

5-1-1965

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Recommended Citation

George W. Pugh, *Cross-Observations on the Administration of Civil Justice in the United States and France*, 19 U. Miami L. Rev. 345 (1965)

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CROSS-OBSERVATIONS ON THE ADMINISTRATION OF CIVIL JUSTICE IN THE UNITED STATES AND FRANCE

GEORGE W. PUGH*

Find the facts, and to these facts, apply the law. This, it seems, is the essence of our judicial process. That the task be accomplished justly, speedily, and inexpensively is a "consummation devoutly to be wished," and since the "twenties" significant progress has been made. However, popular (as well as professional) dissatisfaction with the administration of justice¹ persists, as indeed it should, for we are still far from our announced goal—the "just, speedy and inexpensive"² determination of controversies.

Perhaps continued comparative procedural studies will aid in the fashioning of further procedural reforms: certainly the problem of fact-finding and law-applying is not peculiar to the American system. Whether particular procedural devices which have proved successful in foreign contexts would be effective or desirable in the American environment, in light of our different traditions and expectations, is not necessarily determinative of whether the studies themselves will be useful. From consideration of other systems, we should gain better insight into our own—its strengths and weaknesses—and thereby, perhaps, learn where improvements are needed and how they can be effectively made.

In addition, cogent observations concerning our own system by competent and perceptive foreign observers may afford further insight. From this opportunity to see ourselves as others see us, our understanding of our own institutions, methods, and motivations may be enhanced, and our powers of self-evaluation sharpened.

UNITED STATES

Not long before the great procedural reforms which began in the "thirties," a distinguished French practitioner and scholar, Mr. Pierre LePaulle, studied the administration of justice in the United States. A sharp critic of judicial administration in his own country,³ Mr.

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1. See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

2. See FED. R. CIV. P., Rule 1.

3. LEPAULLE, *LA JUSTICE* (Payot, Paris, 1934).

LePaulle was, however, less than enthusiastic about American counterparts.⁴ His tart observations have for us an arresting, and perhaps instructive, significance. In 1928, Mr. LePaulle wrote:

When a lawyer of the Continent comes for the first time to America, he is usually full of admiration for the administration of justice in the United States. He sees "efficiency" and "service" written and worshiped everywhere, his imagination begins to work, and he thinks immediately of American courts like small Ford factories, where rights are recognized, set in motion, sanctioned in less time than is necessary to build a "flivver." Then he enters into a courtroom. . . . Instead of looking at a trial conducted as a business meeting, with all the work prepared by well-trained specialists, what does he see? That nothing has been done before the trial to ascertain the facts; that oral evidence is seriously considered as reliable; nay! that such evidence is gathered not by a critical and impartial inquiry, but by squeezing the witness through the theatrical scheme of cross-examination; that the inquiry is conducted by lawyers who are not interested in the discovery of the truth, but, to say the least, in a certain presentation of the facts; that abstract rules, called evidence (!!), decide a priori what is relevant or not, what can be proven or not; that a stenographer takes down all that is said at the trial and makes it eventually one or several volumes.

The Civil Law lawyer does not require so much to be out of breath. But, when he sees that complicated sets of facts must be decided by the wife of the plumber, the bootblack, his chambermaid, and nine other picturesque citizens, then he has a fit.⁵

Mr. LePaulle, however, did more than merely criticize; he put forward a number of suggestions for reform. Although many Americans would thoroughly disagree with Mr. LePaulle's controversial proposals, nevertheless his recommendations, coming as they do from a perceptive foreign practitioner, are worthy of consideration. His reflections not only afford insight into our own system, but also give somewhat of an introduction to the French system, which to some extent provided his frame of reference. Mr. LePaulle readily recognized that Constitutional limitations and the attitudes and psychology of the American people might well be a barrier to his proposals, but pretermittting these factors, he suggested in part:

1. Suppress the jury in all private law cases. Its existence at present is nothing but a historical nonsense and a miscon-

4. LePaulle, *Administration of Justice in the United States*, 4 WEST PUBLISHING COMPANY'S DOCKET 3192 (Oct.-Nov. 1928), hereafter quoted with kind permission of Mr. LePaulle and the publisher.

5. *Ibid.*

ception of democracy. A competent, well-trained, and impartial judge should decide both law and facts. Instead of having sentiment, incompetency, and theatrical show up in the courtroom, try to make of your trials a businesslike meeting in a conference room.

2. Suppress the rules of evidence, at least in the measure in which they have not become rules of substantive law. When you have a competent man to determine the fact, he will know what is relevant. The lawyers will soon realize that he knows, and they will act accordingly. That suppression would bring in the law less technicality and more realism.

3. Refuse to admit oral testimony when you have sufficient written evidence. Be aware of the works of modern psychologists showing that witnesses of complete good faith do not frequently tell the truth, even when they have a critical mind.

4. Let the parties prescribe by writing before the trial the facts they want to prove by witnesses. It avoids a terrible waste of time during the examination.

5. Forbid the lawyers to see the witnesses at any time before the trial; you will get more truth, and will get it more easily.

6. Impose higher penalties on perjury.

7. Let the judge examine the witnesses, and allow the lawyers to ask him to put additional questions. Let an impartial, intelligent, and well-trained judge seek for the truth, and you will realize how much quicker and more efficient that method of getting the facts is.

8. Oblige the lawyers to communicate the written evidence they have to their colleagues on the other side, in order to avoid the element of surprise that goes with the psychology of a trial by battle, but not of a businesslike meeting.

9. Have only one way to review a decision, a trial *de novo*; but have it as a matter of right, as a second chance given to the loser. Never try to do the impossible in going into the history of the first trial; suppress the stenographer's record of the proceeding; try over again, before several judges of a higher grade, both law and facts, but do it in a snappy way.

10. Keep your judges away from politics and too direct pressure of public opinion. Elect them, if you want, but for life.

11. Have, in each state, a compulsory organization of the Bar, having a strong control on the moral and intellectual

standards of the lawyers. You will never have a quick and efficient procedure, if the lawyer does not understand what are the only essential points in his case, and if the judge cannot have complete confidence in the counsel.⁶

Of course, the foregoing comments were made, not with respect to American civil procedure of today, but to that of the "twenties." Did the great American procedural reforms of the "thirties," and following, take the path this foreign observer was outling for us? It appears that to a considerable extent, our recent procedural reforms (as well as many of our current proposals for further reform) were designed to remedy the procedural evils he detected and decried. Often the steps actually taken differed widely from those he was urging, but the similarity of overall thrust seems worthy of note. Mr. LePauille's suggestions were mainly aimed at reducing the "game" and "surprise" elements in the American judicial process, and this is surely the path we have been following.

