one, from a lawyer's statement of the case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head."

In other words, for the judge to rule upon admissibility at the trial, and even for counsel to make a claim of admissibility, he must have formulated some theory of relief. In the discussion, he will naturally make his contention of law as to the particular point and as to the case as a whole. The opposing lawyer will answer, and a complete presentation of respective positions of law can be made. The purpose is not presently decision, but clarification.

Agreements on Propositions of Law

The respective contentions shadow forth the questions of law. As in agreements of fact, here also there may be a better understanding by vir-

---

16Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897).
tue of stated agreements of propositions of law. This is possible in no known system of procedure except by use of the device of pretrial conference. It is true, as above noticed, that counsel in preliminary arguments on demurrers or motions to strike or dismiss or in trial-briefs may concede certain rules of law as established. But there is no consistent practice in this regard. As in agreements of fact, there is no reason or necessity for a lawyer to agree either at the suggestion of judge or counsel. On the other hand, counsel can often agree upon certain well established principles of law. At such times, the judge may suggest what principle may apply. As has been pointed out before in this article, this is often done informally now on an argument on a motion. This was sometimes done by entry of an order setting out the position of law adopted by the parties. The peculiar virtue of the conference procedure is that the statements of conceded positions of law may be regularly made and recorded for future guidance in stipulation or pretrial order. A customary pattern is set up which regularizes the informal discussions in which the lawyers now engage.

Formulation of Questions of Law

The respective statements of contentions of law bring out the gist of the altercation. At this point, the variances should be made matter of record. This should be done in no perfunctory manner, but with meticulous care. No formula should be used or stated, however. Plaintiff's claim should be in accord with the substantive law of the jurisdiction, and generally should indicate the general form of action to which he makes reference.

Now likewise, the disagreements of questions of law may be succinctly stated. Of course, it is obvious that not all questions of law in a case can be stated in advance of trial. But it adds to the clarification of the situation if counsel and the court understand that certain propositions of law are not contested and what the difference between the lawyers on the respective sides is. The pretrial conference provides a place where these agreements and disagreements may be recorded.

V. Multiple Pretrial Conferences on Pleadings

So far, an outline has been given of a full-dress pretrial conference such as may always be had just before trial. It is often apparently
thought that there can be only one pretrial conference to bring all the factors together. But conferences may be held at any time after filing of the action, and may be concomitant of every movement in the expansion of the cause.

It is objected then that the conference method duplicates effort. On the contrary, consideration of the practical results in actual cases shows clearly that progress rather than delay is the result. Of course, it is of the essence that the normal forms of pleading be gone through. The motions to strike and to make more definite and certain must be filed. The demurrer still has its office. Under a modified common law system, nothing can replace these instruments for shaping the issues of the pleadings. But by turning the first argument into a pretrial conference and investigating the case at large, the lawyers can eliminate delay and discover the essentials. If all motions and dilatory pleadings can be filed at once or made part of the answer or can be reserved for a final hearing, then the problem is dissipated.

The Declaration

In an illustrative case, defendant filed a motion to make more definite and certain a complaint brought against a railroad, charging that, in the operation of its trains, plaintiff's sheep had been held too long without feed, in violation of a statute. Defendant's lawyer asked plaintiff's lawyer why he sued the defendant railroad, since it was merely the owner and another railroad was the operating corporation. This resulted in immediate voluntary dismissal. Formerly, such a case would have normally gone to trial on a general denial and have been dismissed or been subject to a directed verdict. Legal writers might then have claimed this as another victory founded upon technicality.

