

THE HAMLYN LECTURES

FOURTEENTH SERIES

LAWYER AND LITIGANT IN ENGLAND

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LAWYER AND LITIGANT IN ENGLAND

By

R. E. MEGARRY, Q.C., M.A., LL.D.(Cantab.)

*of Lincoln's Inn; Book Review Editor of
The Law Quarterly Review; Reader
in Equity in the Inns of Court*

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R. E. Megarry

1962

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THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941, aged eighty. She came of an old and well-known Devon family. Her father, William Russell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

“The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries, including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other

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The fourteenth series of Hamlyn Lectures was delivered in November and December 1962 by Dr. R. E. Megarry, q.c., at Cambridge University.

JOHN MURRAY,
Chairman of the Trustees.

December 1962.

CHAPTER 1

INTRODUCTION

MAITLAND's inaugural lecture was entitled "Why the History of English Law is not Written."¹ I confess that I feel tempted to call these lectures "Why a proper appraisal of the value of English lawyers to the public has not been made." For the subject I have chosen is impossible. Under the title "Lawyer and Litigant in England" the task I have set myself is to examine how good English lawyers are at their jobs, seen from the point of view of their clients; and with this goes a critical appreciation of the system within which they work.

Nobody can do this properly. The layman does not know and cannot find out. Even the most persistent litigant yet unmuzzled lacks the width of experience and breadth of vision needed for a fair judgment. Perhaps in these days of Consumers' Unions and the like a Litigants' Union may spring into being and make the inquiry; but the cry "Litigants of the World, Unite" has yet to be heard. The lawyer cannot make the inquiry, for he knows too much of the law and too little of the layman's heart and head. Yet in my disqualification I may timidly peer out of the Chancery Division, and remember the doctrine of *cy-près* ("as nearly as possible"). "Half a loaf is better than no

¹ *Collected Papers*, 1911, Vol. 1, p. 480.

bread" is not one of the recognised maxims of Equity, but it has a kinship. And so I proffer my half loaf.

Before I do this, however, I must express my pleasure at being allowed to be the first to deliver a series of Hamlyn Lectures in Cambridge. The lightning has struck thrice in London, once from Edinburgh to Exeter, and once from Belfast to Lincoln's Inn, but not yet at Cambridge. It is over thirty years since one of my examiners in Part I of the Law Tripos congratulated me on the economy of effort demonstrated by the single mark that stood between me and total disaster; and the years have not shown me how to improve on that precocious venture in judgment. When my present essay falls short of the mark, as assuredly it must, there is nowhere that I can hope for greater charity than in Cambridge.

Let me make an initial disclaimer. Often in putting forward the views expressed in these lectures, I speak on behalf of nobody, not even myself. I have listened, I have inquired, I have surmised, and I report; and to report is not to assert. If a view seems to be generally and soberly held, then it is right that it should be expressed. If such a view seems to have its frailties, then it is also right that these should be mentioned. Of course, I have excluded views that appeared to be no more than idle and ill-informed chatter. But subject to this, I have tried to capture that elusive and perhaps mythical creature, well-informed public opinion. I agree with most of what I say; but let not a practising barrister be said to subscribe to every word of it.

My ultimate goal is to appraise the value of English lawyers and the English legal system to the public in

civil matters; and I hope that nobody whose allegiance lies west of Monmouth will be affronted if for brevity I treat "English" as including "Welsh," though not, of course, "Scottish." This is indeed a vast field. Even though criminal matters are by definition excluded, an examination of every activity which, for example, daily engages the attention of solicitors would take far longer than is at my disposal. Accordingly, in making the survey I shall pay special attention to the litigant in civil proceedings, and in particular the defeated litigant. The successful litigant may have his grumbles. He may complain of the time that it has taken him to obtain justice, and he may be bitter about the amount of the costs which he has had to pay without being able to recover them from the loser. But ultimately he will probably be fairly satisfied with the law: for he has won. His is the gingerbread, and for him the only question is how much of the gilt has been taken off it by delays, costs and other imperfections.

For my purposes, therefore, what matters far more is the defeated litigant. I discard the eccentric and the monomaniac. Under any system of justice that this world can evolve there will always be those who will refuse to accept that their defeat was just. What I am concerned with is the Reasonable Defeated Litigant. Take the Reasonable Man, so long familiar to the common law, put him into court, and let him lose: let the Man on the Clapham Omnibus be defeated in, say, the Camberwell County Court. What are his thoughts about what has happened to him? Let him be questioned not as he walks away from court, for events are then too close to him, but a week or a month later.

How have his lawyers treated him—his solicitor and, if he had one, his counsel? Did they listen to him, understand his grievances and advise him fairly and intelligibly? What of the trial itself? Did he have what he felt to be a fair and full hearing, and a decision given with impartiality, both real and apparent? Are his complaints real grievances, or are they founded on misunderstandings? These are the types of question that I shall try to explore.

You may well object at this point that no mere lawyer, unsupported by the results of informed and intelligent public opinion polls, can hope to answer these questions properly. Must not the half loaf that I proffer savour more of a feat of imagination than of a survey of fact? It would be vain to deny that there is much force in this objection: perhaps the half loaf is not more than a slice, or a few crumbs. Yet, very humbly, I would turn to Holt C.J. for comfort. "However that happen," he once said, "I have stirred these points, which wiser heads in time may settle."² If in years to come others "surcharge and falsify" what I have said, I shall be content: for what matters is that these things should be thought of and spoken of and weighed in the balance. The importance of a system of law and a race of lawyers that all can respect and trust has always stood high in the scale of civilised values; and certainly today it stands no less high than before.

Almost by definition, the jury stands outside my chosen territory; for today it is rare indeed to find a

² *Coggs v. Bernard* (1703) 2 Ld.Raym. 909 at 920; and see *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379 at 424, *per* Lord Denning.

jury in the civil courts of England. In county courts they are virtually unknown; in the High Court they appear in many defamation cases, and sometimes in other proceedings which concern a litigant's honesty or reputation³; but that is nearly all. For a quarter of a century and more, "civil action" has meant "trial by judge" in all save a very small group of High Court cases. This limitation is, indeed, appropriate; for previous lectures in this series have explored the jury⁴ and the criminal process in which the jury flourishes⁵ with an authority and a thoroughness that I could not muster.

My material falls into two halves. First, there are the practising lawyers, the barristers and solicitors who practise in the courts, the system under which they work, and the professional atmosphere in which they live. Secondly, there are the courts and in particular the judges and the conditions under which they perform their duties. These divisions are, however, far from watertight, and many matters that are relevant to both may for convenience be discussed under one head rather than the other. But that is the broad division to be made. To each part there is a pendant. After the lawyers must come some discussion of legal education, for law students are the practitioners of the future; and after the courts there is of necessity a discussion of costs. And so let me set out on my survey.

³ See R.S.C., Ord. 36, r. 2.

⁴ Sir Patrick Devlin, *Trial by Jury*, 1956.

⁵ Dr. Glanville Williams, *The Proof of Guilt*, 2nd ed. 1958.

CHAPTER 2

THE LAWYERS

THE starting-point of any inquiry must lie in the facts. No examination, discussion or evaluation can be really intelligible to others unless there has first been an adequate exposition. Of necessity, therefore, much of these lectures will be geographical; the territory must be mapped before it can be considered critically. Some of what I say may well be familiar to you. Yet it may be that you will not have seen it as a whole before. It is oddly difficult to find any detailed and connected account of how the legal profession in England functions today, although bits and pieces abound, and there are many summaries. And so I hope that you will excuse the repetition of the familiar in the expectation that you will find the unfamiliar just round the corner.

STATISTICS

In England and Wales a population of over 46 millions is served by rather less than 24,000 practising lawyers (I will not venture across the border into Scotland). Of these, a little over 1,900 are barristers (or counsel); the rest are solicitors.¹ There are, of course, very many more than 1,900 persons living who have been called to

¹ Including some 800 or 900 barristers employed in industry or in central or local government on work more akin to that of a solicitor than that of a barrister. What seems important is function, not qualification.

the Bar in England. But large numbers of these come from overseas and have returned there to practise; and of the remainder many have merely used the Bar as a qualification for some salaried appointment. On the other hand, the great majority of those who become solicitors practise as such in this country. The result is that although each year the number of those called to the Bar is approximately equal to the number admitted as solicitors (600 to 700 a year in each category), there are something like ten or eleven solicitors in practice for every practising barrister. In terms of population there is one practising solicitor for every 2,000 persons and one practising barrister for every 23,000. The U.S.A. seems to have one lawyer to every 750 persons,² so that by comparison our lawyers do not seem to be unduly dense.

DISTRIBUTION

The geographical distribution of the two branches of the profession is, of course, entirely different. Solicitors are spread throughout the country, though naturally there are concentrations in the great towns. The Bar, on the other hand, is highly centralised. Three-quarters, including all the Queen's Counsel (or "silks," as they are often called, from the silk gowns that they are entitled to wear in court), have their chambers in London. The remaining quarter is distributed between some twenty of the most important provincial towns. Thus Liverpool has a local Bar of ninety-five, and Birmingham has

² A population of over 180 millions is served by over 240,000 lawyers (over 192,000 in private practice, over 22,000 in industry and over 25,000 in government service): see (1962) 34 *New York State Bar Journal* 44.

eighty, while Hull has six and Bournemouth has five.³ Broadly, the main centres of population have local Bars within convenient reach. A vast amount of the day-to-day work of the Bar in the lower and assize courts is done by members of the local Bar; and most solicitors are within easy reach of counsel for urgent conferences or cases in which it is decided to take in counsel at the last moment.

THE CLIENT'S CHOICE

Competition

From the client's point of view, however, what matters in the first instance is ease of access to a competent solicitor; and for the most part this is what he has. Towns nearly always offer a choice of solicitors, with a wide choice in the larger towns; and as choice means competition, the probability is that they will all be competent. Many villages have a firm of solicitors; but here the position is more difficult. If there is but one firm in the village, that firm has something of a monopoly. Much may depend on how far away the nearest town is, or the nearest rival firm. Sometimes the firm has no competition because it is so good at its work that all attempts at competition have failed. Yet partners die, and sometimes Mr. Junior lives for many years on the reputation of Mr. Senior before it begins to be discovered that he is not half the man his predecessor was. Nothing in the law encourages (and, indeed, compels) efficiency more than rivalry, whether friendly or otherwise; and geography may be an important factor in rivalry.

³ See *The Law List*, 1962, pp. 900-910.

Difficulties

The difficulty, of course, for the client is usually not so much one of finding a solicitor, but of discovering how good he is. Impressed by a fine chairside manner and conviction of voice, the client may well not realise how unsound is the advice that he is being given; disquieted by diffident speech and cautious language, the client may fail to appreciate how valuable is the monition. In this life we are all liable to be influenced overmuch by the trappings and the non-essentials; and in any case appearances may be most deceptive. Some ten or fifteen years ago there appeared in an American illustrated periodical a double page of numbered photographs, passport style, of a hundred men. The caption disclosed that fifty were of eminent judges and fifty of notorious criminals, many of them (if I remember aright) sentenced to death for multiple murders. The intermingling of the two groups of fifty had been achieved with some skill, and a key was provided on another page. The publication was most instructive; none who saw it could ever judge much from externals thereafter.

The client's judgment

Apart from this, solicitors are perforce judged by clients who are in the main ignorant of law and the practice of the law, and often have strange misconceptions about it, sometimes more technical than the law itself. Indeed, it has been well said that one of the main reasons for having a lawyer on every committee is to prevent the other members from being too legalistic. Of this judging by clients I must say more later on.

Only very slowly does it become possible for a solicitor's reputation to be based on his skill in the things that matter. Mr. Alpha Plus may indeed not become Alpha Plus until he has been many years in the law; and mistakes made (and revealed) while he was, say, Beta Minus, may dog him unfairly for many years.

In the end, it will often happen that a client will go to a solicitor with no real knowledge of that solicitor's skill in the work that has to be done. It is one of the outstanding merits of the English legal system that if that work is litigation, it usually does not matter very much to the client whether the solicitor is Alpha, Beta or Gamma; and the same is true if the work is not litigious but requires the advice of counsel to be obtained. The reason, of course, is the division of the legal profession into barristers and solicitors. If Gamma is the solicitor, the burden on the barrister who is instructed will be greater than if Alpha is the solicitor; but usually counsel can redress the unbalance, at any rate to a large extent.

Before I turn to that, let me dispose of one possible misunderstanding. When I speak of solicitors being Alpha, Beta or Gamma, I do not want anyone to think that Gamma implies a disgraceful lack of care or competence. Nobody can become a solicitor without passing formidable examinations and undergoing a period of apprenticeship.⁴ These alone guarantee a real degree of competence. The difficulty is that law, and the practice of the law, are indeed difficult—difficult and complex. "Keeping up to date" is one of the practising

⁴ See *post*, pp. 96, 99.

lawyer's heaviest burdens; and some solicitors keep more up to date than others. Some, too, are born with a nose for the essence of the situation; others are not. Some see the danger round the corner before they reach it; others miss it until they are upon it. So it is not a case of Alpha being a peak 5,000 feet high, Beta being at sea level, and Gamma a marine crevasse 5,000 feet deep. Instead, Gamma stands on a plateau 3,000 feet high, Beta is a minor peak of 4,000 feet and Alpha heads the range at 5,000 feet. From the plateau one can survey most of the terrain; but for some one must ascend Beta, and for the rest nothing save Alpha will do.

SPECIALISATION

The main advantage of the English system of a divided profession lies in the obvious benefits that flow from all specialisation: each becomes expert in his own field. For the public at large, what is statistically the most important is to be able to consult a good solicitor; what is often emotionally and financially the most important is being able to brief good counsel. Most solicitors practise without the distraction of preparing cases in which they will appear as advocates. Correspondingly, the English Bar consists in the main of counsel whose professional life is mainly one of advocacy. The client in England is virtually assured of a regular and not merely intermittent advocate. In saying that it is of the essence of the English system that there should be specialisation, one must distinguish between specialisation of subject and specialisation of function. Specialisation of subject is what is ordinarily meant by the

term specialisation; the person concerned has special knowledge and experience of some branch of the law. It may be property law, or equity, or crime, or divorce, or tax, or patents, or any of dozens of other fields of knowledge—some narrow, some wide, some self-contained and some overlapping.

Specialisation of function is quite different; it deals with professional skills and techniques rather than fields of knowledge. Advocacy is one of the most obvious, and the chairside manner another. Broadly, this is the great distinction between solicitors and barristers; each, when fully trained, become expert in quite different professional skills. These overlap at a number of points, but in substance they are quite distinct. One has only to glimpse the daily lives of a solicitor and a barrister, each in full practice, to see the gulf.

The solicitor

Let us look at the solicitor first. He is usually one of a team, with his partners (or his employers) and the employees of the firm; and ability to work as part of a team is at the least a highly desirable quality. He is essentially an office lawyer. Most of the time he will be found in his office. He is in direct contact with his clients and with many others, whether other firms of solicitors or other professional men (estate agents, accountants, bank managers and so on) or business concerns. He has a vast mail and a constant flow of telephone calls. It is for him to make use of all his contacts for his clients' good. To his clients he is a

combination of an oracle and a comforting shoulder to weep on (and here I do not speak entirely metaphorically). He will probably specialise in a broad division of the law, such as conveyancing, or litigation, or commerce. Nevertheless, he must always be prepared for any subject to arise, and to deal to some extent with segments of the law outside his normal fields; for these are often inseparably enmeshed with his own subjects, or are raised by clients who obstinately refuse even a temporary transfer of their affections to another partner.

A vast part of his practice takes him nowhere near the courts; he drafts documents, writes letters and negotiates. Whatever he is doing, he can never escape far from the tyranny of letters and the telephone. He engages in a wide variety of transactions, and carries them through from beginning to end; he lives with the case from start to finish, and sees it whole. He knows some law—sometimes much law, and always a great deal of practice—but the measure of his success is his knowledge of how and when to use his law. So often common sense, a knowledge of humanity and a flair for the business-like way of doing things matter far more than any knowledge of law. Law is always there in the background, but so often he must prevent it taking the foreground. He is a lawyer but he is not legalistic. The traditional phrase has yet to be bettered: he is “a man of affairs.”