Mr. LePauille's first and fundamental proposal, the abolition of the jury in all private law cases, has, of course, not been adopted. The jury is deeply rooted in our traditions, expectations, and law. Our substantive law, which has been moulded by its procedural shell, would take on a very different meaning if the procedural context in which it grew and developed were suddenly deprived of the jury—one of its most characteristic aspects. With respect to personal injury litigation (where our problems of administration of civil justice are particularly acute), suggestions for jury suppression are increasingly heard. In the opinion of this writer, this simple expedient would not provide the panacea; much more pervasive changes in both substantive and adjective law are needed.

Mr. LePauille's second proposal (the suppression of the rules of evidence) is closely related to the first (the elimination of the jury in private law cases). Since the "twenties," there has been more and more realization that our technical rules of evidence are too technical, even in the context of jury trial. The creative efforts of leading authorities on the law of evidence, the American Law Institute's Model Code, and the Uniform Rules of Evidence, all point towards broader admissibility. Current efforts towards uniform rules for Federal Courts would, if pursued to fruition, undoubtedly follow this trend.

Mr. LePauille's third suggestion—that we refuse to admit oral testimony when there is "sufficient" written evidence—reflects French disenchantment with oral testimony. The French view in this regard perhaps results in part from the fact that examination and cross-examination by counsel, as we know it, is nonexistent in French judicial

6. *Id.* at 3194.

procedure. In the absence of this formidable weapon to test the verity and accuracy of oral testimony, it is no wonder that the French fear it. Although there is no movement in the United States to reject oral testimony, the psychological studies to which Mr. LePaulle referred have had their impact. There are strong voices urging that, despite the hearsay rule, there should be much greater liberality in the admissibility of contemporary writings. This movement aims towards the *admissibility* of helpful written evidence, not the *exclusion* of relevant oral testimony.

The fifth suggestion (that lawyers be prohibited from interviewing witnesses before the trial) and the seventh (that the judge rather than the lawyer conduct the examination) are linked to each other, and further reflect the French distrust of oral testimony noted above. These radical suggestions have surely not been adopted in the United States. Their adoption might well bring more difficulties than we presently encounter. Examination and cross-examination in our traditional adversary proceedings afford cherished protection and a very strong weapon against false claims and false accusations. But this does not necessarily mean that our adversary system is beyond improvement. This writer does not believe that we should close our eyes to the fact that coloration often *does* result from the witness interview, that a witness's recollection frequently *does* fade with the long passage of time that often occurs between event and testimony, and that the pattern of direct and cross-examination at times *does* make it difficult for a witness to "tell his story." If we really want to get the actual facts of an automobile accident, might we not consider the possibility of a tape recording of an inquiry conducted immediately after the accident by an impartial, trained public official—before any witness is interviewed by counsel or insurance adjustors? The hearsay rule as presently constituted would, of course, normally bar the use of such a recording if introduced for its substantive weight—but the hearsay rule could be modified. Would the recording not be of inestimable value in finding the true facts—if that is really what we want? There are difficulties, to be sure, but the idea seems worthy of exploration, and possibly implementation.

As noted above, Mr. LePaulle's fifth and seventh proposals strike at the core of our traditional adversary system. Few of us are likely to feel that it should be thus undermined, but in frank self-appraisal of our own institutions, we must consider whether at times we are carried away, and astray, by unbridled application of the system—failing to delimit adequately its appropriate ambit. This is perhaps particularly apparent with respect to our use (or more properly, abuse) of the erudition of experts in this increasingly scientific world. The French have long employed court-appointed impartial experts, and their experience with the institution certainly commends it to our further use

and experimentation to evolve the most satisfactory system for the American setting. Long steps forward have already been taken and our cross-examination by counsel affords a significant safeguard against the partial or incompetent "impartial" expert. There is so much well-grounded dissatisfaction with the traditional adversary expert system, that some changes, at least, are surely indicated.

Mr. LePauille's sixth suggestion—that our punishment for perjury be increased—probably again reflects French fear of oral testimony. The writer is unaware of any general change in our penalties for perjury.⁷ It is probable that in both countries much more false swearing actually takes place than we are willing to admit, and that we are all far too apathetic. Improvement in attitude of bench, bar and public, and prompt and zealous perjury prosecution (rather than increases in prescribed penalties), are probably needed.⁸

Our great advances in the area of pretrial, deposition and discovery have done much to obviate the "surprise" and "gamesmanship" aspects of American trial practice, towards which Mr. LePauille's fourth and eighth proposals were especially directed. Although our trials have certainly not yet taken on the business conference atmosphere he envisioned, much progress has been made. American discovery practice now generally has broader scope than the French counterpart, and with good results.

Trial de novo on appeal as a matter of right, a much prized institution in French civil procedure, is urged by Mr. LePauille as his ninth suggestion. Its presence in French practice is understandable in the context of France's civil procedure generally. Its absence from American procedure, and its nonfeasibility here, is likewise to be explained in light of other very basic procedural institutions, particularly the jury and our system of oral testimony. As we have seen, Mr. LePauille was urging radical alterations with respect to both of these characteristic institutions, changes which have not been made.

The last two of the quoted recommendations of Mr. LePauille were directed towards achieving a politically independent Bench, and a stronger, well-organized and integrated Bar. In the years that have elapsed since the writing of Mr. LePauille's article, strong movements

7. In France in civil cases the possible penalty for perjury ranges from one to ten years depending on circumstances, plus a fine and loss of certain civil rights, etc., for a stipulated period. FRENCH PENAL CODE arts. 363, 364, 366. One of the factors considered by the French in determining the applicable penalty is whether the perjury was the result of bribery. In cases before the *Cour d'Assises* (where the more serious criminal infractions are tried), if a defendant has been condemned to imprisonment for more than five to ten years, persons who falsely testified against him are subject to the same punishment he received. FRENCH PENAL CODE art. 361.

8. For an interesting informal discussion of the perjury problem in France, see Perrod, *La Foire aux Preuves*, LECTURES POUR TOUS 9, 11 (July 1964).

to achieve these objectives have had considerable success, notably the efforts of the American Bar Association and the American Judicature Society.