In a similar case, an individual was sued as the owner of a building for damage, because of escaping steam from a heating radiator, to articles belonging to one of the tenants. In this jurisdiction, pretrial conference procedure had not been adopted. At the trial, defendant's opening statement to the jury revealed for the first time that defendant had recently formed a corporation which had taken over the functions of operating the building and which at the time the steam escaped had been in control of the furnaces and heating systems. A voluntary nonsuit was immediately taken. There was, of course, considerable expense to both parties. A new action was immediately commenced, in which there was a recovery.
The situation is changed if multiple pretrial conferences are used. Upon the argument of a motion to strike, the lawyer may inquire into the theory upon which his opponent's case is based. If he elects one theory, the movant may permit his motion to be overruled. A demurrer may then be presented. An understanding may be had as to the legal aspects of the case. If a single issue of law is presented and decided, and the facts are agreed finally and not tentatively as on demurrer, of course the matter may go direct to the Supreme Court. The point is that the discussion need not depend upon the terms of the formal motion. The manner of the approach is different. It may be illustrated by the following example. On the argument of a motion to strike involving a complaint charging injury in an elevator, the attorney for defendant asked the attorney for plaintiff whether the complaint was founded on common law or the state employers' liability statute. Plaintiff's lawyer responded that he relied upon the statute, since the use of machinery was involved. Defendant's attorney protested that the elevator was a simple device wherein no machinery was involved and was the type used in some construction jobs where the operator, here plaintiff, simply hoisted the device by pulling upon a rope. Since the building was only a short distance from the courtroom, the attorneys adjourned to view the device. Upon returning to court, plaintiff's case was dismissed, since it was obvious that no liability under the statute existed.

**The Answer**

It will be seen that a great gain in definiteness, certainty and conciseness can be obtained by a pretrial conference upon plaintiff's complaint. However, the matter need not stop here. Either at this time or when the answer comes in, a conference can be held as to the meaning of the denials of the answer. Often in the seclusion of his office, counsel will deny matters as to which, if he is confronted thereby in court, he will disavow the denial. A familiar example is the existence of a corporation, the statement of an account or the existence of a document. The general issue also lends itself to unconscious subterfuge.\(^{17}\) Take, for example, an allega-

\(^{17}\)Cf. Lloyd, *Pleading*, 71 U. of Pa. L. Rev. 26, 32 (1922): "Another source of inconvenience was the enlargement of the scope of the general issue . . . . Consisting of a mere summary denial and giving no notice of the nature of the defense, the effect was to send the whole case to trial without distinguishing fact from law and without defining the exact question to be tried. The result was that the parties were obliged to
tion that "on July 11, 1948, AB drove his car to Miami." In strict form of the classic pleading, this allegation can only be denied as follows:

"Defendant denies that on July 11, 1948, or on any other date or other time or at all, AB drove his or any car or other conveyance or drove, rode or went at all or otherwise to Miami or any other place or at all."

Otherwise, this simple allegation contains four distinct propositions. The usual modern method of answering is to deny it as a whole, which leaves four loopholes open:

(1) Whether AB went to Miami on July 11, 1948.
(2) Whether AB drove his car.
(3) Whether AB drove any car.
(4) Whether AB ever went to Miami in any car or in any fashion on any date or at all.

It is not contended that this is normally meant to deceive. Usually, it is the easier course and is adopted in haste. By questioning, the scope of the denial will be revealed. Not all allegations are so simple as the example. In drafting the pretrial order, it is well to have the agreed facts set out in story form, such as we find in the statement of facts which is usually the introduction to an appellate brief. Such a statement arouses the interest of the triers of fact, be they judges or jurors, and gives them better than anything else an appreciation of the contested issues of fact when these are later put before them. These statements of fact have a tremendous advantage over the normal admissions and denials set out in separate pleadings. Both sides understand them and can use them in their introductory remarks to the jury or in their arguments to the court. The matter is clarified for the judge, who does not have the difficulty of browsing through the pleadings in order to find out what is admitted and what is not. When incorporated in the pretrial order, these are of inestimable value for what follows.

prepare for the proof of every conceivable fact that might bear on the case resulting in an unnecessary accumulation of proof, and, consequently, of expense. The judge also was, in the haste of trial, compelled to extract from the testimony the questions of law and fact for presentation to the jury. The result was that what was seemingly gained through simplicity of pleading was lost through the confusion resulting from trials without well-defined issues, and motions for new trials multiplied in consequence."
Contentions of Law and Fact

Another disadvantage of the modified common law or code pleadings is that there is never any place where the actual contention of the party is set out, either of cause of action or defense. This is based on the proposition that in neither system of pleading in the classic form are there allegations either of theories of law, that is, “legal conclusions,” or of inferences of fact, except as far as the latter can be included in what are termed the “ultimate facts.” Finally, neither system permits the pleading of evidence. In fact-pleading, such as we find in the codes, this rule is more often honored in the breach than in the observance; but the truth is that the rule is a canon or convention of either system of pleading. As has heretofore been pointed out in other places, in strict common-law special pleading both the complaint and the defensive pleadings carried very definite assurances not only as to what “law” the party was seeking to have applied but also as to what evidence he would be required to adduce to establish his point. The fear of deciding causes on technicalities has, however, swept away the definiteness and certainty which could be obtained by common-law pleading in strict form.