The barrister

Now let me turn to the barrister. From the first to last he is an individualist. Partnerships are prohibited,

and they are not wanted by the Bar.⁵ In early years he may devil (*i.e.*, work) for his seniors, and in later years he may employ devils; but the sole responsibility for any written work that has been devilled rests with him who signs the opinion or pleadings. Often he will appear in a case with a leader or a junior, and to that extent he will be one of a team of two or occasionally three; but there are no large teams, nor any long-term teams. A succession of temporary *ad hoc* "partnerships" is very different from membership of a firm of solicitors. Throughout his life counsel is in essence on his own.

He is essentially a court-room lawyer. He may do a considerable volume of paper work in his chambers, but he is in no sense an office lawyer. He has no direct contact with the lay client save through a solicitor; and similarly, except through the solicitor, he has no contact with other solicitors or other professional men. Apart from his personal affairs, he has a very small mail, and rarely writes a letter on professional matters. His telephone is not altogether idle, yet not much penetrates beyond his clerk; certainly the telephone is but a ghost of the tyrant that it is to solicitors. He has no responsibility for co-ordinating the forces that will aid his client, though he may advise the solicitor on the process. Clients rarely get close enough to his shoulder to weep upon it, whether metaphorically or otherwise. He will probably specialise in a narrower division of the law than most solicitors.

He rarely sees a case through from beginning to end.

⁵ See *Annual Statement of the General Council of the Bar*, 1961, p. 40.

He is brought in at intervals as his advice or his advocacy is required, but there are often long periods when he hears nothing of the case, even though much may be happening. He is, of course, not worthy of his robes if he allows his law to override his common sense; yet the calls upon his law are likely to be far more frequent than the client's need for law from his solicitor, and his research will be expected to be deeper and more thorough. He is far less a "man of affairs" than a brain and a tongue and a character.

The contrast

You will see that the contrasts are great. From day to day and hour to hour the lives of barrister and solicitor often touch; but this is only tangential. Each leads his own life: each performs his own function. At some expense, delay and mental effort (for examinations have to be passed) a solicitor may become a barrister or a barrister a solicitor; but such changes are relatively uncommon, and in any case the two branches of the profession are mutually exclusive. In England, nobody can be both a barrister and a solicitor at the same time. True, there are some apparent exceptions to this, but they are no more than amiable English eccentricities of nomenclature. Thus the Solicitor-General must be a barrister, and Treasury Solicitor,⁶ as well as the solicitor to other government departments, may be a barrister or a solicitor. But these are offices or appointments, not professional qualifications, and form no true exception

⁶ See the engaging but unsuccessful objection to Treasury Solicitor, a barrister, acting as a solicitor in *Brownsea Haven Properties, Ltd. v. Poole Corporation* [1958] Ch. 574.

to the rule that "barrister" and "solicitor" are mutually exclusive terms.

EQUALISATION

One important consequence of this division of the profession lies in its equalising function. This, indeed, is at the bottom of the whole system of representation by lawyers. Let a bricklayer sue a Member of Parliament in the High Court, and let all legal representation be forbidden; the disparity in forensic talent would probably be striking. Admit representation by solicitors, and at once the gulf is narrowed. Yet if one party is represented by one of the most distinguished firms in the City of London and the other by a one-man firm in a sleepy country town, the gulf, though narrowed, may still be substantial. If the case were to be fought in court between the solicitors, one would know how to lay the odds, other things being not wholly unequal. However, the whole of the English Bar is open to each side; and it may fairly be said that although there are difficulties in the proposition that all counsel are equal, not many are much more equal than others.

Differentials in advocacy

The point may be made by imagining a scale on which skill and experience in advocacy is assessed from 0 to 100. Give all lawyers a right of audience, and many a case may be fought between an advocate in the bottom quarter of the table and one in the top quarter. Such conditions may well be a substantial obstacle to the triumph of law or justice or both. They may, indeed,

be one explanation of some of the remarkable series of successes of some great advocates who practise under them. Thus, in twenty-six years one American advocate defended just over 400 persons charged with homicide. Some 43 per cent. were acquitted; 55 per cent. received sentences averaging some six years in prison; and only 2 per cent. were executed.⁷

On the other hand, when in England a case is argued between counsel, in the great majority of cases it is argued between advocates who are each somewhere in the top third or quarter of the table. No doubt the absolute range—the gap between Mr. Whitewig, called yesterday, and Sir Iota Omega, q.c.—is greater than that. But what I am speaking of is what happens in fact and not what might theoretically occur. What I have in mind is the effective range, the gap between the counsel in fact likely to be briefed by the solicitors on each side in any case. Here the difference tends to be marginal.

England thus avoids the gulfs that Americans sometimes complain of. In the United States many a lawyer in the main leads a life corresponding to that of an English solicitor, save that once or thrice or even a dozen times in a year he will appear in court.⁸ Quite apart from any question of the effective presentation of a case, the English practice tends to shorten trials. The opinion of one well-known American trial lawyer was that in making an opening speech the experienced

⁷ See Arthur H. Lewis, *The Worlds of Chippy Patterson*, 1961, p. 14.

⁸ See Francis L. Wellman, *The Art of Cross-Examination*, 4th ed. 1936 (1962 reprint), p. 23.

advocate needs at most a quarter of the time required by the inexperienced⁹; and for the client, as for others, time saved is money saved.

The autonomy of cases

It was against this English background of marginal differences in advocacy that Sir Patrick Hastings said that he was satisfied that "at least 90 per cent. of all cases win or lose themselves, and that the ultimate result would have been the same whatever counsel the parties had chosen to represent them. But of the remaining 10 per cent. it is not so easy to speak with any certainty. Undoubtedly a case can be lost by bad advocacy; an indiscreet question may let in evidence otherwise inadmissible; an omission to appreciate an important fact may prevent the court from ever becoming aware of the existence of the most vital element in the case; there are endless ways in which a bad advocate can do his client irreparable harm. But is the antithesis equally true? Can a brilliant advocate ever win a case which without his brilliant advocacy would have been lost? I know that he can; very seldom, it is true, but just on those rare occasions which prove the exception to a general rule."¹⁰ Others have expressed similar views. Theo. Mathew records that Kemp, q.c. "was fond of quoting the saying that of every hundred cases, ninety win themselves, three are won by advocacy, and seven are lost by advocacy."¹¹

Probably most lawyers would be in broad agreement

⁹ *Ibid.*

¹⁰ *Cases in Court*, 1949: Pan Books edition, 1953, p. 250.

¹¹ Theobald Mathew, *For Lawyers and Others*, 1937, p. 272.

with these views, though some would regard the odds as being somewhat pessimistic. Many a case lost in a lower court has been won on appeal by an argument based on some decision never mentioned in the court below but discovered on further research by counsel once the decision has delimited the territory more clearly, or unearthed by a leader brought in for the appeal. Even if there is no clear-cut event such as the discovery of some relevant authority, sometimes a perceptive advocate can detect the importance of some small point that has lain hid in the mass of materials. A shift of emphasis, a proper setting, and in skilled hands that point can be made to blaze with a terrible light that transforms the case.

Equalisation in law

This principle of marginal differences applies not only to skill in advocacy but also to knowledge of substantive law. The case may involve some branch of the law in which there are perhaps less than a dozen experienced counsel; yet they are all equally at the service of either side. You may say that the city firm, engaged in scores of law suits every year, has far more experience and knowledge of counsel, and so will be far better able to select the best than the country solicitor who may escape with only an annual case or two.

This is true but misses the point. Nearly every country solicitor has a firm of "London Agents." These are firms of London solicitors who, in return for a modest share of the profit costs (some would substitute "immodest," but I must not bring down that irrelevant fire on my head) act on behalf of country solicitors in

all London litigation, and some other matters, too. London Agents of necessity become experts in the specialities, abilities and fees of counsel, and to them country solicitors naturally turn when in doubt or difficulty. If *The Law List* were to indicate what types of work each practising barrister engages in (or hopes to engage in), this might prove useful to solicitors. Quite apart from the rigid restrictions on any form of advertising at the Bar, there are obvious difficulties in this suggestion; yet the advantages in the public interest might in the end well outweigh the disadvantages.

So in the end the difference between the city firm and the country solicitor in the choice of counsel shrinks to vanishing point. To each the whole Bar is open, and each is as well able as the other to make a good choice—or a bad. It is by no means unknown for each to go to the same counsel; and then the only question is who got there first. There are, indeed, elaborate “retainer rules”¹² as to what constitutes a retainer of counsel, and so will prevent him from aiding the other side. I need not explore the details, though the main rules may be mentioned. For the modest fee of two guineas (with another half-crown for the clerk) a “special retainer” can be delivered to any counsel at any time after the writ commencing an action has been issued.

Traditionally, payment must be in cash to be effective. Thus where a special retainer was delivered with a cheque, and ten minutes later the other solicitors arrived with a special retainer and cash, he that was last was first. The actual delivery of a brief also constitutes a

¹² See W. W. Boulton, *Conduct and Etiquette at the Bar*, 3rd ed. 1961, pp. 35-41.

special retainer, and unless otherwise arranged so does the delivery of instructions to counsel to settle a writ or any pleadings in an action, or to advise in the action.

A "general retainer" may also be given. Unlike a special retainer, which applies only to one specific action, a general retainer operates for all litigation in any specified courts, tribunals or matters; and it costs five guineas (with half a guinea to the clerk). A retainer not only prevents counsel from appearing for the other side, but entitles him to a brief in the proceedings, so that it would scarcely be open to even the most plutocratic litigant in the most highly specialised type of litigation to hamstring his adversary by delivering retainers to all counsel competent in that field.

The range of the law

This equalising function of the Bar is important not only in litigation but also in advising. The solicitor is of necessity something of a jack of all trades. Most firms are departmentalised to some extent; one partner is in charge of conveyancing, another is commercial, the third is litigious and so on. Again, some firms restrict their activities to certain fields, or exclude certain types of work; thus some firms will not do divorce work. Nevertheless, it is generally true that the client can go to his solicitor, and expect at the very least first aid in whatever trouble besets him; almost by definition, a solicitor's shoulder is metaphorically broad, whatever his corporeal anatomy.

This, of course, poses problems to the solicitor. How can he, alone or with the aid of his partners and staff, possibly profess enough skill over the whole wide canvas

of modern English law? True, his plight is not that of the attorney in the United States. In England, it would be physically possible for a solicitor to read and digest the entire output of Parliament and the law reporters, and still have some time left for practice; not much, but some. Yet physical possibility is one thing, sanity another.

In any case, solicitors professionally lead broken lives. An uninterrupted hour in the office is a rarity. The telephone is perhaps the worst tyrant; but there are also clients, partners, staff, other solicitors and sometimes the Bar. There is also common sense. Why strive for a clear afternoon for research in a strange field when there is the Bar? Half an hour's dictation, and there will emerge a Case to Counsel for Opinion. Counsel, too, will be chosen from those skilled in the field in question, The problem, or others like it, may have come his way a dozen times before. He may well have at his fingertips not only any statutes and reported cases, but also (and this is even more important) any practice that has been growing up in the courts or at the Bar in dealing with this type of problem. By no means all that is a commonplace of practice is to be found in the books.

But it goes farther. Often a problem will involve more than one field of law. What begins with landlord and tenant may soon embrace town planning and then enmesh itself in income tax and death duties. The divisions of the law made for the convenience of lecturers, examiners and textbook writers have no validity in the practice of the law. Yet again, the problems may be practical rather than legal. An expert valuer is

needed; there must be medical or scientific evidence; a town planning consultant must be found.

The Benevolent Spider

I hope the phrase Benevolent Spider will not give offence; but that is how the function of a solicitor may best be represented. He sits in the middle of his web, and pulls each of the radial cords as need dictates. From one counsel comes an opinion on town planning law, from another comes an opinion on taxation; from the valuer comes a report on the valuation problems, from the planning consultant a draft of the evidence that he is prepared to give. On the shoulders of the solicitor rests not only the responsibility of seeing that expert advice is obtained when it is needed, but also the burden of finding the right experts. He must know his men and know their capabilities; and he must know when to take advice on these matters, and where to get it from. He must also know when to make a change.

The solicitor, at the centre of his web, is thus the only person who at all times sees the case whole. As each strand is gathered in, the picture that he sees is a degree more complete. If there is to be litigation, he will pass on this completed picture to counsel who will argue the case. During the interlocutory proceedings before the case gets into court, counsel will see something like the whole picture for a short while; but the summons heard, the master's order made, the papers are returned to the solicitor, and counsel once again disappears from the scene until he is brought in again. Only for the solicitor is there inescapable continuity and wholeness of vision.

Partnership ad hoc

The possible relationships between barrister and solicitor engaged together on a case cover a wide range, depending upon the skill of each. At its best (and often it is), each is complementary to the other. Counsel cannot be better than the material with which the solicitor has supplied him. Behind a "brilliant cross-examination" usually lies much unseen and skilled work by the solicitor, collecting material, investigating possible lines of attack and following clues. He may from time to time consult counsel, or he may simply present him with the results of his labours; but the work is his. His dismay if at the trial he sees the fruits of his labours being squandered or ignored by inept advocacy may be contrasted with his pleasure if he sees them being used to greater effect than he had imagined possible.

In a very special sense each case brings a relationship of partnership and confidence between counsel and solicitor. Yet it is a relationship *ad hoc*, for that case alone; and it rests on a basic inequality. In the background there must always be the realisation that ultimately the solicitor is in a sense dominant. Counsel and solicitor are yoked together for the case; but it is for the solicitor alone to say whether they will ever work together again. Indeed, for the very case itself he may always in practice push the barrister from the saddle. To the outside world the barrister may appear as the government, and so he is so long as he is there; but at any time the solicitor may exercise the powers of the House of Commons and the electorate and change the government, for reasons that may or may not be

adequate or compelling. To change the metaphor, it is the solicitor who is the husband, able at any time to hand a valid bill of divorcement to his wife, the barrister.¹³

EFFICIENCY IN RESEARCH

Let us return, however, to counsel's opinion as part of the equalising process. Does this not simply enable the solicitor to shuffle off, at the expense of the client, the responsibility that he ought to bear? Why cannot the solicitor himself advise just as well as counsel, and more cheaply? These questions really answer themselves. Counsel's opinion is really remarkably cheap. Many an excellent opinion is written for 5 guineas; 10 guineas is a fair fee for a well-established junior; for 20 you may have a leader's opinion. Of course, if you go to a leader of high standing, you will be delighted to escape with 50 guineas, pleasantly surprised at 75 and not upset at 100. Much depends on the complexity of the case, the bulk of papers involved, the reputation of counsel, and the amount at stake. But in the ordinary case, counsel's opinion is cheap in relation to the work and skill involved.

Consider the alternative. Let a solicitor somehow find the time and peace required to do a solid bit of research. How is he to carry it out? First, he must have a well-stocked library available. Many solicitors, of course, have good libraries, or are within easy reach of The Law Society's library in London, or a good provincial Law Society's library; but many solicitors are not in this

¹³ See, e.g., *Har-Shefi v. Har-Shefi* (No. 2) [1953] P. 220.

fortunate position. Without books "research" is a mockery. No doubt the leading practitioner's book on a subject will usually go somewhere near the point; but often it will leave untouched some of the fringe-problems, and so often these are of great practical or strategical importance. And so one needs a really good library where these points can be pursued, sometimes into seemingly remote territory, or in old editions or little-used books. This, of course, counsel can do; for almost by definition his chambers are within easy reach of a good law library. This is part of his specialisation of function, just as it is part of the specialisation of function of the solicitor's branch of the profession to be spread throughout the country, often in places remote from a law library.