The LePaulle recommendations quite naturally reflect their author's frame of reference, the French system for fact-finding and law-applying. In addition to sparking insight as to American institutions, they afford a point of departure for a brief American's-eye view of administration of civil justice in France.⁹

FRANCE

Judicial System and Legal Professions

The *tribunaux de grande instance* are the French noncriminal courts most closely resembling our trial courts of general jurisdiction,¹⁰ and therefore the following discussion will center upon practice and procedure in these courts. It should be noted, however, that in addition to the *tribunaux de grande instance*, there are the *tribunaux d'instance*¹¹ (resembling our small claims courts) and a number of specialized courts. Among the latter are the very important *tribunaux de commerce*, which have exercised extensive jurisdiction over commercial transactions since pre-revolutionary days.¹² In modern times,

9. For some discussions in English concerning the French judicial system, see: DAVID & DEVRIES, *THE FRENCH LEGAL SYSTEM* (1958); Dainow, *The Constitutional and Judicial Organization of France and Germany and some Comparisons of the Civil Law and Common Law Systems*, 37 IND. L.J. 1, 9 (1961); Deák & Rheinstejn, *The Machinery of Law Administration in France and Germany*, 84 U. PA. L. REV. 846 (1936); Kock, *The Machinery of Law Administration in France*, 108 U. PA. L. REV. 366 (1960); Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1 (1962).

For some materials in English on aspects of French civil procedure and evidence generally, see: Anton, *Scottish Thoughts on French Civil Procedure*, 1 (N.S.) JURID. REV. 158 (1956); BODINGTON, *FRENCH LAW OF EVIDENCE* (1904); Giverdon, *The Problem of Proof in French Civil Law*, 31 TUL. L. REV. 29 (1956); Hammelmann, *Expert Evidence*, 10 MODERN L. REV. 32 (1947); Hamson, *Civil Procedure in France and England*, 10 C.A.M.B. L.J. 411 (1950); Hamson, *English and French Legal Methods: The Civil Process*, 67 JURID. REV. 188 (1955); Herzog, *Proof of Facts in French Civil Procedure: The Reforms of 1958 and 1960*, 10 AM. J. COMP. L. 169 (1961); Howard, *Compensation in French Criminal Procedure*, 21 MODERN L. REV. 387 (1958); PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, Vol. 2, Part 1, First Part (Proof) (11th ed. 1939), English translation by the Louisiana State Law Institute (1959); Tyndale, *The Organization and Administration of Justice in France, with an Outline of French Procedure with Respect to the Production of Evidence*, 13 CAN. B. REV. 567 and 655 (1935); Wright, *French and English Civil Procedure*, 42 L.Q. REV. 327 and 502 (1926).

For an excellent French *précis*, see CUCHE ET VINCENT, *PROCÉDURE CIVILE*, (13th ed. Dalloz Précis, 1963) [hereafter cited as CUCHE ET VINCENT]. For more comprehensive treatment, see the very authoritative SOLUS ET PERROT, *DROIT JUDICIAIRE PRIVÉ*, Vol. 1 (1961).

10. For discussion of the organization and jurisdiction of the *tribunaux de grande instance*, see CUCHE ET VINCENT, nos. 86, 91-97, 201, 255.

11. For discussion of the organization and jurisdiction of the *tribunaux d'instance*, see CUCHE ET VINCENT, nos. 106-107, 212-215, 256.

12. For discussion of the history, organization and jurisdiction of the *tribunaux de commerce*, see CUCHE ET VINCENT, nos. 108-111. Others of these specialized courts include *conseils des prudhommes* (industrial councils), discussed CUCHE ET VINCENT, nos. 112-121;

apparently in part as a consequence of the desire to expedite litigation,¹³ a number of new specialized courts have been established. However, the resulting jurisdictional fragmentation, a problem not unknown to the United States, is the subject of considerable concern.¹⁴

Procedural formalities governing the *tribunaux de grande instance* are generally more rigorous than those governing the other courts of original jurisdiction.¹⁵ This is, of course, understandable in light of the small-claims character of the *tribunaux d'instance*, and the fact that generally the specialized courts are staffed, at least in part, by lay judges elected by those groups particularly affected by their various specialized jurisdictions.¹⁶

Except for the *tribunal d'instance* (which is presided over by a single professional judge), and its counterpart for minor criminal cases, a session of a French court is generally presided over by at least three judges. The multi-judge approach is regarded as a basic principle of French justice—insuring, it is felt, well-considered, impartial decision-making.¹⁷ However, many incidental proceedings in which evidence is taken, documents examined, etc., are presided over by a single judge named for that purpose.

The jury is perhaps the most significant single factor distinguishing French and American civil procedural systems. Its presence in our law shaped and moulded many of our characteristic procedural features. Similarly, its complete absence from French civil procedure strongly influenced French adjective law. American civil jury enthusiasts may be surprised to learn that the institution excites practically no enthusiasm in freedom-loving France. Mr. LePauille's views concerning it, noted above, are not atypical. A leading treatise on French civil procedure states, in passing, that proposals to institute jury trials for French civil cases have never been taken seriously.¹⁸ The lay judges of the specialized courts provide the most analogous counterparts to our jurymen, affording at least some lay participation in aspects of the judicial process. It should be reemphasized, however, that the lay judge is a specialist, not the ordinary "man in the street" of our juries.

The French *magistrature*¹⁹ comprises both judges (*magistrature*

commissions de sécurité social (social security commissions), discussed CUCHE ET VINCENT, nos. 122, 122bis, 122ter; *juridictions des logers* (rent courts), discussed CUCHE ET VINCENT, nos. 123-125.

13. See CUCHE ET VINCENT, no. 86.

14. *Ibid.*

15. *Ibid.*

16. See note 12 *supra*.

17. CUCHE ET VINCENT, no. 85.

18. CUCHE ET VINCENT, no. 87.

19. For further discussion of the French *magistrature*, see Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 6 (1962) and authorities therein cited.

assise, seated magistrates) and public attorneys (*magistrature debout*, standing magistrates) corresponding very roughly to our district attorneys and attorneys general). Interchange between the two branches of the *magistrature* is quite possible. Entry, generally, is by rigorous competitive examination, usually shortly after completion of law school. In 1958 a three-year intensive training course for those successfully completing the competitive examination was established.²⁰ It should be underlined, however, that the French *magistrat*, whether judge or public attorney, is a career official, a member of a separate legal profession. He is not, and generally never has been, a regular *avocat* or *avoué* (rough counterparts to our general practitioner). The French judge is a member of an elite, highly selective group of non-political governmental officials and enjoys high respect, both for his ability and for his impartiality. Although less the activist, less the well-known public figure than his American counterpart, his powers are broad. If it were not for his high caliber, independence, impartiality, and political detachment, the French might be more interested in adopting civil jury trials.

The problem of delay which so plagues the administration of civil justice in the United States is also a problem of great significance in France. Whereas French criminal procedure is essentially inquisitorial in nature,²¹ civil proceedings are basically adversary. French judges take a much more passive role in civil than in criminal proceedings. Despite recent reforms, French judges seem quite disinclined to take it upon themselves to expedite civil litigation, and thus generally exert much less control in this regard than many of the more delay-conscious American judges.²² This, as well as the fact that many of the incidental proceedings in French civil litigation are not open to the public, may reflect a basic feeling in France that civil litigation is a rather private matter, and that the state as well as the public should not unduly interfere or intrude.