The pretrial conference, followed by an appropriate order, does offer an opportunity to make good this lack. Before the final conference is closed, each lawyer can state his contentions as to law and fact. This state of contentions incorporated in the pretrial order, more than anything else, narrows the field of controversy. Under most systems, the only method of finding exactly what the party hopes to obtain is found in the prayer; and, when we consider a cause of suit based upon equitable claims, there is usually a prayer for such other and further relief as the court may think in good conscience is due—or some similar shotgun prayer.

Preliminary Proceedings and Provisional Remedies

In addition to the application of pretrial procedures to the pleadings or to the discovery of the issues in the case at large, it should be called to the attention of attorneys that there is a great field for extension of this prehensile device to matters which in the past have been dealt with in an extremely slovenly fashion. Pretrial conferences are a necessity for isolating issues in preliminary procedures and provisional remedies, since there are here no pleadings. Likewise, in this field, certain special defenses can
be effectively handled. The flexibility of this method of finding the basis of dispute is not limited by any barriers except those imposed by common sense.

The affidavit practice in some jurisdictions is carried into summary judgment. Here pretrial conferences are of great value in order to enable the trial judge to determine whether there are any claims of "fact" or contentions of law which should be resolved by testimony rather than by an arbitrary cutting of the Gordian knot before there is an attempt rationally to solve its sinuosities.

Service of process gives rise to complicated problems. There should be issues of fact and law before decision of these. If service is permitted at the accustomed residence upon a member of the family or upon a designated or accredited agent, a pretrial order clearly defining the "facts" in dispute and the contentions of law is highly illuminating. In the federal system, questions of residence, citizenship and jurisdictional amount may be so defined. In the field of provisional remedies, such as attachment, claim and delivery, and arrest and bail, like problems, subject to like definition, arise. There is also an opportunity to isolate decisive issues by consent and try these first. Where there are disputes of fact and law relating to the application of the statute of limitations, the method of isolation is available. Certain other decisive defenses may be so defined and by consent disposed of first. In the field of temporary receivership and preliminary injunctions, the matters which may be vital are often summarily tried or tried upon affidavits without any clarification of issues or contentions. The trial judge is to determine the issues for himself, yet important rights depend thereon.

Although this article is intended to show that conferences are available in common law actions, it must be obvious to anyone who has considered the device with attention that the practice is equally available in a suit in equity.

VI. PRETRIAL ORDERS

If this method is adopted, the common law pleadings will retain their pristine function. These will be elements of the common law judgment roll. Other measures will then be necessary to retain the beneficent results of the pretrial conference. Since the discussions have been held in open court, everything agreed to constitutes a stipulation, and everything stated constitutes a judicial admission.
But unless there is some formal stipulation, there may be a subsequent disagreement as to what fact agreements were actually made. Besides, there is a grave question as to whether these discussions are part of the common law record. Therefore, written stipulations should be prepared and approved as to form by the judge. Such stipulations should include all the highlights of the discussion. There should be stated all facts agreed to, whether in nature evidentiary or ultimate. There should be contained therein a concise statement by each party of his contention as to fact and as to law. There should be stated the final questions of fact which the judge or jury will have to decide. An outline may be made of the questions of law which the court will have to determine. Finally, the agreements, disagreements and questions of fact and law as to the authentication of documents and exhibits which constitute real evidence may well be incorporated. Also, if the matter relates only to some preliminary controversy, these elements may be similarly covered by the stipulation.