The pulse of the courts

Suppose, however, a solicitor next door to a law library. He may be a specialist in the branch of law in which the problem lies; he may know more of the subject than any practising member of the Bar; and he may well then know the answer, or how to find it. In such cases, he will not need counsel's opinion, and will often not seek it. You will see that I say "will often not seek it," not "never." This is because part of the specialisation of function of the Bar is to have its finger on the pulse of judicial opinion. The Bar sees and knows more of the Bench, both directly and vicariously, than solicitors can. There is many an unreported judgment; often a case is settled after the judicial view has become plain, and of course there is no report of this; and from the lunch and dinner table gossip in the Inns

and on the circuits, there is an osmotic permeation of judicial comments and decisions.

Sometimes, therefore, even the most confident of solicitors, advising in his home territory, will prudently send a case to counsel. Quite apart from the sagacity of obtaining a second opinion on any matter where one false step in the reasoning may be disastrous, there is the danger of a perfectly logical and coherent line of reasoning being one which the courts just will not accept. It may be logic, but experience will prevail. And there may be unwelcome side effects; the judge, yielding to the compulsion of judicial logic, may yet feel constrained to strictures which may make the victory costly. In matters such as these, the specialised experience of the Bar, the intuition of the wig, may prove invaluable.

In this field of the giant among solicitors, on his home territory, I say nothing of counsel's opinion as protecting the solicitor against claims for negligence if his advice proves wrong. What is in point is the analogy of counsel's chambers, where it is a commonplace for one member, troubled by doubts or by a solution that seems too easy and conclusive, to "try it out" on some other member of the chambers, often less skilled in that branch of the law, but bringing to the question the instinctive reaction of experience and a sense of the Bench. In law as in life, it is all too easy to forget the doormat until one stumbles over it.

Let me leave the exceptional case, however. Let me turn to the solicitor faced by a problem in a field in which he is not an expert. Is it not of the essence of economy and efficiency that the burden should be put on the shoulders of him who is an expert in the field,

well equipped both with experience and a good law library, and who often can start by taking for granted much that others would have to disinter laboriously from the books? Why spend a day on a problem when another can solve it with greater certitude in an hour, and uncover difficulties and dangers invisible to less percipient eyes?

Responsibility

You will see that the essence of the English system is that of leaving the overall direction in the hands of the worldly-wise solicitor who employs independent specialists, legal and otherwise, as requisite. In relation to each specialist, the solicitor's skill and knowledge is less than his; he is seeking guidance from an expert. The solicitor in effect has the right to "hire and fire" the experts, but otherwise they are in no way his servants. So long as the solicitor does not lead the horse away, it is they and not he who are in that particular saddle. In high degree they are independent, and they have all the strength that independence gives. Counsel says that this point is bad, or that point, though good, will let in the enemy by a side-gate. The solicitor may not agree, and may convince counsel, or may even change counsel; but more often, he accepts his views. The contrast with undivided professions is that there the partner responsible for a case will as a matter of routine get one or more of his employees to do whatever research is necessary, and then make such use of it as he thinks fit. The advice is advice coming from a

less-experienced subordinate instead of from a more-experienced independent expert; and such advice must leave a greater burden resting on the partner's shoulders.

Cunctation

As I wrote these words, a journal arrived and my eye fell on this passage. "Even if he [the solicitor] seeks advice from the specialist, the present organisation of both branches of the legal profession usually means that four to six weeks elapses before counsel's opinion reaches his client. Few business problems can wait that long for an answer."¹⁴ It is, of course, true that sometimes four to six weeks, and at times even more, elapses before counsel's opinion reaches the client. But I would question the word "usually." The average time taken to produce a written opinion no doubt varies greatly from counsel to counsel and from case to case. The problem may be complex, the papers voluminous; somewhere in the hundreds of pages of typewriting may lie the vital half dozen words on which a difficult legal question may turn, and an overpressed member of the Bar must find the day or more that may be involved even in reading the papers.

One way in which clerks to overworked counsel try to regulate the flow of work is by telling solicitors that there is no hope of Mr. Blank being able to look at the papers for another six weeks. The solicitor then has to decide whether it is to the best interests of his client to wait, or whether he should instruct some less busy

¹⁴ Professor G. S. A. Wheatcroft (1962) 7 J.S.P.T.L.(n.s.) 7.

member of the Bar. On the other hand, in some cases, half an hour may suffice to appreciate the problem, and for an expert in that field it may not take as long to find or confirm the answer. With such wide variables it is almost impossible to generalise, but if I had to, the period I should give would be appreciably less than "four to six weeks."

However, my quarrel is not so much with what is said as with what is not said. The picture that the business man should be given is not of an enforced wait of some four to six weeks for counsel's written opinion, but of counsel being available, in urgent cases, for a conference within twenty-four hours or less. The "urgent conference" is a commonplace of life at the Bar. If papers have to be read first, enough time for this must be allowed; often these are the papers that counsel takes home to read overnight so that in the morning he may advise on a problem that reached him on the afternoon before. Sometimes there is no need for this, and the conference takes place just as soon as the solicitor can arrive at the chambers of the first counsel he has found who is available. "Conferences on the telephone" are by no means uncommon, either; and sometimes it is even the transatlantic telephone. If counsel is asked for his views "off the cuff," then off the cuff they are given, often to be confirmed or modified or added to as soon as counsel can get to the books; and if counsel is expert in the particular field of inquiry, as usually he is, he will not only frequently know the answer but also know when further research is essential.

In short, the picture as I know it is not of a cunctative¹⁵ Bar four to six weeks remote from the client, but of a Bar that is on tap, available quickly, and ready and able to give speedy advice at short notice in any field. Naturally, a written opinion sometimes gives greater assurance than advice in conference and justifies the longer time that must elapse before it is available; yet often counsel is able in conference to give such clear and assured advice that no confirmatory written opinion is sought. For the solicitor who uses the Bar wisely (and most of them do) expert advice on any branch of law is there for the asking, and speedily, if need be.

No loss of clients

Another advantage of the divided profession is that a solicitor may always consult counsel without any fear that he may thereby lose his client to counsel. With a few strictly limited exceptions, of very small practical importance, no member of the Bar may accept instructions from any member of the public. For the client, the road to counsel's chambers lies through a solicitor's office. If the client is consumed with admiration for counsel's perspicacity (and it is a pardonable failing of the Bar to imagine that this is occasionally the case), the solicitor will bask in the glory of having made so skilled a choice of counsel. His client will be bound the more securely to him.

When the profession is undivided, matters are otherwise. A lawyer may feel that in justice to his client he

¹⁵ The great Lord Eldon was noted for his long delays in deciding cases. He put it a little differently: "I confess I have somewhat of the Cunctative": *Lord Eldon's Anecdote Book*, 1960, p. 131.

must enlist the aid of a specialist in the branch of law involved; and such a specialist there is in another firm. Yet the better the specialist, the greater the fear that the client will transfer his allegiance to the specialist's firm. Even if there are rules of conduct aimed against such transfers, there is the risk or suspicion of such a transfer; and no rules can very well inhibit friends or relations of the client. The divided profession makes these risks and suspicions impossible. The difference is between specialists who are available without risk and as a matter of routine and those who are available with risk and by way of exception; and the sense of risk must tend to influence judgment whether a specialist ought to be brought in.

THE CAB RANK

Let me turn to an allied topic, the choice of an advocate. Surely much of the strength of the English system lies in the concentration and freedom of choice of advocates. In London there are some 1,500 practising members of the Bar. In the traditional phrase, they are "on the cab rank." Each is available to any litigant. Provided a suitable fee is offered and counsel has no prior commitment, no member of the English Bar may refuse a brief to appear in any class of case within his competence. There is no question of the choice being restricted to whoever are the "trial lawyers" in the particular firm of attorneys that the client has instructed; the choice is not between, say, five, but between 1,500.

In practice, of course, the range is often not so wide. In specialist matters, there are usually a relatively small number of counsel regularly practising in that field. Are

there more than two dozen in company law, or more than three dozen in income tax law? But the point is that the whole field, whatever it is, is open to all, with free and unfettered choice. Let the client be a wretch with the most repulsive and unsavoury record, or a tiresome zealot in some unpopular minority group, and the answer is the same: no member of the Bar will refuse to appear for him, or do less for him than his best. True justice demands this, and the English Bar offers no less.

At times members of the Bar find this rule something of a burden; but it is honourably observed, and it does not lack its consolations. In particular, questions of the type "How *could* you appear for such a blackguard?" tend not to be asked. When appearance in court for a client is of professional duty and not as of choice, any identification of counsel with his client or his client's interests lacks reality. The Bar is virtually free from any political or social reproaches arising from performing its forensic duties. There is no surprise at finding a Tory M.P. appearing as counsel for a local authority with a Socialist majority on its council, or *vice versa*, or counsel with rigid personal moral standards vigorously defending drug merchants or blackmailers. The dissociation between the man and the advocate is nearly complete, even in the public eye.

JUDGING PROFESSIONAL COMPETENCE

I have so far said little about an important feature of the English system, that of judging professional competence. The proposition is that whereas solicitors are

judged by their clients, the Bar is judged by solicitors. A layman with a legal problem has at the outset the preliminary difficulty that I have already mentioned¹⁶: which solicitors should he go to? He may have regular solicitors and be happy to go to them; he may have regular solicitors, and be unhappy about going to them; or he may have no regular solicitors at all, and know few or none. All he can do is to ask and guess; ask his neighbours, his friends, his bank manager, anyone, and then make the best choice he can. Much of the advice that he gets may be pretty wide of the mark. A happy householder may recommend a mainly conveyancing firm to him for a county court case, or he may be given the name of a successful magistrates' court advocate for his complex conveyancing job. When he sees the solicitor, he may be recommended to another firm, and perhaps feel hurt or suspicious at this rejection of his custom. And the basis of the recommendation may rest on shifting sands. So often a skilled man finds himself appreciated or admired for the wrong things. What has been singled out for praise is no more than is the competence of any who profess the law; what has passed unremarked is an *expertise* that few—well, not very many—possess.

Judging solicitors

When the advice is given, the job done, the case fought, how does the client appraise his solicitor? Will he sing his merits, or deplore his failings? How much of his estimation is based on the things that matter and

¹⁶ *Ante*, p. 9.

how much on the incidentals that do not—a brusqueness of speech, an attractive or an ill-favoured office, or even a blonde typist? I confess that I do not rank the average client highly as a judge of solicitors; I would not think myself better as a judge of medical skill. In the words of Brandeis J., “Knowledge is essential to understanding; and understanding should precede judging.”¹⁷ The client and I do not know, do not understand, and cannot judge. In the end, no doubt, reputations are built up, and, like most reputations, they rest on something solid. The good solicitor will rise and prosper, the bad droop and decline; but slowly, and often not to the extreme.

Judging the Bar

How different the Bar! For the whole of his professional life a barrister will be judged and assessed by the skilled and knowledgeable rather than by the unskilled layman. The process begins in chambers, and later extends to solicitors. A barrister’s world is, indeed, a world of expanding reputations; but always it is his reputation with the legal profession and not with the public that is decisive. He is judged by those who know.

In chambers

Let me take it by stages. First, the barrister is a pupil in chambers; what reputation does he gain with his master? The pupil’s knowledge of law is frail and patchy, his knowledge of daily practice non-existent.

¹⁷ *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 at 520 (1924).

How does he find out? Does he just ask, or does he look in the books—and the right books—as thoroughly as may be before asking? Does he perceive what lies under and beyond the questions asked in the solicitor's instructions to his master? Does he state nothing for a verity until he knows, or does he "take a chance," or "suppose," or "assume"? Is his Yea, Yea, and his Nay, Nay? Does he make sure of one step, and then test and confirm it before he takes the next? Does his master begin to trust him, within his competence, or remain suspicious? Does he resist the seductions of the nice point of law until he has first made sure of the dull questions of fact? Are his quotations from statutes or judgments true quotations, literal and exact to the last comma, or are they merely paraphrases? These and a dozen other unformed questions are subconsciously asked and subconsciously answered; and the pupil's reputation grows or it withers. If one word were needed for the manifold qualities a pupil must exhibit, I suppose it would be "thorough." No skaters on the surface need apply, whether the ice be thick or thin.

After the master, the clerk and the other members of chambers. A pupil may survive an unfavourable verdict from his master; but if he does he—or his master—will be exceptional. Such a verdict will mean that the pupil is unlikely to be invited to remain on in that set of chambers when his pupillage ends. He may well find other chambers that will take him in, but they may equally well not be such good chambers; or the verdict may be such that, after inquiry, no chambers are to be found that will offer him a seat.

In court

Suppose, however, that the verdict is favourable. The word goes round that the pupil is pretty useful; and this means that sooner or later he will get his chance. He will be allowed on his feet in court for some formal application; or the impossibility of his master being in three places at once gives him a greater chance, and an agony of mind more acute. Each time he stands on his feet in court he will be observed by at least two firms of solicitors, often more; and he now moves into the second stage, that of being judged by solicitors.

For all practical purposes counsel receives no work except from solicitors. If a barrister makes a brave showing, he may not only keep his own solicitor but also may tempt the solicitor on the other side for some future case. He may lose his case but lose it in a way that wins the solicitor on the other side from his adversary. His clerk by now feels able to recommend him in small cases when solicitors, unable to brief their usual counsel because he is engaged elsewhere, seek his aid.

The clerk goes carefully. He has his own reputation and the reputation of his chambers to consider. One fiasco, and an important firm of solicitors may be not only alienated from the author of the disaster but also lost to the chambers altogether. It is so easy for solicitors to transfer their allegiance from one set of chambers to another; it is so easy, and so right that it should be easy. The fittest survive. One disaster, one case lost not by inevitability but by a failure to prepare it properly, or by inability to meet any of the sudden dilemmas that present themselves unawares, is more

significant than a dozen cases well won. Solicitors seek counsel who will not lose the case that ought to be won rather than counsel who will bring off a brilliant win. Later in life, when his robe is silk and not stuff, counsel may be sought out in the hope of that last ounce of strategy that will defeat fearful odds; but in the first years, it is soundness that counts.

So the circle of reputation grows, from pupil-master to clerk and chambers, and then beyond, to an increasing circle of solicitors. Each new brief is a new risk of disaster and a new opportunity for one of the 2,000 to impress two or more of the 22,000. The court-room is so public. Doctors, the jesters say, bury their mistakes. Many of the mistakes of most other professional men lie unperceived. Only in the law, and especially in court, does there lie waiting an adversary to pounce on any mistake, real or supposed, that has been made. In the full hearing of all, the error will be emphasised and rubbed in; and authority, in the form of the judge, is there to pronounce upon it. A young but sturdy reputation may receive a shock from which recovery will be slow; several shocks, and life may be extinct.

Does this overdraw the picture? No member of the Bar in practice can look back over his career without blushing; there are minutes that seemed like hours that we all would wish un-lived. A mistake is made and proclaimed; how does counsel meet it? Does he crumple, or does he confess and avoid; and how skilled is his avoidance? Afterwards, does he fall into a decline, or does he grit his teeth, and learn all that can be learned from his mistake? His clerk and the other members of his chambers will do what they can to help

and sustain him, and they can do much; yet ultimately the question is what stuff he is made of.

Judging by solicitors

This, of course, is fully appreciated by solicitors. They know and understand; and their judgment rests on a foundation more solid than foibles and trappings. The solicitor or his managing clerk (I suppose we shall all soon get used to calling them "legal executives") are the scarred veterans of hundreds of battles in court. They can distinguish the just deserts of insufficient preparation from valiant resourcefulness in meeting an unpredictable point; they can discriminate between one who is inexperienced but basically good and one who is experienced but incurably bad; and they can judge when their client has had 50 guineas' worth on a 15-guinea brief, and when the brief fee, whatever it was, was too dear.