Personal injury suits constitute a relatively small percentage of French civil litigation. As the result of a very interesting procedure, a personal injury claim is often adjudicated as an incident of the criminal case growing out of the accident giving rise to the civil claim.²³ The ever-increasing number of personal injury claims, resulting from our automotive age, does not cause the same clogging of civil dockets in France that it does in the United States. In France, anyone who has personally suffered as the result of damage directly caused by

20. Ordinance 58:1270 of December 22, 1958.

21. See Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 10 *et seq.* (1962).

22. See CUCHE ET VINCENT, nos. 290, 317.

23. See Howard, *Compensation in French Criminal Procedure*, 21 MODERN L. REV. 387 (1958); Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 12 (1962) and authorities therein cited.

an infraction of the criminal law has a civil action for relief.²⁴ This cause of action may be asserted by the injured party as an incident of the criminal case, or in a separate civil proceeding.²⁵ In practice, it appears that in most instances the injured party will choose to assert his claim in the criminal proceeding. In this way he can take advantage of the essentially inquisitorial aspects of French criminal justice, the state's investigatory procedures, the presentation by the public attorney, and the relative speed, economy, and more liberal rules of evidence which characterize French criminal proceedings. In addition, he has the psychological advantage of having his antagonist in the role of a criminally accused. Frequently the civil action aspects of French criminal proceedings are more important than the criminal. France has both a comparative negligence system and compulsory unlimited insurance coverage. It frequently happens, therefore, that in a criminal trial growing out of an automobile accident, the insurance companies for both the defendant and the civil party plaintiff, through their defense of their policyholders, are *de facto* participants.

Despite the absence in France of the contingency fee contract,²⁶ the cost of civil litigation appears high. This results in part from the fact that compared to our own, the French legal profession is quite fragmented.²⁷ There is no single counterpart in France to the American lawyer; instead, aspects of his role are performed by various separate professions, only some of which will be discussed here.

The *avocat*, who corresponds very roughly to the English barrister, possesses, with minor exceptions, the exclusive right to argue cases on behalf of clients before the *tribunaux de grande instance* and the *cours d'appel* (courts of appeal).²⁸ He also has the right (although not the exclusive right) to argue cases before practically all other French tribunals. Traditionally, the *avocat's* role is to *speak on behalf of* the client, not to represent him. The *avocat* is generally a highly cultured, very articulate individual—a member of an elite, well organized, self-disciplined, and quite autonomous profession, whose traditions go back to the fourteenth century.

Before the *tribunaux de grande instance* and the *cours d'appel*, a person *must* have an *avoué* (who corresponds very roughly to the

24. FRENCH CODE OF CRIMINAL PROCEDURE art. 2.

25. FRENCH CODE OF CRIMINAL PROCEDURE arts. 3, 4.

26. See LePaulle, *Law Practice in France*, 50 COLUM. L. REV. 945, 952 (1950); ENCYCLOPÉDIE DALLOZ, PROCÉDURE CIVILE, 1955, *Avocat*, no. 205; lePoittevin, DICTIONNAIRE FORMULAIRE DES PARQUETS ET DE LA POLICE JUDICIAIRE, 1954, Tome I, *Avocat*, no. 11.

27. For discussion of the legal profession in France, see: LePaulle, *Law Practice in France*, 50 COLUM. L. REV. 945 (1950); Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 6-10 (1962) and authorities therein cited.

28. For discussion of the history, prerogatives, and disabilities of the *avocat*, see CUCHE ET VINCENT, nos. 170-181.

English solicitor), and it is the *avoué* who *represents* him.²⁹ Although an ordinary litigant may argue his case in proper person, and thus in theory does not need the services of an *avocat*, he must be represented by an *avoué*.³⁰ In these courts it is the *avoué* who has the exclusive right to represent and plead in writing. In practice it appears that often the pleadings are drafted originally by the *avocat*, and given to the *avoué* for his approval and signature. A litigant in one of the *tribunaux de grande instance* thus normally needs the services of both an *avoué* (to represent him and plead in writing) and an *avocat* (to speak in his behalf).

A litigant must also employ the services of another professional, the *huissier de justice*, who enjoys certain exclusive rights relative to service, and plays a very important role with respect to verification of facts and enforcement of judgments.³¹

If the case is appealed to a *cour d'appel* (where a trial *de novo* is available), another *avoué* must be employed, for an *avoué's* exclusive prerogatives extend only to the court to which he is attached. If the case is to be taken to France's highest court, the *Cour de cassation*, the client generally must employ still another individual, an *avocat à la Cour de cassation*, who, however, handles both oral argument and written pleading before that tribunal.³²

Although the French system no doubt produces specialists of outstanding ability, it appears to this observer to result in undue duplication of effort, and unnecessary expense. Both the *avocat* and *avoué* are the beneficiaries, and to some extent the captives, of centuries of tradition. They enjoy high social and economic standing. Today the distinctions between *avocat* and *avoué* are less rigorous than previously,³³ and for many years there has been talk of eliminating the *avocat-avoué* dichotomy. However, there are powerful counterweights in economic factors³⁴ and proud tradition.

An amelioration of the expense element of French litigation is a pervasive legal aid system for those meeting the financial test.³⁵ Of

29. The state and certain governmental agencies, however, may be represented by the public ministry. CUCHE ET VINCENT, no. 318. For discussion of the *avoué* and his profession, see CUCHE ET VINCENT, nos. 182-185*bis*, 187-189.

30. See CUCHE ET VINCENT, nos. 178, 187, 302, 318.

31. CUCHE ET VINCENT, no. 191.

32. For discussion of the *avocat à la Cour de cassation*, see CUCHE ET VINCENT, no. 190.

33. See CUCHE ET VINCENT, nos. 177*bis*-178.

34. It is generally felt that to effect such a merger, the government would have to remunerate the *avoués* for the loss of their monopoly or exclusive right to perform certain functions, for the *avoué's* right is acquired only after remuneration of his predecessor or predecessor's estate. It is considered, therefore, that the reform would carry a very high price tag.