There will be no attempt here to outline a definitive pretrial order such as might be appropriate when there are only general notice pleadings, but a possible form will be suggested.\(^{18}\) Such a pretrial order may crystallize the results of the conference under the following divisions:

(a) Introductory statements.
(b) Statement of agreed facts.
(c) The contentions of the parties.
(d) Questions of fact.
(e) Disputed issues of law.
(f) List of documents and factual exhibits, and agreements or objections thereto.
(g) Conclusion—recital of the function of the order and the steps to be taken upon resolution of the issues therein isolated.

The final pretrial conference, which has just been outlined, is effective because of the intervention of the judge. While the judge should not adopt arbitrary and improper methods, and should always act judicially, his very presence tends to work out the results without concealment or chicanery. These informal conversations outline all of the features which are at times left vague and indefinite in any pleading or series of pleadings. In those rare instances in which the pleadings do, as their advocates claim, efficiently outline all of the possible issues understandably for trial, the

\(^{18}\text{Cf. Fee, The Lost Horizon in Pleading under the Federal Rules of Civil Procedure, 48 Cor. L. Rev. 491, 509 (1948).}\)
pretrial conference will only serve the purpose of assuring both parties and the judge that the lawsuit will proceed within the limits so canalized.

**Two Alternatives for Common Law: Amended Pleadings or Definitive Order**

After the final pretrial conference, there are two possible courses open. The pleadings may be amended to embrace all of the issues of fact and law which have developed at the conference or conferences, or a definitive pretrial order may be entered wherein the results of the pleadings and conferences are engrossed.

The first alternative is deemed preferable. By that method, the pleadings may be reformed in the light of the conversations regarding the evidence and the documents. Full effect may be given, not only to the forms suggested by, but also to the principles promulgated by Chitty. The decisions under the Hilary Rules may be followed. The most efficient instrumentalities for developing the issues which were ever devised may again be used, shorn of their emphasis upon technicality, inequality and injustice. In the light of a party presentation of a review of the evidence, the judge may suggest and control the amendment of the pleadings to conform to these highly efficient practices.

**VII. Answers to Objections to Use of Pretrial Technique**

One great gain can be marked down for pretrial conference. Under whatever system, as has been pointed out above, there are good and bad pleadings. In uncontrolled common law pleading as modified, as even the most enthusiastic protagonists must admit, there are hidden and uncontrolled issues. There are also rulings which represent a just decision on the facts but which appear to be based upon technicalities of pleading.\(^\text{19}\) The imperative is that the pleadings define issues. When pretrial

\(^{19}\)It is often forgotten that a technicality of pleading often represented a tangible actuality. In actions by the government against the citizen, such “technicalities,” manned by independent judges, stood as bulwarks of liberty, as is shown by the following ancient example from Beresford, C. J., in Goldington v. Bassingburn, Y. B. Trin. 3 Edw. II, f. 27b, 20 Selden Soc. 194, 196 (1310):

"In the time of the late King Edward a writ issued from the Chancery to the sheriff of Northumberland to summon Isabel Countess of Albermarle to be at the next parliament to answer the King 'touching what should be objected against her.' The lady came to the parliament, and the King himself took his seat in the par-
conferences are used and such a situation develops, it will not appear that the litigant has lost his case because the lawyer has gotten into an angle of pleading. The record will show the facts to be such that the pleader could not have taken any other course. The judge, who should be interested in only the orderly process of finding grounds of contention, may suggest or even direct how the pleading should be amended to accomplish the result. Much of the criticism of technicalities of pleading would disappear if the "facts" in the background with which the lawyer is dealing were made patent.

It should here be noted with emphasis that the purpose of the pretrial conference in this respect is not to make pleading easy for the inexpert lawyer, but to make it adequate for the purpose of doing justice. Pretrial conference furnishes no royal road to dalliance for loafers. It is the most arduous test of the ability, skill and learning of the lawyers and the judge.

Necessity of Use with General Notice Pleading

The method of developing the issue by pretrial conference must be defended on two different fronts of criticism: first, in recent years there is a theoretical interest in general notice pleading; second, many lawyers are convinced that special issue pleadings with abolition of the general denial and common counts can be restored. Neither of these criticisms is valid.