True, there are some 22,000 solicitors: disaster on one brief leaves one solicitor alienated, but are there not 21,999 more? The answer is No: life is not mathematical. There was the solicitor on the other side; each solicitor may have partners, employers or employees; and the word gets round. One failure does not make a disaster, but not very many more are needed. During the first few years at the Bar, every barrister suffers far more trials than he ever conducts in court. His opinions, his pleadings and his advice in conference are all looked at with critical and discerning eyes. How much use is he? Is he worth persevering with? Shall we try him again? Appearances in court matter most, of course. They are more public, more spontaneous and

less retrievable. They also are tests of the ultimate at the Bar. A solicitor wants to go to counsel whom he can trust to see the case through to the end. Counsel may be able to advise with the infallibility of an oracle and draft pleadings like an angel; but what use if he cannot be relied upon to be as a lion in strife before the master and the judge? Sometimes, it is true, solicitors instruct such a barrister, and then take in a leader when the case comes to court; and leaders are grateful. But none can hope for the highest rewards of the Bar if on his feet he is deserted by the skill that clothes him in his chair.

The animus revertendi

The test, in the end, is in the solicitors who come back for more. A beginner at the Bar will get a little work from one source or another, and all will be warmly received by him and his clerk. But what gladdens the clerk's fatherly eye more than anything is to see another set of papers arriving from solicitors whom the beginner has already advised. When half a dozen firms have returned more than once, the clerk begins to feel—and rightly—that the beginner will at least stay the course. That beginner will sooner or later get a real chance. On the other hand, many solicitors may sample and few return; and then the clerk will wonder how long it will be before the attractions of a round salary and an assured position in industry or the civil service will triumph over the beginner's fading hopes.

Throughout a barrister's professional life, he is judged by solicitors. The spur of percipient appraisal is always there. He can hope to build a reputation, maintain it,

and perhaps enhance it; but under a discerning professional gaze he can never safely rest on his reputation. There is also a point in his career when the judgment of solicitors becomes of special importance: that is when he takes silk, *i.e.*, becomes a Queen's Counsel.

La Gazza Ladra

Of silk itself, I shall have more to say later.¹⁸ Here I am concerned only with the judging of the Bar by solicitors. A barrister who takes silk cuts himself off from much of the old life that he led as a junior. He can no longer draft pleadings, a wearisome but responsible task that provided much of his bread and butter. He can no longer draft conveyances, contracts or other documents. Work such as this is reserved for the junior Bar, either alone or in conjunction with a silk. He can no longer appear in court in a case unless he has a junior briefed with him. His life changes greatly. Gone are routine work and petty cases. His is now a life with the heavier work, the bigger cases, the larger fees: but if, and only if, he succeeds. He is allowed to finish off all the work he has undertaken as a junior, and see to an end the cases he has begun, just as if he had not taken silk; and this will often tide him over the transition. But what he and his clerk are watching is the new work, silk's work. How soon will this flow, and how freely? And this depends on solicitors. Is he thought silkworthy? He has moved into a new world with higher standards, and with more pay for less work, but far more formidable competition.

¹⁸ See *post*, pp. 89 *et seq.*

Lucrum cessans

Many make the grade, and go from success to success, with increasing fees and sometimes a restriction of the class of work to be undertaken as the means of keeping the volume of work within bounds. Many others succeed, though more modestly. Their income falters, dips a little, then steadily climbs above their junior income, and flattens out to a secure and comfortable but unexciting increase above their junior fees, perhaps to the level of the salary of a High Court judge. Others—too many—fail. The qualities that assured them success as a junior prove unequal to the front row, or so solicitors think. Fees of £4,000 or £6,000 a year dwindle to a mere £1,000 or £2,000, and out of that expenses have to be paid.¹⁹

My object, however, is not to dwell on this, but to give point to my comment that the Bar is judged by solicitors. Judgment is continuous, but it comes twice with especial force; during the first five years in practice and during the first three years of silk. He who emerges from these periods with a practice may regard himself as established, to be maintained only by eternal vigilance, but likely to be maintained. He who finds himself with no more than a trickle need not abandon hope, but it is hope rather than confidence that fills the future. The tide may turn; a senior in his chambers may die, or retire, or take silk, or go on the Bench. His rivals on circuit or in his particular field may do likewise. Better the shoes of others than no shoes at all. But within these limits, the Bar is a career which rests

¹⁹ For professional incomes, see *post*, pp. 179 *et seq.*

on the judgments of solicitors, and few would have it otherwise. For, by and large, solicitors do not make mistakes in this territory. Few of the truly worthy remain undiscovered for very long, and the prospects of survival for the incompetent are justly bleak.

Lest this sounds smug, I hasten to add that many of those who have "failed" at the Bar have amply demonstrated that in other fields they have qualities as great or greater than any at the Bar. To those with talents for administration, for example, the Bar offers nothing, and their especial skills would be wasted in chambers. Failure at the Bar is not precisely a stepping-stone to success as an administrator; but if it is not the *causa causans*, it is often the *causa sine qua non*. The higher ranks of the Civil Service and industry have cause to be grateful to the rigours of the Bar.

Earnings

The difference between the judging of solicitors and the judging of barristers contributes to the financial contrasts. Once a solicitor has qualified, he is virtually assured of at least a living wage for the rest of his life. A newly qualified barrister has the virtual assurance of no income at all for at least a year, and then only a pallid ghost of an income for another year or more. He cannot become a salaried employee and continue to practise at the Bar. His career is essentially personal and not vicarious. If he is unsuited to the Bar, his practice will grow very slowly and never prosper much; and in time it may well wither away altogether. He is judged by himself and by a relatively narrow circle of those who know. The solicitor who is unsuited to his

profession has always the cover and aid of his employers, his partners and his employees; and he can turn to the Bar for help. He is judged more as a unit in a team, and by the unknowledgeable public at large. The Bar is a garden which is weeded more intensively and more skilfully than the Roll of Solicitors. Survival at the Bar is tough, and in the public interest justly so.

VERSATILITY

Freedom of choice has another consequence. It tends to prevent counsel from becoming "typed" as to the party. He does not, for example, spend all his time appearing for defendant insurance companies, or for plaintiffs in accident cases. Success in a given field of law may well lead to counsel becoming more and more frequently involved in a particular type of case; but equally that success will lead to his appearing indifferently for plaintiff or defendant. Let counsel become noted for his skill in highway accident cases, and he will find himself appearing for claimants as well as insurance companies, for insurance companies as well as claimants. Success as a poacher is often the best qualification for a gamekeeper, *et e converso*.

This must not be taken too far, however; a busy insurance company may have so much work for a favourite counsel that he has little time for rival claimants; but broadly the principle is true. It is aided by self-interest; counsel who lets too much of his work come from one source may find himself very cold if that sun ceases to shine upon him. At least there can be

no question of counsel being a servant of a litigant; no "tame lawyer," employed at a salary, may argue cases in court as counsel. Counsel are of necessity independent, and in broad terms it is right to say that they do not become identified in outlook with any particular interest or set of interests. Even only occasional appearances for "the other side" can serve as a wonderful corrective to myopia.

THE CONTRAST

It is, I suppose, possible for there to be two views on almost anything; yet on the merits of the English system of a divided profession, I find it hard to think that there can be much doubt. Let me put it in the form of a question:

A client has a legal problem, and does not know whether it is easy or difficult. He consults a firm of lawyers. Under which of the following two systems is he likely to get the better service?

- (a) If the resources of the firm are available to him, but it is unlikely that any aid outside those resources will be available even if the problem is difficult: the normal limits are the limits of the skill, experience and expertise of the firm; or
- (b) If the resources of the firm are available to him, but if the problem is difficult, all the specialist skill, experience and expertise of the Bar are also available to him at reasonable cost: the only limits are the limits of the learning and capabilities of the entire Bar.

WITNESSES

A further advantage of the English system of a divided profession, often little understood, lies in the field of untrue evidence. The starting-point is the rule of etiquette which forbids any barrister, save in exceptional circumstances, to interview or discuss the case with any witnesses or permit them to be present at any consultations or conferences with him. To this rule there are two exceptions.

First, if the client himself is to give evidence, that does not prevent counsel from seeing him and discussing the case with him; his status as a witness does not override his rights as a client. Secondly, counsel may discuss the case with expert witnesses, such as doctors or valuers or scientists. This exception is essential in the interests of efficiency. Often counsel could not make a lucid opening speech or effectively cross-examine the opposing witnesses without having first seen his own expert and obtaining from him explanations and examples of the technicalities involved. The exception also recognises the integrity of professional experts. An expert's opinion within his field of skill, too, is less frail and liable to change in discussion than human recollection of facts.

The unknown witness

With these exceptions, the rule operates strictly. When counsel calls one of his witnesses, he usually has never even seen him before. With the others in court he will watch with interest to see who will answer to the words "I call Mr. Brown." Naturally, counsel knows

what evidence Mr. Brown is expected to give. The instructing solicitor will have interviewed Mr. Brown, sometimes more than once, and will have prepared a "Proof of Evidence" which sets out what Mr. Brown says he will say. This proof will be with counsel's brief, and counsel will use it for his examination-in-chief. Often Mr. Brown says in evidence just what he has said in his proof; but it is far from rare for him to leave out some points, add new points, and often state the points set out in the proof in different—and sometimes significantly different—language.

But what, you may ask, is the advantage of this system, especially in the field of untrue evidence? If there is any question of persuading a witness to give false evidence, or to suppress awkward facts, would it not be possible for the solicitor to arrange matters? For he interviews the witness, and could easily make the attempt.

Theoretically the answer is Yes; in practice it is nearly always No. The crucial point is that the person asking the questions is different from the person who interviewed the witness; and this is a powerful brake on dishonesty. If the advocate and the witness conspire together, no doubt they could manufacture false evidence that might often succeed in its evil purpose. But it is another matter for A to arrange a story with the witness in such a way that when B asks the witness questions about it, often in quite different language from that used by A, a flawless tale will emerge. The questioner is different, his language and arrangement are different, and the circumstances are different; what is likely to emerge is either the truth, or lies that are detectable as

such. Quite apart from the high standard of honour among solicitors, the knowledge of the risks created by this system is a powerful deterrent to dishonesty.

Coaching witnesses

The result is that the "coaching" of witnesses is rare, and, when it happens, it is usually inefficient and ineffective. Perjury, of course, is by no means unknown; but when it occurs it is most unlikely to have been organised by any member of the legal profession. Since any form of "payment by results," or "contingent fees" (*i.e.*, fees depending on the result of the case) is strictly forbidden, there will also normally be no financial incentive either to counsel or solicitor to attempt to ensure success by procuring perjury. In England such perjury as occurs is nearly always amateur and unorganised. An intelligent witness who has been carefully coached and rehearsed by a skilled advocate would probably be very difficult to break down in cross-examination; but fortunately such a creature is almost unknown in England.

The witness parade

Let me take a defeated litigant under other systems. How may he feel when he learns of the advice that is given and doubtless acted upon? I shall quote some passages written by an American author and selected for inclusion in an Indian book.²⁰

²⁰ R. K. Soonavala, *Advocacy: Its Principles and Practice*, 2nd ed. 1960, pp. 505-507, quoting from Sydney C. Schweitzer, *Trial Guide*, 1948, Vol. 3, pp. 1157-1175, 1185-1192, 1345-1346.

“A few days before the trial it is well to go over with each witness the testimony that he will give at the trial. Put him through the direct examination. Make sure his recollection is not vague or in error as to dates, distances, descriptions, etc. Those points that you feel will form the decisive phases of cross-examination, should be reviewed in great detail with the witness, and every effort made to see that he will take the stand with the story firmly fixed in his mind. . . .

“Counsel should repeatedly make clear to the *nervous, excitable witness* the necessity for self-control at all times. The questions to be asked him upon direct examination, and likely points of cross-examination, should be gone over carefully before the trial, and any matters likely to cause him confusion should be explained in detail.

“The *timid witness* is easily identified. Write out for such witness the questions and answers upon the vital point in his testimony, and let him read it a few days before the trial. This will give the witness a certain assurance when he takes the stand at the trial. Caution such a witness against accepting any changes in his story during cross-examination. . . .

“It is a wise precaution for counsel, before the trial, to reconstruct the accident in the presence of all the witnesses. This practice will help materially in securing a consistent and logical story of the occurrence. Each witness should be made to repeat what he heard or saw in connection with the accident. The participants in the actual occurrence should relate their version of the accident, detailing all that they saw or heard, in

each other's presence. Any discrepancies can then be carefully discussed."

Under a system which permits such discussions, no doubt such advice is admirable. Given such careful instruction, how could a witness, either individually or as one of a team, go "wrong"? The English practice must seem oddly haphazard and amateurish. Yet is not the object of a trial to elicit the truth? In the end, excluding all questions of deliberate fabrication, the question is how do you like the truth—unvarnished or varnished?

I am not for one moment criticising the authors or practitioners under these other systems. Each practitioner must do the best he properly can for his client. What the system regards as proper he must do; and authors must advise practitioners. What I do venture to assert is that under the English system a defeated litigant is likely to have less to complain of and less to suspect; and that I count for merit.

AN HONOURABLE CODE HONOURABLY OBSERVED

This brings me to one of the layman's deepest suspicions. "Granted," he says, "that there are these and other highly ethical rules of conduct. But who is to know if you break them? Surely it is easy enough to keep quiet about it." The answer is simple enough: the Bar is a small and honourable profession, and with very rare exceptions the rules are honourably and loyally observed. Often a breach of the rules would involve something like a conspiracy with a member of another

honourable profession, the solicitors'; and the coincidence of dishonourable barrister and dishonourable solicitor is likely to be rare indeed. In any case, the word gets round. Exactly how, I cannot say; but it does.

Once the word gets round (and the practising Bar is small and concentrated), the Bar is watchful, and sooner rather than later consequences are likely to follow. Above all, there is the atmosphere of chambers, of hall and of the circuit mess. The newest recruit soon sees many instances of counsel unhesitatingly rejecting the easy half-truth or equivocation that would help him or his client, of scrupulous respect outside the four walls of chambers for the professional secrets in his care (often financially valuable or socially interesting), and, in short, of honourable and responsible conduct which fully matches the demands made by the long traditions of the Bar. This is not mere theory, or words, or a pious hope; it is real. With very few reservations, I would accept the word of a practising barrister or solicitor as readily as that of a bishop. This is the climate in which the Bar lives and works, and the neophyte takes colour from his surroundings. He can soon see why it is that the Bench will at once accept the word of counsel from his place in court without the sanction of the oath.

Assertion and argument

That points a distinction. What counsel assert for truth, the court accepts; but what counsel argues the court judges. Most of what counsel says in court is, indeed, mere argument; only occasionally does he speak as to fact. Suppose in a county court a question arises

about what a witness said in evidence on a previous day, and only the plaintiff's counsel has a note of that particular part of the evidence. His note will unquestioningly be accepted by both the judge and the defendant's counsel; and it is unthinkable that he should have altered in any way what he took down. But the weight to be attached to the evidence and its effect on the matter in issue are mere matters of argument; and the rejection of his argument casts not the slightest slur on counsel.

The bad cause

Similarly, counsel is in no way dishonoured by his cause, however unfounded it proves in the event. In his well-known paper entitled "The Ethics of Advocacy,"²¹ Lord Macmillan points out that by arguing what ultimately turns out to be a bad case an advocate is not thereby shown to be dishonest. He does not assert his own opinions or judge the merits of his client's case, but merely presents to the court "all that his client would have said for himself if he had possessed the requisite skill and knowledge."²² This echoes Dr. Johnson: "A lawyer is not to tell what he knows to be a lie: he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence—what shall be the result of legal

²¹ Lord Macmillan, *Law and Other Things*, 1937, pp. 171-199.

²² *Ibid.* at p. 181.

argument. . . . A lawyer is to do for his client all that his client might fairly²³ do for himself, if he could.”²⁴

It has been said “Do advocates actually live up to the standard that Lord Macmillan describes? Unhappily the answer is no. I do not suppose that there is one of us who has been in practice for as much as twenty years who can lay his hand on his heart and say that he has never transgressed the code of honour and conduct which he knows he ought to have observed.”²⁵ If this means that after twenty years’ practice at the Bar there are none who can assert that they have never consciously acted dishonourably, I would vigorously dissent.