35. For a very interesting discussion of the French legal aid system, see CUCHE ET VINCENT, nos. 592-604.

very ancient origins, the system was developed under the influence of the ecclesiastical courts. It extends to all indigents (plaintiff or defendant), for all causes of action, before all courts (civil, administrative, and criminal, affording at least temporary relief against the payment of all fees (filing, *avoué*, *avocat*, *huissier*, appeal, etc.). Legal aid bureaus throughout the country, staffed by members from the legal professions and governmental officials, administer the system. There is a bureau for each *tribunal de grande instance*, each *cour d'appel*, and the *Cour de cassation*. If the bureau decides favorably on the application for legal aid, the indigent is assigned an *avocat*, an *avoué*, and a *huissier* by the local titular heads of these professions. An appeal from the decision of the local bureau to the next higher bureau in the legal aid hierarchy is possible, but only on the initiative of the representative of the public ministry.

The French legal aid system is worthy of our study, and perhaps, emulation. Recent developments in the United States in the criminal area are well known, but we have not done nearly enough to afford representation for the indigent in civil litigation. The contingency fee contract, a practice prohibited in France,³⁶ makes it possible for an indigent with a good money claim to secure counsel—at a percentage fee that may at times seem unconscionable. This, has taken off much of the “pressure” that otherwise would have built up. But what of the indigent plaintiff whose claim is small, or does not otherwise lend itself to the contingency fee device; what of the indigent defendant in an eviction case, in the usual chattel mortgage foreclosure case, etc.? Although in many areas of our country, legal aid organizations are doing fine work, there is much more to be done if everyone is to have his “day in court.”

Pleading, Service, Docketing, and Joinder of Issue

In France, as in the United States, a great many procedural reforms have been adopted during the last thirty years.³⁷ Nevertheless, French civil procedure continues in large measure to be governed by one of the Napoleonic codes, the Code of Civil Procedure (1806), which itself was strongly influenced by the *Ordonnance de 1667*. As might be anticipated, French and American adjective law differ widely.

Before a brief examination of some of the more detailed aspects of French civil procedure, it should be noted that in France there is no real counterpart to the American trial; there is no single continuous hearing in which *all* of the testimony and *all* of the documents are presented in open court. In France, the final argument is based not upon evidence adduced at an immediately preceding hearing, but upon *dos-*

36. See note 26 *supra*.

37. CUCHE ET VINCENT, no. 6.

siers (or case records) containing pleadings, documentary evidence, etc.³⁸ Of particular significance, a *dossier* often contains the written summations of the various incidental proceedings, or separate compartmentalized hearings or investigations, that may have been held in order to develop and clarify certain aspects of the case.

The first pleading in a French civil proceeding is a document (*l'exploit d'ajournement*) containing a statement of the demand or claim, and the name of plaintiff's *avoué*, his agent and representative with respect to the cause.³⁹ A copy of the *exploit d'ajournement* is served by a *huissier*.⁴⁰ It should be noted that at this stage nothing is filed with the court as in American procedure. Filing comes later.

If the defendant is domiciled in France, service may be either personal or domiciliary.⁴¹ Domiciliary service may be accomplished by service on a servant, a relative, or even a neighbor if he is willing to undertake delivery of the document.⁴² If the neighbor refuses, and apparently he normally does, the *exploit* is to be served upon a designated local official and the *huissier* must so notify defendant by registered mail.

From the *exploit d'ajournement* forward, there is what is known as *instruction*, which is divided into two distinct phases.⁴³ During the first phase, culminating in the *audience* for the joinder of issue (when the claim and answer are submitted in open court without argument), technical procedural matters not going to the merits are considered. During the second phase, including the final *audience* (when the case is argued by the *avocats* on the record that has been developed), the merits of the case are clarified and developed by incidental proceedings and the parties refine their contentions and attempt to produce evidentiary justification.

Within the period stipulated by the initial pleading (*l'exploit d'ajournement*), usually a week, the defendant is to secure the services

38. Both plaintiff and defendant compile *dossiers*. Also, since 1935, there is a *dossier* (or court record) compiled by the *greffier* (or clerk of court). CUCHE ET VINCENT, nos. 317, 320.

39. CUCHE ET VINCENT, nos. 311-313. The *exploit d'ajournement* contains, *inter alia*, the date; the name, profession and domicile of the plaintiff; name, domicile and official enrollment number of the *huissier*; name and residence of the defendant; name of person on whom copy of *l'exploit* is served; the court before whom the defendant is required to appear; delay allowed by law (generally a week) during which defendant must retain an *avoué* who within this time must notify the plaintiff's *avoué* of his designation.

40. Service may also be made by the *huissier's* clerk. For the formalities regulating service (*signification*), see CUCHE ET VINCENT, nos. 314-316. The original of the *exploit d'ajournement* is retained by the *huissier* for inclusion in plaintiff's *dossier*. CUCHE ET VINCENT, no. 312.

41. Service may not be made between 8:00 p.m. and 6:00 a.m.

42. In such cases, to insure secrecy and discourage gossip, the law requires that the *exploit d'ajournement* be enclosed in an envelope sealed with the seal of the *huissier*, and aside from this, manifesting nothing other than the name and address of the defendant.

43. CUCHE ET VINCENT, nos. 290, 317.

of an *avoué* who in turn is to notify plaintiff's *avoué* in writing of his selection.⁴⁴ Otherwise, a default judgment might ensue. To docket the case, plaintiff's *avoué* then files with the clerk of court a *placet*, a document consisting essentially of a copy of the statement of plaintiff's demand or claim.⁴⁵ The case is assigned to a division of the court, and the clerk begins assembling the case record or *dossier*.⁴⁶

At the time the case is docketed, a judge is designated as the magistrate who will have the obligation of supervising this particular case (*le juge chargé de suivre la procédure*).⁴⁷ This procedural institution, inaugurated in 1935, departs somewhat from the multiple-judge aspect of French justice; it was instituted, however, as a means of expediting litigation. In order that this judge may be kept abreast of proceedings, copies of pertinent documents must be filed with the clerk for inclusion in the *dossier*.⁴⁸ By assigning to each case a judge charged with keeping abreast of proceedings, and giving him extensive powers, it was hoped that French civil actions might proceed more rapidly. Results, however, have been quite disappointing. If the role envisioned for the *juge chargé de suivre la procédure* were fully implemented, French civil justice could indeed be dispensed with greater speed. *Inter alia*, he is authorized, during the earlier stages of litigation, to request the parties to appear before him in an effort to achieve a compromise. If an accord is thus reached, it can be reduced to writing and made executory. He can call the *avoués* together at any time to discuss the progress of the case. He has the power within certain limitations to order incidental proceedings to develop and clarify certain aspects of the litigation. At the final *audience*, he shall report in open court on the entire history of the case, without, however, giving his opinion on the merits. These powers are by no means fully utilized, due apparently to a number of factors—including traditional passivity of the French *magistrat* in civil cases, procedural inertia, and overwork. The institution, however, and the continued efforts to make it truly effective are extremely interesting. The nearest American counterpart seems to be the role of the American judge in our "pretrial procedure." The American judge, however, by tradition is much more the activist and much more likely to take a firm hand in expediting matters than his French counterpart.