As to general notice pleading by definition, the issues are not thereby stated. This is pure negation. The difficulties of formulating the issues
intelligibly are avoided simply by failure to define them. The theorists believe that, by saving the bad pleader from the immediate consequences of bad pleading, they work out justice. Quite the contrary is the result. If the issues are undefined, clear thinking about the facts and the law is impossible to either a lawyer or a judge. Determination of the issues becomes dependent on the whim of the man who is presiding. The oriental cadi would do better, since he is more used to the process. Wager of battle would be more nearly just. The true analogy, however, is found in the ordeals of walking on hot plowshares or perhaps the ordeal of water.

General notice pleading, combined with some practice of the lawyers whereby the issues are defined, may do no harm. If implemented by appropriate motions and combined with pretrial conferences, as it is in the federal system, it may be developed by a scientific bar together with competent judges into a thoroughly efficient system.

The Best Means to Reach Definition of Issues in Issue Pleading

It is the thesis of many defenders of the common law system that, if the pleadings were drawn in concise and definite fashion and the common counts and general issue laid aside, the controversy could be completely outlined. The experiment of abolishing the general issue and common counts was tried, as pointed out above, by the adoption of the Hilary Rules. That attempt was a failure. If we assume the thesis is correct, there must be a method devised of correcting the pleadings before trial. Unless a place is provided where all the contentions of fact and law on both sides can be known, all documents displayed, and agreements had in exact form as to facts upon which both sides agree, there is no way of making the pleadings develop the actual issues.

Value Equal Whether Litigation is Simple or Complicated

Now, it is objected at times that pretrial conferences are of use in complicated business litigation, but that, in simpler cases involving small amounts, such a conference would be a useless expense. This, however, is a fallacy. It is in the apparently simple cases, in which there has been less preparation, that hidden issues develop at trial. But if the lawyers
come into court just before trial with a pretrial order ready for signature of the judge, which limits the issues of fact and law to those stated, the desired end is accomplished. No waste of time or expense is involved. The only necessity is for the lawyers and judge to determine that the issues are stated, whether by pleading or otherwise, and that no other issues will be tried. This pretrial conference is as important as the trial. If a hidden issue does crop up notwithstanding this precaution, the court may amend the pretrial order, if the issue is vital and a manifest injustice would be done if amendment were not allowed. But all share in the mistake of leaving this issue undefined until trial. In the simpler cases, pretrial conferences take the place of all other procedures. These make unnecessary, depositions, formal motions for inspection of documents, motions to make more definite and certain, motions to strike, and other methods of discovery.

**Comparison with Deposition and Discovery Devices**

Many lawyers think that today they can protect their own clients by use of depositions, motions, and discovery and inspection procedures, and that therefore they do not need pretrial conferences. They fear the other lawyers, and they fear to ask for pretrial conferences. The basis of the fear is that at pretrial conference a lawyer may be asked questions which expose the weakness of his client's case. But on trial other weakness may be exposed, which the most experienced lawyer may not anticipate, even if he has used all the methods available except a conference.

Besides, it is said that, since most jurisdictions have some methods for the examination of documents, production at trial, depositions, and answers to interrogatories, pretrial conferences are simply other devices which are unnecessary duplications. In practice, however, this criticism is found to be invalid. The informal discussions in open court, without concealment, do in a few moments' time outline situations which it would require months to uncover by exchange of pleadings or any discovery device.

**Oral Pleading an Indispensable Tool, Modernly as well as Anciently**

It may be said that, if the lawyers who constitute a local bar are too incompetent, too lazy or too indifferent to utilize the devices of special
common law pleading to get at the real issues, they will not be able to use pretrial conferences with effect. The answer to this is that the members of the bar as a whole do not have these qualities. They are not shiftless, improvident and poor pleaders. The instrument itself fails. Even at its best and in the hands of the masters, common law pleading often worked injustices and, as shown above, had great lacunas of inadequacy. By a reverter to the informal conversation of the ancient common law pleaders under the supervision of the judge, a legal contest becomes again a dignified inquest into the essential rights of the parties, rather than a combat with phantoms in a miasma.