Mistakes are another matter. There can be very few at the Bar who have no recollection of occasions when they have erred, either by omission or commission, and failed to do the best that could properly be done for their client. Indeed, it is just those occasions, mostly but not exclusively in the first years of practice, that are likely to have burned most deeply into the memory of any successful practitioner who has learned even more from his own mistakes than from the mistakes of others. In that sense, memory brings a blush to the advocate’s cheek. But conscious wrongdoing is entirely different. The point is hardly susceptible of proof, and man is frail. Nevertheless, a record of universal (even though occasional) conscious wrongdoing is surely the last thing that would be associated with the English Bar.

²³ The “fairly” is no doubt implicit in Lord Macmillan’s statement; nevertheless, it is right that it should be explicit.

²⁴ James Boswell, *A Journal of a Tour to the Hebrides* (ed. P. Fitzgerald, 1888), p. 212.

²⁵ C. P. Harvey, *The Advocate’s Devil*, 1958, p. 13.

Discipline

I have said nothing about disciplinary proceedings. For the solicitor there is the Disciplinary Committee under the Solicitors Act, 1957, composed of eminent solicitors, with power to fine, suspend or strike off the rolls. For the barrister, there are the benchers of his Inn, with power to suspend or disbar. One must discard the transatlantic whimsy which proclaims that in England "disciplinary control of barristers is exercised very strictly by the Bar Council, of which the president is the Lord Chancellor. . . . The Bar Council would not hesitate to strike off any member of the Bar who might bring it into the slightest malrespect."²⁶ In truth, the Bar Council has never had any disciplinary powers, although it often exercises the valuable function of preliminary investigation and, where necessary, report to the appropriate benchers. Nor, I may add, is the Lord Chancellor the president or even a member of the Bar Council; as head of the judiciary he would be wholly out of place in an elected body of practising barristers, with a few non-practising members.

The powers of the Disciplinary Committee and of the benchers are, of course, important in the last resort; the two branches of the profession must have adequate powers to purify their membership.²⁷ But what in many ways is more important is the existence of strong and effective professional opinion. This not only dissuades from conduct that would fall within the ambit

²⁶ Derrick Bass (1949) 35 A.B.A.J. 995 at 996, reprinted in *The Lawyer's Treasury*, 1956, p. 122 at p. 125.

²⁷ The phrase is Cardozo J.'s: *Matter of Rouss*, 221 N.Y. 81 at 91 (1917).

of disciplinary proceedings but also checks much conduct which, though outside that ambit, is undesirable. Most important of all, this professional opinion is not merely a deterrent to misconduct but also encourages and sustains all that is best. The existence of such a body of opinion in England is neither mirage nor aspiration, but solid reality; and for that all must be grateful.

THE BARRISTER'S CLERK

I must now turn to an important part of the English legal scene, the barrister's clerk. You will find little about him in the books. Nevertheless, he makes an important contribution to the efficient practice of the law and so to the interests of the public.

He is one of the most remarkable institutions of the English legal system. Even his name is something of a misnomer. He is normally a clerk to no one barrister, but to a number of barristers; and yet he is clerk to none collectively but to each individually. In general terms, he is a complicated cross between a theatrical agent, a business manager, an accountant and a trainer. Let us look at the organisation of a set of chambers, and the part played by the clerk.

All chambers great and small

Every set of barrister's chambers houses a barrister's clerk. Occasionally there may be two clerks in partnership, as it were, but the general rule is one clerk for each set of chambers. Under him there will usually be a staff of two or three; sometimes less, occasionally more. There will be a junior clerk and a typist or a

boy, or both; much depends on the size of chambers. At the beginning of 1961, of a little over 1,900 practising barristers, some eighty were in chambers of three or less, and some 210 in chambers of fourteen to seventeen inclusive. Some 85 per cent. of the Bar accordingly practise in chambers of not less than four nor more than thirteen, with seven as the most popular number.²⁸ Although in recent years there has been something of a tendency towards the amalgamation of two small sets of chambers into one, there are still forty-six sets with three barristers or less.

Do not judge the size of chambers by the lists of names to be seen painted outside the door. Some of those names are of former members of the chambers who have since become judges. Their names are kept up for old times' sake and, I suppose, for the warming glory of the judicial robe. Other names are of those dead or retired; their names must be kept up so that the postman may know where to deliver their letters. As some of these letters will contain cheques in payment of outstanding fees, and as occasionally fees may outstand for five or even ten years, the names may stay up for a long time.

Other names may be of those who have forsaken the practice of law for other activities, but for whom there is some advantage in retaining a notional foothold in chambers. The names of many a teacher of law, secure in the unhurried calm and comfort of a university life (or so it seems from the Bar), are to be found in this category. A display of fifteen names outside a set of

²⁸ See *Annual Statement of the General Council of the Bar*, 1960, p. 45.

chambers may thus mean that only eight are, from time to time, to be found bodily within. The other seven are traceable (if still on earth) but no more.

In recent years two convenient practices have gained a foothold. The first is to put the name of the clerk at the foot of the list of names, usually in italics and preceded by the word "Clerk." The second is to have the names of only the active members of chambers painted in the usual size of lettering, with the names of the inactive grouped at the foot of the list in smaller lettering. You will see no more than names and titles ("Sir John Smith: Mr. A. B. Jones" and the like); neither "q.c." nor any other advertisement of distinction will appear. Nor, incidentally, do practising barristers have visiting cards or notepaper which disclose their status.

Depending on the number of effective members of the chambers, the staff under the clerk will be small or very small. But the supervision of staff is the least of the clerk's duties. His two main functions can be put under the broad headings of management and money. The former is broadly the more important, but exposition is easier if I begin with money; and so I will, for once, put money first.

Fixing fees

The starting-point is the rigid rule of etiquette that forbids a practising barrister to discuss any question of fees with a solicitor or solicitor's clerk. Only in cases of "special difficulty" is there any exception to this

rule, and then only as regards silks,²⁹ who are presumably in a stronger position than juniors. The result of the rule is that all discussions take place between the solicitor or his clerk, on the one hand, and the barrister's clerk, on the other hand.

Many types of work tend to have fees that are more or less stereotyped, and leave little room for argument. Much written work is in practice the subject of no previous agreement as to fees: counsel writes his opinion, his clerk notes in his books what he considers to be the appropriate fee, and then in due course sends in an account for this fee. If the solicitor thinks it too much, he will usually ring up the clerk and discuss it; and in most cases agreement will be reached without much difficulty. The clerk has in mind future work to come from the solicitor and how much or how little the barrister needs that work, and the solicitor knows how valuable the opinion was, the probability of his wanting to return again to that particular counsel or his chambers, and so on. If there are special circumstances in the case that call for lower fees than usual (*e.g.*, that the client is poor but deserving), usually the solicitor will have a word with counsel's clerk before delivering the papers; and, of course, the solicitor can always have the fee agreed or estimated in advance, if he wishes. Within these limits, many of the fees charged for paper work are largely a matter of routine.

That, however, is far from being the whole picture. For all except the small and routine cases, counsel's brief fee—his fee for preparing the case and for the

²⁹ W. W. Boulton, *Conduct and Etiquette at the Bar*, 3rd ed. 1961, p. 46.

first five hours of the actual hearing (if the case takes so long)—is essentially a matter of discretion and argument. In normal cases the solicitor naturally tries to get counsel for the lowest proper fee; the barrister's clerk tries for the highest proper fee. Note the word "proper," and the scope for argument that it offers. To the question "What is the proper fee for a county court brief?" there can be no answer. How long will the case last? How far is the county court from chambers (for the brief fee must cover all travelling and other expenses)? How much is at stake? What is the standing of counsel and the demand for his services? Ten guineas may be a fair fee or ludicrously inadequate; fifty may be greatly excessive or barely enough.

At times the fortunate are privileged to hear snatches of a clerk at work, settling a brief fee with solicitors. The offer and counter-offer, the clerk's generous estimations of counsel's standing and experience and the solicitor's confident statements of highly economical competition, are all conducted in words of indignation and assurance uttered in, fundamentally, the most good-natured tones. Skill, judgment and a knowledge of humanity are vital in a clerk. He knows no law, or very little; but he knows men. A good clerk may be worth a fortune to his principals; a bad clerk may cost thousands, or even spell disaster.

Accountancy

There is another, more routine, side to money. It is the clerk who records in his books all fees due to each of his principals. If briefs or other papers are delivered, the clerk will record the fact in his books; when the

work has been done, the appropriate fee will be recorded; and periodically, usually at every quarter-day, a note of the fees outstanding will be sent to all the solicitors concerned. When cheques are received, the clerk will give them to counsel, or pay them into his bank, and get counsel to sign a receipt for the fees, which is then sent to the solicitor.

This stage is usually the only contact counsel has with fees. Brief fees must be marked on the brief before counsel goes into court (with the exception of legal aid cases and briefs for government departments), and so counsel knows what he is being paid for the brief. But "refreshers" (*i.e.*, fees on a brief to cover each period of five hours in excess of the initial five hours) are usually not marked, though they may be. Again, fees for opinions are usually not marked, though again they may be. Thus it often happens that counsel first discovers what he has earned for a particular piece of work when he signs a receipt for it, months or even years later. Fees are clerk's business, and counsel gratefully and trustingly leaves it to him.

Of course there are variations. Some counsel discuss most or all of their fees with their clerks; others discuss only the larger or more difficult fees. Some exclaim with horror at the fee which their clerks have agreed with solicitors and marked on their briefs. But the horror is varied: sometimes it is at the smallness of the fee, but sometimes it is at its magnitude. "That's robbery" is a cry from counsel to clerk that is by no means unknown. But broadly it is true to say that the time and anxiety expended by counsel on fees is negligible. Fees are clerk's business.

Clerk's fees

This phrase is true in more senses than one; for a barrister's clerk is remunerated in a way different from any other occupants of chambers. The starting-point is an explanation of "clerk's fees." Suppose a solicitor has had a conference with junior counsel lasting not more than twenty minutes or half an hour. For this, the standard fee is two guineas. When, however, counsel's fee note is sent to the solicitor, it will be for £2 7s. 0d., not £2 2s. 0d.; and for double time it is double these figures. Again, if counsel writes a short opinion for which the fee is three or five guineas, the fee note will be for £3 5s. 6d. or £5 10s. 0d. The reason is that there is an accepted scale of clerk's fees which are payable in addition to counsel's fees. These fees are not a fixed percentage: five shillings on two guineas bears no obvious relationship to half a crown on three guineas or five shillings on five guineas. In fact, it is the two latter which are in line with the general scale and the first which is exceptional.

The explanation is quaint. It has nothing to do with the amount of two guineas, but is due to the work being a conference. Conferences are often held in the late afternoons, when the courts have risen for the day; in the winter months, this will usually be after dark. A century ago, it was the clerk's duty to provide and pay for the candles for conferences; and so the clerk's fee on a conference, instead of being an orthodox half crown *ex candles*, was double that but *cum candles*. So goes the legend, which may well be true. However that may be, there is a fixed scale of costs which will be allowed by the Taxing Masters in litigation; and apart

from conferences, these are at a rate of $2\frac{1}{2}$ per cent. on each fee of fifty guineas or more, and between $2\frac{1}{2}$ and 5 per cent. on all smaller fees.³⁰

Time was when a barrister's clerk subsisted on clerk's fees alone. As a matter of mechanics, his fees are paid in one mass with counsel's fees into counsel's bank, but periodically counsel gives his clerk a cheque for the clerk's fees. As counsel prospered, his clerk would hope to be given "the shillings on the guineas" as well, so that his total remuneration would come to something like 8 per cent. of his principal's fees. Today, most clerks have made good their claim either to a uniform "clerk's fees plus shillings on the guineas," or, quite commonly, to a flat 10 per cent. on the total payments, counsel's fees and clerk's fees together, received by each of his principals.

The happy clerk

The result can be easily illustrated. Take this sample of a hypothetical set of chambers; the fees are all gross, *i.e.*, before paying chambers and other expenses.

	£
One flourishing silk	15,000
One so far unlucky silk	3,000
One flourishing junior	6,000
Two sound juniors	{ 4,000
	{ 3,500
One rising junior	2,500
One fading junior	1,000
One neophitic junior	500
	<hr/>
	£35,500
One clerk at 10 per cent.	£3,550
	<hr/> <hr/>

³⁰ *Supreme Court Costs Rules, 1959, Appendix 2, Part X, r. 3.*

This clerk is fortunate. All his trees are bearing fruit. But he is at risk. Suppose his flourishing silk dies, or retires, or becomes a judge. At a blow over one-third of the clerk's income has vanished. The flourishing junior may then take silk unwisely and halve his fees. An income of £1,750 for the clerk is indeed not to be despised; but to have an income halved would come as a blow to most. Other clerks are less fortunate. There are chambers with no silks, or silks or juniors who do not flourish, or who flourish but little. *Per contra*, some chambers house two flourishing silks; and some have specialist juniors who command very high fees. But whatever the chambers, the principle is the same; apart from all other ties, the fortunes of the clerk and his principals are linked by a strong financial link. As they prosper, so does he; their ill-fortune is his also. Only at one point do their interests diverge: promotion to the Bench may mean a financial sacrifice or a financial advantage to the principal, but in terms of money it means only loss to the clerk. The culmination of a successful career at the Bar which the clerk may have nursed skilfully for twenty or thirty years or more may literally cost him dear.

Trainer and manager

From these financial considerations much of the other functions of a clerk may be discerned. He must not only be skilled in dealing with outside humanity, but also have a sure touch within his chambers. He is clerk not to one barrister but to six or nine or a dozen. He

is not only Mr. Alpha's clerk, but also Mr. Beta's, Mr. Gamma's and so on. Outside films and novels, he will never answer the 'phone by saying "Mr. Delta's clerk speaking," for he cannot tell whether his caller wants the clerk to Mr. Delta or the clerk to any of the other counsel in his charge.

There will be occasions when he will be in the happy but delicate position of being clerk to each of the adversaries in a case: Mr. Beta is for the plaintiffs, Mr. Epsilon for the defendant. Needless to say, confidences will be as safe with him as they are with counsel. Mr. Beta's Advice on Evidence for the plaintiff, with many a shrewd tactical thrust, may be typed by the same hands as typed Mr. Epsilon's Advice on Evidence for the defendant, with wise advice on how to meet the plaintiff's expected alternative lines of attack; yet all in the clerk's room will be as scrupulous as the two counsel themselves in keeping apart all that should be kept apart. A leakage is unthinkable. In court, Beta and Epsilon will assail each other with all the added vehemence of old and close acquaintances, knowing each other's points of weakness and strength in advocacy; for Beta may be as strong on his law as Epsilon is skilled in his handling of witnesses.

In chambers as in court, Beta and Epsilon are two different men; each is known to his clerk. Beta may be brilliant but idle; Epsilon may be dogged and tending to work harder than his health allows. For one the clerk has the spur and for the other the rein. A good clerk can do much—very much—to help a barrister to get the best out of himself.

One facet of this is the regulation of the flow of work. Some work comes and is accepted with inevitability; it is of such importance that there is no question of refusing it. Other work is marginal: it can be taken, or obtained, or discouraged, or rejected. If a willing horse is overworking, the clerk can say to the solicitor: "I'm afraid Mr. Delta won't be able to look at this for three weeks," and often the solicitor will seek other counsel; with luck, the solicitor can be persuaded to divert the papers to another member of the same chambers who may be as able as he is under-employed. Such papers are then not "lost to the chambers," which, *inter alia*, means that the clerk's fee is not lost to the clerk.