After the case is docketed, plaintiff's *avoué*, by a document known as an *avenir*, gives defendant's *avoué* at least two weeks notice of the date on which the claim and answer (*conclusions*) are to be presented

44. CUCHE ET VINCENT, no. 318. It should be noted that it appears that this delay and many of the others stipulated by law are not assiduously followed in practice.

45. CUCHE ET VINCENT, no. 319. If the plaintiff fails to docket the case timely, defendant's *avoué* may do so.

46. CUCHE ET VINCENT, no. 320.

47. For general discussion of the *juge chargé de suivre la procédure*, see CUCHE ET VINCENT, nos. 290, 317, 320, 330-331.

48. CUCHE ET VINCENT, no. 332.

to the three-judge tribunal in open court, the *audience* for the joinder of issue. Within a two-week period from this notification, plaintiff's *avoué* is to be served with a copy of defendant's answer. At the day fixed for the *audience*, both plaintiff and defendant present their *conclusions* (claim and answer) in open court to the three-judge tribunal, which ultimately will decide the case. There is no oral presentation to the court at this time. Although the *conclusions* may subsequently be amended in certain respects, they fix the jurisdiction of the court and the amount of the claim.⁴⁹ In this way, issue is joined.

Development and Clarification of the Facts

After the first *audience*, the second phase commences, wherein the parties are to grapple on the merits. During this phase, generally the defendant may no longer raise exceptions and objections not going to the merits of the plaintiff's claim.⁵⁰

As noted above, instead of being adduced in one continuous hearing immediately before the closing argument, the facts are usually developed and clarified via episodic, compartmentalized, incidental proceedings. In any one case, there may be a number of such proceedings, touching different aspects of the case, and using different kinds of proof—written, oral, expert inquiry, etc. In contrast to criminal proceedings,⁵¹ the rules of evidence governing cases before the *tribunaux de grande instance* are extremely technical.⁵² Also technical and formalistic are the procedural rules regulating the various kinds of incidental hearings, patterned in large measure after procedures evolved during the latter half of the seventeenth century.⁵³ It has been suggested that one of the reasons underlying the rigorous evidentiary requirements for civil cases is the traditional desire of French landowners to protect their interests from fraudulent claims.

Generally, proof of civil transactions involving more than fifty new francs (or approximately ten dollars) must be by notarial act or by act under private signature.⁵⁴ This rule does not apply to transactions which under French law are considered "commercial,"⁵⁵ to torts and quasi-contracts, nor to cases in which it is deemed that there was a moral impossibility for the parties to secure the required documenta-

49. The court may not award plaintiff more than he has thus prayed for.

50. CUCHE ET VINCENT, nos. 323, 507. No discussion will here be attempted as to the possible procedural exceptions and objections, but it should be noted that their disposition may well have required considerable time.

51. See Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1 (1962).

52. For discussion of the rules of evidence and proceedings for developing and clarifying the evidence, see CUCHE ET VINCENT, nos. 508-547.

53. CUCHE ET VINCENT, no. 510.

54. FRENCH CIVIL CODE art. 1341.

55. *Ibid.*

tion.⁵⁶ The rule is also relaxed when there is a commencement of proof by writing (*commencement de preuve par écrit*),⁵⁷ an exception which has been given a very broad interpretation by the jurisprudence. The rigorous documentation requirement can be successfully evaded if the court in its discretion orders a hearing for the personal appearance of the parties for questioning (*comparution personnelle*).⁵⁸ Although not under oath, the parties' statements when summarized in writing by the court, constitute commencement of proof by writing.⁵⁹

After issue is joined, a litigant is obligated to acquaint his opponent with all documents he intends to use in his own behalf in the proceedings.⁶⁰ Generally, this is done completely without question, and thus the "surprise" element is decreased considerably. If a litigant fails to comply with his obligation in this regard, and this appears to be quite rare, there is a means by which he may be forced to do so (*exception de communication de pièces*).⁶¹ Although it is quite clear that there is also a way by which a notary or other public officer may be forced to produce a relevant document, it is not completely clear that a private third party may be compelled to do so. Nor is it clear that an adversary can be forced to produce a document which might well be of assistance to his opponent.⁶² In any event, it appears that the French have by no means developed deposition and discovery procedures to the extent now current in American practice.

Primary contemporary written documentation of a litigant's claim may be either of two kinds—authentic acts⁶³ and acts under private signature.⁶⁴

Authentic acts are those executed according to prescribed formalities before designated public officials—particularly the very important *notaire* (or notary), a member of a separate, distinct, and very respected legal profession. Authentic acts are generally self-proving,⁶⁵ and to a remarkable extent, constitute full proof of the facts to which the notary

56. FRENCH CIVIL CODE art. 1348; Giverdon, *The Problem of Proof in French Civil Law*, 31 TUL. L. REV. 29, 32-33 (1956).

57. FRENCH CIVIL CODE art. 1347.

58. Giverdon, *The Problem of Proof in French Civil Law*, 31 TUL. L. REV. 29, 33 (1956); CUCHE ET VINCENT, nos. 534-538.

59. If a party fails to appear for the *comparution personnelle*, or remains silent in the face of questioning, this also may be considered as the equivalent of a commencement of proof by writing. See CUCHE ET VINCENT, no. 537.

60. CUCHE ET VINCENT, no. 324.

61. CUCHE ET VINCENT, no. 506.

62. See CUCHE ET VINCENT, no. 512.

63. PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, Vol. 2, Part 1, First Part (Proof) (11th ed. 1939), English translation by the Louisiana State Law Institute (1959), nos. 80-93.

64. *Id.* at nos. 57-79.