CONCLUSION: THE MODERN DEVELOPMENT OF SUBSTANTIVE COMMON LAW DEMANDS EVOLUTION OF PROCEDURE

The substantive law in every jurisdiction of the United States is expanding extremely rapidly to cover new ground. Some of the statutes contain provisions whereby the practice can be liberalized to take care of the expansion of the substantive law and the demand for less delay and more efficiency in the courts. But the bar must not fail to use these devices. It is said that some of the constitutions of the Latin American countries contain guaranties comparable to our own, but that, because of the inertia and neglect of responsibility, these are not worth the paper on which they are written. It is of no use to have a theoretical right which is never enforced and to which no one pays any attention. The living tradition of the Anglo-Saxon bar and the judges has been infused into the bar of this country. If we are to preserve the essentials of the substantive common law, we must follow the spirit of procedure in an evolutionary expansion. The movement of the substantive law into new fields would strike the Sheriff of Nottingham dumb with amazement if he could witness the invasion. Robin Hood, if he could walk again, would find wrongs of the people righted without the aid of his colorful brigandage. The common substantive law has caught the features from the doctrines applicable to the feudal law states and freed them in protean forms to deal with a society based on rigid contractual structure. At the same time, these same principles are remolded by the counter-contractual influences so as to become ministers to an evolutionary society in which the emphasis is upon economic freedom of groups and tremendous concentration of economically organized minorities.
Procedurally, the bar must keep pace, still maintaining its grasp on essentials. The emphasis must be upon winning cases when the facts may, to all who know them, justify the result. The effort must be forward to eliminate delay, strike light into concealments, and win on the essential facts. The pretrial conference procedure permits the attainment of these objectives.

The criticism of courts and lawyers has been such in the past few years that the bar must see that the demand for progress is met. The lawyers must meet the needs of their business clients and make procedure effective to obtain just solution of the controversy in favor of their clients. They cannot hesitate for fear of the unfamiliar. Otherwise, there is danger that the result will be revolution and not evolution. The system of pleading, which has been adopted in a particular state and to which the lawyers and the judges are accustomed, is geared to the substantive law which is in force. The defects which are pointed out are rather the defects of administration than anything inherent. It cannot be over-emphasized that the essence lies in the practice and procedure which is in use, including pastel shadings of differences in the substantive field and in uncodified customs of lawyers, rather than in any rules of pleading adopted by statute or by formal rule. While it is true that, in jurisdictions where no rule exists for holding pretrial conferences, lawyers may be excused for a failure to use consistently the practices which are embodied therein, the bar cannot escape responsibility for failure to use this flexible method of attaining proper results in any state where the opportunity has been presented by rule or statute.

It must be concluded that, if the administration of justice through the civil courts is to be retained, the bench and bar must meet the just criticism of the lay public, the community and the law schools. In business litigation particularly, whether unions, corporations or individuals involved, there must be an attempt to meet economic necessities. Only the barbaric yawps of those who wish to destroy the judicial system in America can be safely disregarded. No mode of pleading presently in use actually fulfills the need of the lawyers, the judges and the litigants. By the use of multiple pretrial conferences, the demands of a rigid system of pleading can be met while all the optimum advantages of a flexible system can be retained. The procedure of such conferences, which are held by the lawyers in open court after all pleadings and depositions are filed and which are consummated by a record which crystallizes the positions of the parties
in definitive form before trial, conforms to all requirements of a proper tendency in the art of pleading:

(a) It is a proper development of the practice of oral pleading, which historically lies at the foundation of our present forms of procedure.

(b) It follows a practice which has been developed in modern courts by the lawyers themselves to meet present conditions and the interests of the litigants and which is analogous to that adopted in England.

(c) It avoids the looseness of a situation in which the parties must try all issues which could be spelled out of the record on the one hand, and on the other the spirit of technicality, whereby justice is sacrificed to proficiency in written pleadings.

The lawyer, by thus using the common law techniques, relieved of limitations and restored to flexibility, will be able to get for his client that to which the latter is justly entitled. The courts will be relieved of the necessity of deciding cases on pleading points, and can instead decide them upon the facts under the rules of law set up in contested issues by the parties and their attorneys. Justice will be thus served.