Again, an overpressed member of chambers may be shielded by his clerk asking a higher fee than is likely to be paid. This is more delicate: it is one thing to raise the general level of the fees charged by Mr. Gamma, another to charge more than his usual fees in particular cases. The levels of variation, indeed, are much less flexible with a junior than with a silk. Ultimately, if Gamma is chronically overworked despite the raising of fees and delays in his paper work, the only remedy is for him to take silk, with all the risk that that entails.

The clerkly reputation

Lest it be thought too easy for the clerk to divert work from the overpressed Gamma to the underpressed Delta, let me add this. No clerk will make such a suggestion to a solicitor unless he feels confident that Delta will do the work well. It is not only counsel that

have their reputation; clerks have theirs. A solicitor will ring up a clerk whom he trusts and ask him if he has a young junior in chambers who can do a small case for him—too small for Mr. Gamma—on Thursday next. If on the clerk's recommendation the brief goes to Zeta in his chambers, and he mishandles the case, not only is Zeta certain to get no more briefs from that firm of solicitors, but the clerk has also lost his reputation with the firm. Indeed, that firm may even desert the chambers altogether and transfer its allegiance elsewhere; Zeta's fiasco may have been the last cut that severed an already weakened attachment. So no clerk will knowingly sell a pup.

From this you will see how tender and how beautiful is the flower of confidence that the beginner at the Bar must seek to implant in the breast of his clerk. It is here that his career must begin, if it is ever to begin at all. The clerk will do all he can for the beginner, but not at the risk of his reputation. It is here that the clerk needs all his wisdom. Zeta is rash, impetuous, lacking in thoroughness; if this cannot be curbed, is the Bar the place for him? Eta is slow and thorough but nervous and over-sensitive; he must be encouraged and fortified if he is to endure. When the spark has turned into a small flame, a gentle breath will make it glow, but a gale will extinguish it; it must be built up slowly and not overtaxed. "Softly, softly catchee monkey" is true at the Bar, as in many other fields.

The adjuster

Let me return to the busy Gamma. Again and again he will have the problem of being in two or more places

at once; and here is a field of heroic endeavour for his clerk. Sometimes something can be done; often nothing is possible save to return a brief: and of this I shall say more later. Here I am concerned only to point out that if anything is to be done, it is the clerk who must do it. He and the judges' clerks speak a common language, for most of the judges' clerks were once barristers' clerks. By being present in the Law Courts when the lists for the next day are being made up, by talking to the clerk to counsel on the other side and sometimes making common cause with him, by talking to instructing solicitors and obtaining their agreement to the case being postponed a day or so, the clerk can sometimes achieve the seemingly impossible. There is also preventive work; when a date is being fixed for a particular case, the clerk can often steer the case away from dangerous groups of other dates.

The insulator

By now you may well be saying: "Let all this be so; yet how does it affect the efficiency of the legal profession?" The answer is simple; it plays a major part in setting the barrister free to work with the very minimum of interruption and extraneous worry. It is all parcel of that specialisation of function which is one of the major achievements of the English system. No telephone rings in counsel's room unless his clerk is satisfied that counsel must deal with it himself, or would want to do so. None of the problems of fees detain counsel for more than a few minutes several times a year.

All that counsel has to do is to do the work his clerk arranges for him. If Gamma's clerk comes into Gamma's room on a Monday and tells him that he has a twenty-guinea brief in Clerkenwell County Court on Friday next, all Gamma has to do is to get up the case in time and fight it. He may never have heard of the case or the client or the solicitor before, and he may never hear of them again. The negotiations over the brief may have been protracted and difficult, or they may have been short and satisfactory; of this Gamma may know nothing. If a case is far out of London, it is Gamma's clerk who will see that a room is booked for him at an hotel and that he catches a suitable train. Gamma has nothing to do except his work; and he is set free of all clerkly worries so that he may do that work well. The barrister's clerk is his shield and his buffer.

You will see from this how important the barrister's clerk is in the English legal system. His is a position of much responsibility. To all in his chambers he is of vital importance; and to the beginner at the Bar he is the most important of all. As with all the other persons and institutions that I describe, he is not always perfect. Mistakes are sometimes made; human frailties have sometimes appeared; and complaints are occasionally heard of a clerk who is said to have become too dominant for the proper health of his chambers. If there are a number of beginners at the Bar in the chambers, the clerk may see to it that one prospers while another does not; and personalities rather than a just estimation of abilities are sometimes said to govern the choice. Yet in the ultimates of judging human abilities, who can speak

with certainty? Is Omega really the equal of Alpha that he thinks himself to be?

There are indeed possibilities of abuse, and not even barristers' clerks are angels. Yet members of the Bar do not lack tongues with which to complain, nor are the senior members of the chambers without ears. In the end, I would doubt whether there is more than an occasional outcropping that demonstrates the need for vigilance. Certainly the great majority of barristers' clerks fully justify the confidence and affection which their principals feel for them.

THE CORPORATE SPIRIT OF THE BAR

I turn from the human and physical to the abstract and metaphysical. An understanding of the corporate spirit of the Bar is essential to any appreciation of the English legal system. There are many things, some of them small and even trivial, which foster this spirit. I have already mentioned the importance of communal food. Of the 1,500 members of the Bar who practise in London, perhaps 200 or 300 will be engaged on cases out of London on any given day. Of the remainder, an inspection of the luncheon tables in the halls of the four Inns of Court and in the refreshment room in the Law Courts ("the crypt") would probably reveal 70 or 80 per cent. of them.

Across the table flows the professional gossip. Some concerns the law, though detailed individual problems are discouraged; what is discussed is generalised law and legal ideas. Much of the talk is personal, and some of this concerns those not present: someone had X against

him the other day, and found him a dangerous cross-examiner; someone else thought that Y was not very fair in the way that he put the case in his concluding speech; and others contribute their experiences with Y or contrast him with Z. Thus are professional reputations made or sullied, and bodies of informed opinion grow up. Association fosters integrity. The Bar works in public, and it is proper that it should be astute to detect and check deviations from propriety.

The bonds of convention

The sense of community which springs from daily contact in hall and crypt is fostered in many other ways. The inveterate custom is that, save in court or in other circumstances of formality, every member of the Bar should address any other member of the Bar by his surname alone, without any prefix of "Mr.," unless, indeed, he knows him well enough to call him by his Christian name. The rawest recruit to the Bar, called ten minutes ago, must address the most senior leader thus. To him, the Attorney-General himself is "Hobson" and not "Sir John"; all are brothers at the Bar. Within any set of chambers and on the Bench of an Inn the normal rule is that of Christian names; and there is something of a similar convention as between silk and silk. Again, the Bar does not shake hands with the Bar. Let there be a consultation in a leader's chambers, and you will find him shaking hands with the solicitor and the client and everyone else save his junior; to him there will be a friendly nod and "Glad to see you, Charles" or "Hello, Jones," as the case may be; it matters not that he has never seen him before.

Counsel are brothers, living and working in one community; would you shake hands with your brother when you meet him at breakfast?

Is this trivial? I think not. So often it is the little things that count. There is a very real sense of friendship at the English Bar. None would deny that the bonds of friendship bind less strongly with some than with others. The Bar has its bores and even its boors; but fewer, far fewer, than its share, for the courts do not provide the soil in which they can flourish best. There is a strong and healthy climate of respect for ability and appreciation of integrity that does much to foster these qualities. The schizophrenic mind that happily prosecutes one day and defends the next finds no difficulty in attacking in court a luncheon companion or friend in chambers who is on the other side; indeed, the closeness of association often gives an added zest to the attack.

There are other customs, too, that help to mark off the Bar from the rest of the world. The wearing of robes, of course, does that, and so does the treatment of judges out of court. In court a judge is "My Lord"; but outside, a barrister in conversation with him will call him "Judge," and address him in the same way if he writes to him. Again, it is the custom for counsel to raise their hats to judges if they meet them out of doors, and the judges return the compliment. Yet again, the formula for describing one's adversary in court is "My learned friend" or "My friend." There is a political group which in comparatively recent times has found merit in the appellation "Comrade," no doubt as an aid to thoughts of comradeship. I do not

know whether the idea was a conscious derivative from "My learned friend"; but I think the English Bar can claim substantial priority. You may be professionally or personally angry with your friend; but he is still your friend.

LAWYERS AS PROFESSIONAL MEN

A further point that I would emphasise is how truly professional English lawyers are. No doubt "profession" means many things to many people. For my purpose the element that I want to emphasise is not so much the intellectual skill but the selflessness and integrity of English lawyers. Comparisons are both odious and impossible: yet I find it difficult to envisage any calling in which so much advice is given which is in the true interests of the client and against the immediate interests of the professional man himself.

Discouraging litigation

I am thinking in particular of litigation. Look into a solicitor's office or counsel's chambers and as like as not you will find the lawyers trying to dissuade the client from litigating. No doubt the English fall some way behind the great litigating nations of the world. Whether Ireland today is as Ireland was I cannot say: but the Irishman certainly had a litigious record that the Englishman could only marvel at. Nevertheless, the Englishman is no mean litigant, and in some parts of the country (which I prudently refrain from specifying) he is less mean than in others. The old picture of the lawyer pushing the reluctant client into unnecessary litigation is today as false as a picture well could be.

When the doubts are real or the difficulties palpable it is the lawyers who seek to restrain the client from putting money into their pockets by litigating.

Do not think that I am suggesting that the legal profession is one vast conspiracy to prevent litigation; if it were, it would be one of the most unsuccessful conspiracies of all time. Of course there are many cases in which the lawyer's advice must be to sue, unless the client prefers to grin and bear it. But if it were possible to examine the advice given in all the actions that failed, I believe that those in which the client sued despite the advice of his lawyers would greatly outweigh those in which the lawyers urged a reluctant client to sue.

The point is illustrated, perhaps (or perhaps not), by the story of the client fifty years ago who laid his troubles before his solicitor, and was told that there was nothing that he could do. Nevertheless, the client insisted that a writ should be issued, and persisted in this even when leading counsel advised that the case was hopeless. The case was duly lost, and as they walked away from court, the client said: "Where do we go from here?" The solicitor said: "Well, you can go to the Court of Appeal, but I don't advise it." The client simply said "Appeal," and in due course promptly paid the solicitor's bill without demur. The appeal was duly lost, and in a similar way the bill was paid and an appeal to the House of Lords was lost. As they walked away from the House of Lords, the client said: "Where do we go from here?" The solicitor said: "You can't go anywhere; the Lords are final. Only a private Act of Parliament could alter the result." Whereupon the client said: "Commence proceedings for a private Act."

The solicitor stopped dead in his tracks, and looked at his client with admiration. "My dear Sir," he said, "I should like to breed from you."

Generosity

I have given but one instance of the general approach, that the best interests of the client come first. There are many others. There are many instances in most lawyers' recollection of cases that have "gone wrong"; an injustice has been done, yet the client lacks the means to appeal (the Legal Aid Scheme has not cured all evils). There are other cases where the hearing has become protracted beyond expectation, and the funds available have become exhausted before the end. Sometimes there is injustice outside the help of legal aid; and before the war there were many Poor Man's Lawyers, served by lawyers who received no payment for their work. How many lawyers are content to leave injustice unrighted unless they get their fees? Nobody can practise law for very long without encountering many, many instances of fees waived or reduced to a mere token, of work done for nothing save the knowledge that it would be wrong to leave it undone. I suppose that as a class the English lawyer may be described as calculating, in the sense that he usually knows and deliberates on what he is doing; but I hope never to hear him described as ungenerous. It is the client, the law and ultimately a feeling that justice has been done that matter. Is it surprising that the daily practice of the law should foster a preoccupation with what is right and fitting and proper?

Craftsmanship

The lawyer's sense of profession also makes him a craftsman in a rather unusual sense. In many of the professions there is no enemy, or a common enemy. The accountant usually works to achieve that which is accurate and right; the doctor fights, often with his brethren, against common enemies such as disease and injury. It is given to the lawyer, and especially the barrister, to live in strife. Each daily uses his skill and cunning to defeat his brethren. Yet it is among lawyers that one perhaps most often hears open expressions of admiration for the achievements of another. The junior, drafting a defence, admires the skill displayed by the statement of claim that he has to meet. The silk, preparing for the morrow, reflects with admiration on the ingenuity of his adversary's contentions in the Court of Appeal that day. Lawyers live and work in strife; yet strife does not stifle admiration, but instead gives point to it. With the spur not merely of rivalry but of actual contest, the lawyer is quick to see the good in what it will be his duty to contend is bad. To the layman, all that comes from the enemy must of necessity be bad. The lawyer knows a truer reckoning.

Self-effacement

Finally, let me mention self-effacement. It often falls to the lawyer to advance views contrary to those that he holds himself. His client's cause may be opposed to his views in politics, in religion or in ethics. The lawyer will not put forward contentions that are illegal or immoral, but subject to that, so long as he acts for his client, he will do the best he can for his client in

accordance with his client's instructions. If a solicitor is instructed to advance contentions so repugnant to his own views that he feels he cannot properly do so, he may decline to act for his client any further, and leave him to find another solicitor; but so long as he acts, it is his client's views and not his that will be urged. He may advise, and attempt to dissuade, but once the decision is taken, he will not seek to evade its consequences by any lack of zeal. He plays fair with his client.

Sometimes a family solicitor will lose his client rather than draft what he considers to be an unjust will for him; and I do not speak only of flagrant cases of a testator who seeks to leave all to his mistress and none to his family. Naturally, the solicitor will first attempt to guide and persuade his client. But if these attempts fail he may have to choose between his self-respect and his client; and I do not doubt his choice.

For counsel, the position is somewhat different, owing to the "cab-rank" principle³¹: counsel cannot refuse a proper brief. Nevertheless, the position of counsel is such that his views will usually carry much weight, and this weight is sometimes used to great effect. Not many clients feel happy about pressing counsel to take a course which he has strongly advised against; but if this happens, then counsel will, as in duty bound, pursue that course with as much vigour as is proper. However, the insistent client is more likely, if time permits, to seek other counsel; and his first choice will gladly release him. Though the hand that severs the bond differs in

³¹ See *ante*, p. 32.

the two cases, with both barrister and solicitor it is true to say that while the bond endures the lawyer will do all that he properly can to carry out his client's instructions, whatever his own views may be.

THE RETURNED BRIEF

I do not, of course, suggest that the English legal rose has no thorn. Quite apart from failings of the individual, some defects spring from the system itself. One of the litigant's most just grievances is that of the returned brief. The client has accompanied his solicitor to numerous conferences with counsel as the case has developed. Counsel has settled all the pleadings, fought all the interlocutory proceedings in chambers, and has generally nursed the case through its childhood. Then, forty-eight hours before the case is due to begin, counsel returns his brief. Another case in which he is deeply engaged has lasted far longer than could have been expected; or some other case to which he is bound to give precedence has suddenly come into the list for hearing. At short notice another counsel has to prepare for battle and fight the case; and all the understanding and confidence that had grown up between the client and counsel has gone for naught. Is it to be wondered that the client feels bitter about the system, however able the substitute?

Of course, there are many cases in which a returned brief causes little distress. Sometimes the solicitor has carried through all the preliminary stages of the case himself, and counsel has come into the picture only when the brief was delivered to him a week or so before

the hearing. In such cases the transfer of the brief a few days later may cause little or no concern. But often—too often—a returned brief is an anxious matter for the solicitor. A good substitute has to be found at short notice, which may not be easy; and a worried client, querulous and suspicious, must be comforted. The solicitor cannot do much more; least of all can he justify the system.

“Counsel’s convenience”

The causes are not hard to find: the remedy is another matter. Broadly, the foundation is the rule of practice that no hearing of a case will be postponed merely for “counsel’s convenience.” The phrase itself is damning; if it were merely “counsel’s convenience,” then few would question the rule. But substitute “the litigant’s right to representation by counsel of his choosing,” which is what it really is, and the rule wears a different aspect. “Continuances,” so freely obtainable in most American jurisdictions, do not run in England. If an adjournment is sought merely on the ground of counsel’s inability to be in two places at once, the judge’s answer will be courteous but firm. He will express his regret that he will not have the pleasure of hearing Mr. X, but add that he is confident that there are other members of the Bar fully qualified to present the case to the court; and there is no adjournment.