65. *Id.* at no. 88.

has personally and officially attested.⁶⁶ A litigant wishing to contest the full proof aspects of an authentic act must undertake a very complex, perilous, and rarely used procedure, which is permitted only in the discretion of the court (*inscription de faux*).⁶⁷

If a party wishes to make use of an act under private signature, purportedly emanating from his opponent, he may call upon the opponent to admit or deny its authenticity.⁶⁸ If the opponent admits the genuineness of the document, or refuses to affirm or deny it, then the verity of the document is established, for the failure to deny one's purported signature is taken as an affirmation. If the opponent denies the signature, the court, in its discretion, may nonetheless accept the document as valid, may accept the denial as valid, or may order one or more incidental proceedings to inquire into the verity of the document (*vérification d'écritures*).⁶⁹ Thus, the document is either verified or not verified, and accordingly is either available or not available to establish the proponent's case.⁷⁰

In the discretion of the court, on request of one of the parties or on its own motion, testimony of witnesses as to one or more of the factual issues in a case may be received via incidental proceedings known as *enquêtes*. It should be reemphasized that the parties do not have the right to have the testimony of witnesses taken; the matter is discretionary.⁷¹ Although the procedural rules governing these *enquêtes* were considerably

66. See PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, Vol. 2, Part 1, First Part (Proof) (11th ed. 1939), English translation by the Louisiana State Law Institute (1959), no. 90, wherein it is stated:

When the fact announced in the act is affirmed by the public officer who drafted it as having been accomplished by himself, or as having taken place in his presence, the declaration is given faith until an "inscription de faux". . . . The reason for this is that the sincerity of the public officer is guaranteed: (1) By the conditions prior to his nomination which assure to the functions of which he is charged, a recruitment as good as possible; and (2) by the terrible consequences for him of a forgery committed in the exercise of his functions: loss of his place and functions, and conviction to hard labor for life. The public officer who drafts an authentic act is therefore a privileged witness, whose attestation in the eyes of the law has an exceptional value. (Footnotes omitted.)

67. CUCHE ET VINCENT, nos. 519-521; PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, Vol. 2, Part 1, First Part (Proof) (11th ed. 1939), English translation by the Louisiana State Law Institute (1959), nos. 83-86.

68. CUCHE ET VINCENT, nos. 513-518; PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, Vol. 2, Part 1, First Part (Proof) (11th ed. 1939), English translation by the Louisiana State Law Institute (1959), nos. 67-79.

69. Such proceedings include, in the discretion of the court, one or more of the following methods: by *ilites* (when the contents of the contested documents are related in other acts whose authenticity is not contested; by witnesses (who, for example, saw the document in question signed, or who are familiar with the signature); or by submission to a panel of three experts.

70. If as a result of incidental proceedings, the authenticity of the document is rejected, the proponent is liable for costs and damages. If on the other hand, the court finds that the opponent falsely denied his own signature, he is liable for costs, damages and a fine.

71. For rules governing these proceedings, see CUCHE ET VINCENT, nos. 522-533.

liberalized by reform legislation in 1958, they nonetheless remain very technical. Since 1958, the three-judge tribunal may itself hear the witnesses, but in general the testimony continues to be taken as formerly, either before a judge designated by the court for this purpose, or before the *juge chargé de suivre la procédure*.⁷² The proceeding need not be open to the public, and often is not. The judge is in control of the hearing, and alone has the right to question the witnesses. Although a party may request the judge to ask the witnesses certain questions, the law stipulates that a party may not himself directly question the witnesses, under pain of fine and exclusion from the hearing.⁷³ The witnesses may be heard individually, or confronted with each other or with the parties. A *procès-verbal* is generally made of the hearing, containing written summaries (not a *verbatim* transcript) of the testimony of the witnesses, dictated by the presiding judge.⁷⁴ Thus, the three-judge tribunal generally obtains oral testimony of the witnesses not by seeing and hearing them, but by *procès-verbaux* included in the *dossier*.

Rigorous rules regulate testimonial competency; interest, infamy, and infancy still play an important role. Except under exceptional procedures (*serment décisoire* and *serment supplétoire*),⁷⁵ the parties themselves are not sworn, and because of the interest disqualification, they do not testify as witnesses. There is a prescribed procedure, however, by which the three-judge tribunal in its discretion may itself interrogate the parties without putting them to the oath (*comparution personnelle*).⁷⁶ The interest disqualification also generally bars the sworn testimony of a party's spouse, ascendants and descendants. Certain persons because of their criminal record may not testify under oath, but their unsworn statements may be received. Children under fifteen years of age may not give testimony under oath, but again, their unsworn testimony may be accepted. Although strange to a present-day American observer, in light of our current practices, it should be noted that until relatively recently, similar grounds for incompetency prevailed in the United States.

On motion of a party or on its own motion, the three-judge tribunal in its discretion may order an incidental proceeding known as a *comparution personnelle*.⁷⁷ This permits the court to interrogate the parties without putting them to the oath. In such event, as noted previously, the

72. It should be noted that the *juge chargé de suivre la procédure*, on his own motion or on motion of a party, may himself order the holding of an *enquête*, in which event he is to preside over the hearing. CUCHE ET VINCENT, nos. 331, 523.

73. CUCHE ET VINCENT, no. 528; FRENCH CODE OF CIVIL PROCEDURE art. 265.

74. A witness is read the summary of his testimony thus prepared, and if he wishes to make changes, these are inserted in the margin or at the end of the written statement. He is invited to sign it. If he does not wish to sign it, or cannot, mention thereof is to be made in the *procès-verbal*.

75. See discussion of *serment décisoire* and *serment supplétoire*, *infra*.

76. See discussion of *comparution personnelle*, *infra*.

77. CUCHE ET VINCENT, nos. 534-538.

unsworn testimony of the parties (or even their refusal to appear or testify) suffices to meet the requirement of commencement of proof by writing. Although assisted by their *avocats*, who have the right to request the court to ask certain questions, the parties are interrogated by the court itself in a closed proceeding. The parties may be examined consecutively or collectively.⁷⁸ A *procès-verbal* similar to that prepared at an *enquête* when ordinary witnesses are heard is confected. There is no *verbatim* record of the proceedings.

There is an interesting, but very seldomly employed procedure, by which one of the parties may call upon his opponent to take the *serment décisoire* (or decisory oath).⁷⁹ This affords a party with a meritorious claim and a scrupulous opponent an opportunity to carry the day, even in the absence of usual evidentiary requirements. If the opponent takes the oath, both the proponent and the court are bound by the solemn declaration, for the oath is indeed decisory. There is another procedure by which the judge in his discretion, in order to bolster the evidence of a party with a meritorious claim but insufficient proof, may invite him to take a supplementary oath (*serment supplétoire*).⁸⁰ This oath is to be distinguished from the decisory oath; it does not bind the court.

Either the three-judge tribunal or the *juge chargé de suivre la procédure*, on motion of a party or on its own motion, may order an *expertise* (expert investigation) as to technical aspects of a case.⁸¹ Whether experts are to be named, and if so, who is to be named, is generally a matter of discretion.⁸² The order providing for the *expertise* itself designates who is to make the investigation and the time within which the report is to be submitted.⁸³ The parties and the *juge chargé de suivre la procédure* are entitled to be present when the expert investigation is made. Although the expert may question persons he feels may be of assistance, if he wishes to receive the benefit of sworn testimony, he is to address a request for same to the *juge chargé de suivre la procédure*. The formal report is filed with the *greffier* (or clerk of court). If more than one expert has been appointed, and the experts are not unanimous in their opinion, the report is to note the divergence—with no indication, however, as to which of the experts held the majority or minority view. The court

78. They may also be examined in the absence of each other.

79. CUCHE ET VINCENT, no. 539; PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, Vol. 2, Part 1, First Part (Proof) (11th ed. 1939), English translation by the Louisiana State Law Institute (1959), nos. 31-34; SOLUS, COURS DE DROIT JUDICIAIRE PRIVÉ (PROCÉDURE CIVILE) 565-66 (1961-62); FRENCH CIVIL CODE arts. 1357-1369.