Exceptions

The rule is not absolute. All courts bow to the House of Lords, and if counsel will be engaged there, any case of his in a lower court will be adjourned until he is free

to return from the Lords. By judicial comity, a similar rule is applied to the Judicial Committee of the Privy Council. But there the main exceptions stop. Usually, it is possible to have a case stood out of the list if written consents by all parties are handed in to the court; but often delay is inconvenient to the other side, and their agreement cannot be obtained. In marginal cases, too, it is sometimes possible for counsel's clerk to achieve some concession from the clerk in charge of the particular list; a case that must appear in the list may nevertheless be marked "Not before 2 p.m." and so allow counsel time to get back from some other case in the country. Yet with these qualifications the rule is inexorable. "Counsel's convenience" is no ground for adjourning a case.

Fixed dates

Now it is true that there are fixed dates for many types of proceedings. Witness actions in the High Court usually have fixed dates, and that of course is often most valuable to the witnesses. There are fixed dates in county courts and for town planning and other ministerial inquiries. As between such proceedings, counsel and his clerk usually do not have much difficulty in avoiding conflicts. Such trouble as there is usually arises from duration: will the witness action end within the forecast of four days, or may it drag on into a sixth and so collide with a planning inquiry?

The rub comes hardest with the impact of fixed dates upon unfixed, or as between two or more with unfixed dates. An appeal in the list of Chancery Final Appeals before Court of Appeal I is working its way to the top

of the list and should be on and over by the end of next week, comfortably in time for a Queen's Bench Non-jury the week after; but then, before the case is reached, Court of Appeal I drops the Chancery Finals and turns to County Court Appeals. Six weeks later, the court returns to Chancery Finals, and the case is near the top of the list, while counsel is in the middle of a planning inquiry good for another fortnight; and so the brief must be returned.

Even if the list continues without interruption, its progress may depart widely from the forecast. An appeal estimated at two days may be settled before it is begun; the next appeal, estimated at three days, may be broken up by the court during the first day; and the consequent acceleration of four days may wreak havoc further down the list. Briefs are returned by counsel to whom acceleration means collision. Then, perhaps, the case at the head of the list, estimated at one day, runs into deep waters and takes nearly four, so that none of the returning need have been; and yet the clients are left with counsel not of their solicitors' first choice.

Counsel of his own choosing

Do I labour the point over-much? After all, it merely concerns the tedious but necessary work of keeping the cases in ordered flow. But I think it matters, and matters greatly. There is a failure of the machinery of justice if a litigant is needlessly deprived of the advocate in whom he has put his trust. Yet it is difficult to see any clear remedy. Allow adjournments to suit "counsel's convenience," and the road to delay opens wide. If each side is represented by two busy counsel, it may

be months before a date can be found when each is certainly free. After all, one of the virtues of the English system is that the brief should contain all that is necessary to fight the case effectively, and so should be readily transferable.

Sometimes, too, counsel or his clerk may be persuaded or tempted to accept more briefs than at first sight it seems possible to fit in together. This may be justified. Not infrequently cases are settled as the litigant gets nearer to the doors of the court, and for the first time the frailties in his case and the possibilities of having to meet a heavy bill of costs begin to loom larger than his grievance. Many an instance of an apparently insoluble clash of two or three cases has resolved itself for counsel so that in the end he has only one to fight. With this possibility as an ever-present reality it is often hard to condemn counsel for accepting too many briefs. "It will all come out in the wash" is a maxim of practice. Provided a brief to be returned is returned in ample time for other counsel to be found and get the case up (a most important proviso), the acceptance of probably overlapping briefs can, within limits, be justified.

The sanctity of judicial time

Perhaps the greatest difficulty lies in the unspoken maxim that no minute of judicial time may be wasted. A division of the Court of Appeal has a case before it, Case No. 1, that is coming to its end when the list for the next day is being made up at 2.30 p.m.; perhaps there will be an hour left in it the next day. The next case, Case No. 2, is estimated at five hours, and together they should more than fill the judicial day of just under

five hours. But that case might not run the full five hours. After hearing the appellant, the court might not call on the respondent, and might dismiss the appeal; and so, to be safe, Case No. 3 is put into the list, marked "Not before 2 p.m." Counsel in Case No. 3 is then in a dilemma; he has another case for that day, sure to finish within the day, but by no means sure to release him by 2 p.m. One brief or the other must be returned. He returns the brief in the Court of Appeal, does his other case, and on his return finds that Case No. 1 took the Court of Appeal the whole morning to finish, and at the end of the day Case No. 2 was firmly under way, but no more. In the end Case No. 2 absorbs the whole of the next day, and Case No. 3 finally comes on at the head of the list for the next day, the third after it was first in the list for hearing.

In one sense, no harm was done. The delay gave the substitute counsel all the more time to prepare the case. Yet the precautionary insertion of Case No. 3 has wasted the time and care that the original counsel gave in preparing the case; it wasted his background knowledge, particularly if it was he who argued the case in the court below; it has given the solicitor the anxiety and responsibility of finding a suitable substitute counsel, and of "explaining" the system and its results to the client; and it has added another layman to the not inconsiderable list of those suspicious and critical of the law and lawyers. The only good it has done is to provide an insurance against some two hours of judicial time being wasted, and the progress of the lists being delayed to that extent.

The swollen county court list

Other instances are provided by some county courts, where, of course, the system is for all cases to have a fixed day, and for any unfinished case to be adjourned to another fixed day, very rarely the next day. Counsel with a case likely to last for three hours who travels fifty or a hundred miles to a county court and finds his case at the bottom of a list containing, say, thirty or fifty judgment summonses and four ordinary cases may well be dismayed. To do this case he has had to return another brief; and yet the chances of his case being even begun are remote. The judge finishes the judgment summonses by 3 p.m., and rises at 5.30 with two out of the four cases decided, but the rest of the list untouched. In the train back, counsel may be left musing on the brief that he so inevitably and yet so needlessly returned. Let us hope the client never hears that counsel abandoned his cause for the scant pleasure of sitting in court with a settled, hopeless expectation of not being reached.

I take these two instances because both are drawn from life in 1962. They are very far from standing alone. In particular, Assizes and Quarter Sessions yield accounts as deplorable, and sometimes more so. The amount of good that, on balance, would be done by judges risking little temporary unemployment is, I think, quite remarkable. One can well see that with crowded lists and not enough judges, there was a very natural tendency to conserve judicial time. But this is 1962; there have been changes.

At the county court level important improvements have been made in the last six years; conditions are not

now as they once were. By the Landlord and Tenant Act, 1954,³² county courts were given jurisdiction in proceedings for the compulsory grant of new tenancies of shops, offices and other business premises of a rateable value not exceeding £500. This, of course, includes the great majority of what one may call ordinary shops and offices; and some of these cases last days and even weeks. By the County Courts Act, 1955, the jurisdiction of county courts in claims for damages for breach of contract and tort was extended from £200 to £400³³; and again this resulted in the lists being swollen by heavier cases than before.

This advent of new and longer cases worked havoc in the county court lists. The natural tendency was to put the heavier cases at the bottom of the list, so that by disposing of the shorter cases the greater number of litigants might be satisfied. The "heavy case," which would probably be barely reached, would then be given a fixed day or days, and usually the promise that no other case would be in the list before it. This much counsel would achieve by sitting in court for the best part of a day. If at the end of the fixed day or days the case was still not finished, other fixed days would be arranged; but owing to the crowded state of the list, the earliest open days would usually be some two months later. Counsel would then have to drop the case and pick it up again; and often the first half hour

³² s. 63 (2).

³³ County Courts Act, 1955, s. 1 (1). Under the County Courts Act, 1888, s. 56, the limit was £50. This was doubled by the County Courts Act, 1903, s. 3, and doubled again by the Administration of Justice Act, 1938, s. 16 (1).

or so of the resumed hearing would be occupied by reminding the judge of how the case stood thus far.

The remedy

The remedy was simple and effective. There had long been a power for a county court judge to appoint a deputy to act for him if he was ill or unavoidably absent, and a power in other cases with the approval of the Lord Chancellor to appoint a deputy for not more than two months in any twelve.³⁴ In 1956, Parliament supplemented these powers by providing that if it appeared to the Lord Chancellor, on representations made to him by a county court judge, that it was expedient so to do in order to avoid delays in the administration of justice, the Lord Chancellor might appoint a properly qualified person as a judge to act temporarily.³⁵

A county court judge who finds his lists swollen by cases likely to take more than a day can now with comparative ease arrange for the appointment of a temporary judge, and allocate the heavier cases and his ordinary list between himself and the temporary judge as he thinks fit. This power is for the most part freely used; and where it is, the old abuses vanish. No longer is there attendance for a blank day in order to get a fixed date; no more are there gaps of two months or more between each leg of a long case.

There have also been substantial changes in the judicial arrangements in county courts. Let me summarise

³⁴ County Courts Act, 1934, s. 11 (1), (2).

³⁵ Administration of Justice Act, 1956, s. 22.

certain of the facts that can be discovered from *The Law Lists* of the years mentioned:

	1937	1948	1956	1962
Number of judges . . .	59	62	65	76
Number of circuits . . .	55	54	56	58
Circuits with one judge . . .	47	43	40	40
Circuits with two judges . . .	8	8	14	18
Circuits with three judges . . .	nil	1	2	nil

You will observe that the figures do not always appear to add up correctly. Thus if in 1956 there were forty circuits with one judge, fourteen with two and two with three, this mathematically presupposes seventy-four judges; but in fact there were only sixty-five. The explanation is that many of the circuits shown with two or three judges had but one full-time judge, and only part of the time of another judge or judges, who were attached to two circuits. A "two-judge circuit" might in fact be only a one-and-a-quarter-judge circuit. But by 1962 this system had come to an end. Not only has there been an appreciable increase in two-judge circuits, but they are now all truly two-judge circuits.

Flexibility of judicial manpower

The point, of course, is that in the last twenty-five years, and especially in the last fifteen, county courts have become far more flexible in judicial power. With only one judge and a restricted system of deputy judges, litigants were tied to one man and to the changes that could be rung on the time of one. With a basic ration of two judges on the circuits that need them most, and always a bisque there for the taking (if with decorum a temporary judge can be so described), the picture is

quite different. Wasted attendances by clients, witnesses, counsel and solicitors ought to be things of the past. Yet they needlessly linger on. Old habits of mind die hard. In some courts—probably a small minority—the list packed beyond reason is still to be seen.

The remedy lies with solicitors and the Bar. The human failing of readiness to grumble yet reluctance to act is not sloughed off on call to the Bar or admission as a solicitor. Without reliable information the Lord Chancellor's office cannot act. If solicitors would inform The Law Society and counsel would inform the Bar Council, suitably depersonalised representations would soon enough be made to the Lord Chancellor's office. Before long, encouragement from on high to risk an occasional blank judicial hour would make itself felt where it is needed.

More judges

The Court of Appeal, too, has had its changes. In 1937 it normally consisted of the Master of the Rolls and five Lords Justices of Appeal, sitting in two divisions of three. Since the beginning of 1961 it has been twice that size³⁶; the Master of the Rolls and eleven Lords Justices sit in four divisions of three. True, there has also been a marked increase in the number of judges from whom appeal lies to the Court of Appeal. The eighteen judges of the King's Bench Division have now become thirty-two. Yet here the increase is more apparent than real; much of the time of the Queen's Bench judges is spent on crime, and with this the Court of Appeal has

³⁶ In October 1938 the five became eight.

no concern. The Chancery Division, fruitful of complex appeals, has remained pretty constant at six, though today there is one additional judge who is mainly occupied with special work. The Probate, Divorce and Admiralty Division has swelled from three to eleven judges; but here again much of the increase is due to divorce business of a type not productive of appeals. The number of county court judges has risen from fifty-nine in 1937 to seventy-six, to say nothing of deputy and temporary judges. New bodies such as the Lands Tribunal, set up in 1949, now make substantial contributions to the list; and of course the law has not grown simpler, nor has Parliament failed to create brave new fields for endeavour.

Making every allowance for the increase in work, has not the time come when the Court of Appeal can afford to run the risk of an occasional wasted hour? Nothing need be changed except an attitude of mind. The change would not be so great as the recent and most valued change in practice which made it unnecessary for counsel to go down to court and wait during the concluding stages of the argument in the case preceding theirs because of the risk that judgment would be reserved and so immediately the arguments ended their case would be called on. The new practice, which in most cases provides for an adjournment of ten minutes if counsel in the next case are not in court,³⁷ has saved many a harassed member of the Bar from wasting the best part of a morning or afternoon that he could ill afford. This crack in the principle of the sanctity of

³⁷ See *Annual Statements of the General Council of the Bar*, 1958, p. 21; 1961, p. 17.

judicial time need not be enlarged into a gulf. All that is needed is the death of the cant phrase "counsel's convenience" and some recognition that a client's desire to have counsel of his choosing is a proper desire that should if possible be translated "counsel of his first choosing," and not counsel of the last minute *faute de mieux* choosing.

SILK

Next, let me turn to what is variously known as "silk," "the front row," "leading counsel" or "Q.C.s." As an institution, silk has a number of merits for the client. It is a generally recognised guarantee of competence as an advocate and of experience in the law. Silks also can give more time to difficult problems than is usually possible for busy juniors. In most cases "leading counsel's opinion" is (very properly) accorded greater respect than a junior's opinion, even if the junior is very senior. For the Bar, however, silk has its disadvantages; but first I must briefly put the institution in perspective.

Until the reign of William IV there were rarely more than two or three new silks a year. In the seven years of his reign an average of nine were created each year, and this continued in the reign of Victoria. By the turn of the century the flow was eleven or twelve a year. The two of 1889 and the twenty-three of 1895 seem to be the low and the high. In recent years the eleven of 1956 and the thirty-four of 1961 are the extremes, with the average somewhere under twenty. The total number of silks today is some 300, though if one deducts those who have retired from practice or who hold some official post incompatible with practice, the number

comes down to some 200 or less.³⁸ Probably three-quarters of the work is done by not much over 100 of these.

The reality of silk

These numbers may perhaps give some idea of the reality of silk in England. In Canada, for example, bitter complaint is heard of silk being given for political reasons, and in over-generous quantities. A population of some eighteen millions supports many more silks than England's forty-six millions. But then Canadian silk imposes no professional disadvantages; the lawyer continues to practise as he always has done, unchanged save for the honour. Not for him are there any of the requirements that oblige his English brother to give up drafting pleadings and other documents except in conjunction with a junior, and not to go into court without a junior.

If the lists of English silks are examined it will be seen that in every 100, perhaps half a dozen are senior lawyers in the government service, another two or three are distinguished academic lawyers, and all the rest are or have been practising barristers. Over 90 per cent., in other words, are those to whom silk will be a great adventure, with much to gain and much to lose. In England, silk as an honour without risk is contained within narrow bounds, and professional opinion is strong that it should be so; indeed, even the modest

³⁸ For the year 1960-61, 173 practising members of the Bar paid subscriptions to the Bar Council at the rate of 10 guineas appropriate to silks: *Annual Statement of the General Council of the Bar*, 1961, p. 50.

quotas of official and academic silks attract some mild criticism.

Waste

Is not the English system wasteful? Is it not cruel? Nobody can know the detailed figures, but probably out of a batch of fifteen silks, the results five years later may be that one has risen to great heights, four have done really well, six are firmly established without being overworked, and the remaining four have never really got going in the front row. For the last four, there is no going back to the junior Bar. There is always hope; but for a man in his forties or fifties with family responsibilities hope is a poor substitute for half his income. Sometimes the trouble is self-misjudgment; for who can truly see himself as others see him? Good friends can give good advice, but sometimes their vision is faulty or their advice too frail to override the lure of the front row. Sometimes the difficulty is that of supply and demand; there is too little suitable work for the number of competent silks available. But whatever the reason, is not the system wasteful and cruel?