80. *Ibid.*

81. CUCHE ET VINCENT, nos. 541-546; Hammelmann, *Expert Evidence*, 10 MODERN L. REV. 32 (1947).

82. The law stipulates, however, that unless the court deems it necessary to name three experts, only one shall be named. This provision came into the law in 1944, to minimize expense.

83. There is a means by which the parties may attempt to recuse a designated expert.

is not bound by the report. If it feels that a second *expertise* on the same subject matter would be beneficial, it may so order.⁸⁴

It appears that in practice *expertises* are quite frequently ordered, and the French seem generally satisfied with the system. The expert investigation often entails considerable delay, however, and this element provokes criticism. It should be emphasized that an *expertise* is an incidental proceeding designed to produce a *written report* of an investigation conducted by an impartial expert for the use of the court in its determination of the facts. This is in sharp contrast to our battle of experts with examination and cross-examination in open court.

The court, on its own motion or motion of a party, may decide that a judge or the three-judge tribunal itself should go to the scene which has given rise to a factual controversy. In such event, a distinct incidental proceeding is ordered, *descente sur les lieux* (or visit to the scene).⁸⁵ Accompanied by the clerk of court, and the parties if they desire, the judge or judges go to the scene, question any persons there they deem helpful, and make whatever investigations they think appropriate. A *procès-verbal* of the proceeding is prepared for inclusion in the *dossier*.

Final Pleadings, Argument by Avocats

After completion of incidental proceedings for the development and clarification of controverted factual issues, and after the parties have exchanged amended written pleadings setting forth final positions as to both fact and law (*conclusions définitives*), the *juge chargé de suivre la procédure* convokes a conference with the *avocats*.⁸⁶ At this conference, the *avocats* are given a choice as to subsequent procedure.

The *avocats* may agree to present their case orally before the *juge chargé de suivre la procédure*, a simplified and expeditious procedure established in 1958. If they do, it is unnecessary for the case to wait its turn on the docket. After hearing the *avocats*, the *juge chargé de suivre la procédure* transmits the case record to the president of the three-judge tribunal which, after receiving the report on the cause by the *juge chargé de suivre la procédure*, will decide the case. This expeditious procedure bears some resemblance to the practice sometimes employed on appeal in the United States of submitting a case "on briefs," without oral argument.

If the parties do not agree to follow the new optional streamlined procedure mentioned above, then the case will be presented in the traditional fashion before the three-judge tribunal itself. After the *juge chargé*

84. It appears, however, that this occurs only rarely.

85. CUCHE ET VINCENT, no. 540. *Descente sur les lieux* sometimes takes place instead of an *expertise*, which may be ordered to accomplish much the same purpose.

86. For discussion of this and subsequent proceedings at the final *audience*, see CUCHE ET VINCENT, nos. 325-328.

de suivre la procédure transmits the *dossier* to the president of the three-judge tribunal, the president assigns a date for hearing. To discourage the *avocats* and *avoués* from postponing the case from the day fixed (apparently a fairly frequent practice) the French devised a very ingenious procedure. Since 1958, the clerk of court has been given the duty of sending a letter to the parties themselves directly informing them of the day fixed for the hearing.⁸⁷ This, it was hoped, would provide a spur which in turn would promote celerity.

At the hearing before the three-judge tribunal, the written pleadings are first read—in a proceeding normally open to the public. The *juge chargé de suivre la procédure* then presents an oral report summarizing the history of the litigation and the matters in controversy. He is not permitted, however, to express his opinion on the merits. The *avocats* make their presentations on both fact and law (*plaidoirie*), and the president of the court thereafter officially closes the adversary proceedings.

Of considerable interest, after the close of the adversary proceedings, the representative of the public ministry (*ministère public*) is given the opportunity to express his views.⁸⁸ Generally in the *tribunaux de grande instance* this official makes no more than a pro forma appearance, but he has the right (and exceptionally, the obligation), to express himself on every case.⁸⁹ He acts somewhat as an official juriconsult for the court, appearing on behalf of society's interest and the proper application of the law.⁹⁰ The parties have no right to respond orally to the presentation made by the public ministry. They may, however, submit written memoranda to the court, and if the court feels that new and important questions have thus been raised, it can order another hearing wherein the *avocats* and the representative of the public ministry will again be heard. The authority of the public ministry with respect to the clarification of the law, is indeed great. Under certain circumstances, he may invoke the powers of France's highest court, the *Cour de cassation*, to declare a lower court's judgment erroneous—where the parties themselves have not made a timely attack. In such cases, the parties remain bound by the prior judgment, but the misconception that otherwise would have been engendered by the erroneous decision is effectively erased.⁹¹ In view of the theoretical differences as to the force of prior decisions in civil and common-law systems,⁹² it is quite interesting that it is in France that such procedures are found.

87. CUCHE ET VINCENT, no. 326.

88. CUCHE ET VINCENT, nos. 160-164, 327.

89. In all cases before France's highest court, the *Cour de cassation*, a representative of the public ministry is obligated to make a presentation. CUCHE ET VINCENT, no. 163.

90. See Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 5 (1962) and authorities therein cited.

91. CUCHE ET VINCENT, no. 468.

92. DAVID & DEVRIES, *THE FRENCH LEGAL SYSTEM*, 113-121 (1958).

Appeal

As noted previously, France generally affords a plenary review by the courts of appeal (*cours d'appel*) on both facts and law⁹³—what in American terminology might be called a trial de novo. The procedure on appeal is basically the same as that for the original proceeding in the *tribunal de grande instance*. This plenary review by the *cours d'appel* is to be distinguished from the power exercised by France's highest court, the *Cour de cassation*—in general, the power to *casser* (break or set aside) lower court decisions on matters of law alone, not to itself decide the case.⁹⁴

In France, as in the United States, procedures for fact-finding and law-applying are often time-consuming and expensive. Procedural reforms of considerable significance have been, and are being, made in each country. Despite the wide differences that separate our two systems, each can learn from the thoughts and experience of the other.

93. See CUCHE ET VINCENT, nos. 411-447*bis*.

94. CUCHE ET VINCENT, nos. 126-131; see Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 5 (1962) and authorities therein cited.