It is difficult to do otherwise than answer Yes. Almost by definition a man must be a successful junior to be given silk at all. The disappointment and anxiety of finding that honour has thrust out success need no comment; and is it not wasteful for some four good juniors to be lost each year to so small a Bar as we have in England? Yet there seems no easy solution. Abolish the rules that distinguish silks from juniors, and you extinguish the reality of silk. What is more, you

abolish much of the specialisation of function. In any case, the edge is taken off the problems, and rather more, by the opportunities that open with silk. There are many full-time and important part-time legal appointments short of the High Court Bench to which a silk may aspire, and in which he will find full scope for his abilities. Nor are the letters "q.c." any disqualification for many positions outside the law. In the end, although disappointment may be inescapable, real tragedy is rare. There is a price to pay for our system, but it is not exorbitant.

A shift in function

The years have brought changes not only in the numbers of silks but also in their functions. The classical picture is of giants like Edward Clarke, Rufus Isaacs and F. E. Smith darting from one court to another, and sandwiching a devastating cross-examination in Case A between a pellucid opening in Case B and a brilliant closing speech in Case C. In each court a devoted junior would keep the case going as best he could, never knowing when his leader would be present in the flesh as well as in the spirit.

Today the picture is often just the opposite. A leader is expected to be there virtually throughout the case; absences are the exception, to be provided for, rather than the rule. Instead, a junior may contentedly amble from court to court, listening to one of his leaders cross-examining in Case A, as a change from the tedium of hearing another of his leaders open Case B, and then arriving for the end of his third leader's closing speech in Case C. Maybe I overdraw the picture a little; but the

tendency is there. An absent junior will, of course, provide some other junior to sit in his place during the absences, and often the substitute will know a good deal about the case. But today a silk earns his fee by his presence rather than his absence; and few would deny that the change is for the better.

CHAPTER 3

LEGAL EDUCATION

THUS far, I have been discussing practising barristers and solicitors, but I have said little about legal education and law students. The students of today are the practitioners of tomorrow, and this is Cambridge University, so that it is right that I should say something of them. Legal education and training for the law is by itself a large subject, large enough, indeed, to form the subject of a series of Hamlyn Lectures in itself. I cannot begin to explore it in full, but equally I cannot omit it altogether. One conclusion that I think most practising lawyers would readily accept is that a barrister who has just been called to the Bar is far less qualified for practice as a barrister than a newly admitted solicitor is fitted for practice as a solicitor. Two main factors are responsible for this disparity, namely, the subjects of the examinations, and the systems of apprenticeship. Let me take these in turn.

EXAMINATION SUBJECTS

Taught law

Taught law is tough law. It is astonishing how, in later life, when two or three decades have passed since a subject was learned for some examination, a lawyer will find himself able to recollect some of the basic principles and, in so doing, be able to find his way about a text-book on the subject and use it to some purpose. It is

remarkable how often an analogy or idea from some other branch of law will prove valuable in the lawyer's chosen field of endeavour. Student days are days of reading and of the comprehensive view of a subject. A practitioner will frequently consult law books, but he will very rarely read any. The index and perhaps the table of cases or table of statutes will guide the practitioner to the passages in point for his particular problem, and he will read these and a little round and about them for safety's sake: but he will not read the book as a whole, for he has neither the need nor the time. Indeed, it is probably true to say that few except the author or editor have ever read any practitioner's book from beginning to end.

The danger, of course, is that unless the practitioner's book is unusually well cross-referenced, there is always the risk that what is so clearly set out on, say, pp. 741, 742, is in the particular case in question vitiated by some general qualifying doctrine to be found on p. 344. If the subject is one which the practitioner has been taught, almost certainly he will retain some recollection of that doctrine, and all will be well. But if the subject is one which he has never been taught, disaster lurks. To have covered the whole of a subject, even if only in outline, with the intensity required by the prospect of facing the examiners is the best guarantee I know that in later years it will be possible to use a full-scale practitioner's book on the subject with skill and assurance.

Students' books

Perhaps, too, I may add this: that he who passes his

law examinations would be well advised to pause before disposing of his books. They are likely to be the last law books that he will ever read from cover to cover and that he will really know; and it is astonishing how much that is half-recollected from student days will prove as hard to unearth in the bigger books as it is easy to turn up in the old enemies that, strangely, have become old friends. Again, the lecturer's vivid phrase or the supervisor's apt illustration so often continue to flash their warning signals a quarter of a century on.

The range of subjects

From this exordium you will perhaps observe that I am an enthusiast for taught law. Good teaching endures. Under modern conditions, it is the examination that is the master of both the teacher and the author. If there are examinations on a subject, it will be taught, and books will be written for it; if there are no examinations on a subject, then probably, though not inevitably, there will be neither teaching nor students' books. And so, when one contrasts the subjects for the Bar examination with those for the solicitors' examinations,¹ one perforce reaches the conclusion that the newly called barrister is likely to be somewhat less well stocked with tough law than the recently admitted solicitor. In particular, there is a striking contrast in taxation. The solicitor, very properly, must know something of income tax and death duties; the barrister need not.

¹ For summaries, see (1961) 14 J.Leg.Ed. 23, 24; Cmnd. 1255 (1961: the "Denning Report"), pp. 12, 13; J. C. Hall (1962) 7 J.S.P.T.L. (N.S.) 25.

Overseas students

The Bar, of course, has a special problem on its hands. For, unlike The Law Society, the Council of Legal Education is catering for students of whom some three-quarters are domiciled overseas.² Quite apart from giving options for subjects suited to the needs of such students, such as Hindu Law, Mohamedan Law and African Law, the Council's examinations cater for them by stressing the more general and traditional subjects, such as contract and tort, which run through the common law world, and by abstaining from statutory subjects of more local English interest.

On a broad view this may well be right; and the picture may change when the activities of newly founded local law schools, especially in Africa, reduce the overseas influx. Yet meantime the English Bar student suffers—no doubt with fortitude—a syllabus which in 1962 seems to many to be somewhat narrow and traditional. Of the law which is going to occupy the English barrister's attentions daily, too little—some would say much too little—has ever been taught to him for his examinations. Ought a change in this situation to await events in Africa and elsewhere? Is not the English barrister important enough to us (whatever his numerical inferiority) for some re-examination of the syllabus to be made now? I confess to little doubt as to the answers to these questions.

² Of those called to the Bar in 1959-60 (thus excluding the unsuccessful student) 68 per cent. were domiciled overseas (459 out of 676): *Annual Statement of the General Council of the Bar*, 1961, p. 47. For the previous year, the figures were nearly 72 per cent. (490 out of 682): *ibid.* See also *post*, p. 180.

A test

A practical test (though now a little dated) may be offered. Consider the case of the secretary of a Poor Man's Lawyer shortly before the outbreak of war in 1939. Hard-pressed to find enough advisers, he is offered a newly called barrister and a recently admitted solicitor. He will be polite about the first, enthusiastic about the second. Matrimonial law, the Rent Acts and workmen's compensation together make up over three-quarters of the work. Of these, the barrister has normally been taught nothing, whereas the solicitor has been examined on all three. He may not have devoted much time to all of them. Before the war, a single lecture of an hour and a half to meet the customary Rent Acts question in the Conveyancing paper was usually all the solicitor would get; but it is remarkable how much ground could be usefully covered in that period.

Times have changed. The Rent Acts have lost some of their importance. Workmen's compensation is no longer with us as such. Divorce is included in the Bar examinations and is much favoured by Bar students as a means of avoiding the travail of conveyancing, an option not open to solicitors. But the principle remains unaltered. The need, perhaps, is not so much for complete new subjects which will provide a whole paper in the examination, or half a paper, but for the broadening of existing subjects, or for the provision of an inescapable question or two on a particular sub-subject. "The Rent Acts question" of the pre-war solicitors' final examination has much merit in principle.

APPRENTICESHIP

Articled clerks and Bar pupils

I turn to the other main factor, apprenticeship. Here again there is a sharp contrast. For long the broad picture has been that none could become a solicitor without having served an apprenticeship under "Articles of Clerkship" to a practising solicitor for five years, or three years for a university graduate. On the other hand, a Bar student could be called to the Bar and commence practice without having served any apprenticeship at all. True, a pupillage of a year with a practising barrister was traditional, but it was not obligatory, nor did the existence of a pupillage preclude practice while *in statu pupillaris*. It came as something of a surprise to many members of the Bar to discover that in post-war years over a third of those starting to practise at the Bar did so without serving a pupillage³; to this extent practice had ceased to accord with tradition.

Pupillage a requisite for practice

In the result, all those called to the Bar after April 7, 1959, have been required by their Inns of Court to give an undertaking on call not to practise at the English Bar without embarking on a twelve months' pupillage; and the Inn may permit attendance at one of the Council of Legal Education's Post-Final Courses as an alternative to six months of this period.⁴ (Of these

³ See the statistics for 1949-54 in the *Annual Statement of the General Council of the Bar*, 1957, p. 36.

⁴ See Consolidated Regulations of the Inns of Court, reg. 41.

courses, I shall have more to say.⁵) This change is clearly for the better; but some have questioned whether it has gone far enough. First, the undertaking in effect relates merely to the commencement of the pupillage, not its completion.⁶ A pupil may appear in court or otherwise practise on the very day upon which his pupillage begins, when *ex hypothesi* his pupillage can have had no effect upon him. Secondly, the undertaking does not affect call to the Bar; it is a restriction upon making use of the qualification as a barrister, not on obtaining that qualification. Each of these points deserves some consideration.

Advocacy

The first point is undoubtedly a serious matter. It means that the barrister's robes offer no assurance that the barrister has ever received any instruction or assistance on the technique of appearing in court; they guarantee no more than that he has eaten his dinners, passed his examinations and embarked on a pupillage. Of any knowledge or experience of advocacy he may be wholly innocent. Can this be right? True, the wearing of his robes is a guarantee that he has been instructed by a solicitor in the usual way; and the solicitor, it may be said, ought first to have assured

⁵ See *post*, p. 103.

⁶ The Report of the Committee on Legal Education for Students from Africa (Cmnd. 1255 (1961: the "Denning Report")) states that the undertaking is not to practise "until he has done twelve months' pupillage" (p. 14). In fact, the words of reg. 41 are "until I have satisfied [my Benchers] that I have completed or have commenced and intend to complete a period of not less than twelve months pupillage. . . ." The difference is vital.

himself of the competence of the barrister. Yet the English system of refusing adjournments for the "convenience of counsel"⁷ may mean that briefs have been returned, and the solicitor has understandably seized upon the barrister in question as a qualified barrister who is undoubtedly available.

The point is that he ought not to be qualified. Advocacy in even the simplest of cases is a skilled and highly responsible matter, and it is not to the credit of the English Bar that the law accepts as qualified to practise as advocates those who are not in substance so qualified. Regarded from the client's point of view, the present position is indefensible: and it is from his point of view that the position ought to be considered.

Is not the remedy simple? Why not prohibit practice at the Bar until the completion of a twelve-months' pupillage? Yet how effective would this be? Just how good is a pupillage in teaching the techniques of practice at the Bar in general, and advocacy in particular?

Value of pupillage

Pupillages vary infinitely in their efficacy. At their worst they can be deplorable; at their best they may be admirable. Yet however good or bad the pupillage, there is an important distinction between two categories of legal skills. First, there are those skills which a pupillage can teach in the best way in which any skill can be taught, namely, by the pupil making his endeavour, and then observing what his master does with his prentice effort. The pupil drafts a statement of

⁷ See *ante*, p. 78.

claim, and his master uses only the first two paragraphs of it; the pupil, having wrestled with the problem by himself, can see from his master's solution what was wrong with his own, and often the master will explain and amplify.

Opinions, contracts and, indeed, all written work can be dealt with thus. But when it comes to oral work, how different is the picture. The pupil sees the papers beforehand, he can appreciate some at least of the problems, and his master may discuss the matter with him: but once the conference begins, or the case is called on in court, the pupil can do little save listen and admire his master's easy lucidity and ready resource. When his chance comes the ex-pupil can attempt to imitate his master's fluency; yet here lies peril. For Alpha's style in advocacy may ill suit Beta. Alpha's style is rock-like solidity and assurance; in later years Beta will realise how little this style suits his natural abilities of subtle analysis. Each advocate must find and develop his natural abilities; simple imitation of his master in the law will rarely be the answer.

In advocacy, a pupillage can provide discussion, precept and example; it cannot provide practice and criticism. Yet practice and criticism are precisely what are most needed. At present, the pupil is likely to get some practice in advocacy. He may hold a brief for his master in some minor matter when his master is engaged in some more important case. The pupil tries his hand and makes his mistakes; but *ex hypothesi* his master is not there to guide him and criticise his performance, and the mistakes are made at the expense of the client. Surely what is needed is some scheme

whereby the tyro is given practice in advocacy in simulated cases and has his efforts subjected to skilled constructive criticism.

EDUCATION IN PROFESSIONAL SKILLS

Such a scheme has in fact been in operation since 1949. In that year the Council of Legal Education started the "Post-Final Courses" that have proved so valuable. I will not describe these courses in detail.⁸ Broadly, they essay in some three months or so to teach the skills required for practice at the Bar, as distinct from substantive law; and advocacy is first among those skills. The tacit keynote is "Do it yourself, be criticised and then do it again"; and although most is learned from one's own mistakes, much can be learned from the mistakes of others when they are pointed out and discussed by the tutor. And, of course, there is no question of the interests of any client being prejudiced, for the advocates appear in simulated cases before imitation courts.

Is not such a course of instruction in advocacy better, both for the instructed and the public, than anything that a pupillage can offer? It is difficult to avoid answering Yes. Yet the courses have been little patronised by those intending to practise at the English Bar. The courses were instituted mainly in order to meet the difficulties encountered by overseas students in undertaking the six months' pupillage required as a condition of call to their overseas Bar; and to this day the courses have remained predominantly courses for overseas

⁸ I have done this elsewhere: see (1961) 14 J.Leg.Ed. 21.

students, adapted to their needs.⁹ There have been criticisms, too, that the pace is too leisurely, and that the truly industrious student could do all the work required in half the time, or less; better still, that double the amount of practice in advocacy should be given. But despite the criticisms, the basic idea is sound enough and, given some encouragement, there seems no reason why the courses, or some modification of them, should not serve the English Bar as well as they have already served the overseas Bars.

An addition to pupillage

Let me make it plain that I am suggesting these courses not as a substitute for pupillage, but as an addition to it. No imitation of life can take the place of life itself. What I would urge is that nobody should be permitted to practise at the English Bar until he has diligently and successfully completed a somewhat intensified version of these courses and has commenced a pupillage. It remains for dispute whether the course should be in addition to a pupillage of twelve months' duration, or whether the course might take the place of three months or so out of the twelve. But at least such a scheme would offer a guarantee against advocacy at the client's expense by advocates who lack any experience or training under court-like conditions. And is not such a proposal modesty itself?

⁹ For proposed extensions to these courses for overseas students, see the Report of the Committee on Legal Education for Students from Africa (Cmnd. 1255 (1961: the "Denning Report")), p. 14.

Call to the Bar not affected

I turn to the second aspect of the undertaking, that it does not affect call to the Bar, as distinct from practice at the Bar. The Bar Council has committed itself to the view that nobody should be called to the Bar until he has served a six-months' pupillage with an approved pupil master, or alternatively, with his Inn's permission, attended one of the Post-Final Courses.¹⁰ I am delighted to see that three of the four Inns have rejected this proposal¹¹; for surely it would do little to protect the public and at the same time it would virtually put an end to the creation of "paper barristers."

PAPER BARRISTERS

As regards the public, restrictions on practising at the English Bar are quite sufficient to protect clients; the mischief is not of the unskilled advocate becoming a barrister but of his practising as such. In any case, a mere six months' pupillage is a poor guarantee of even minimum skill as an advocate. The "paper barrister" is another matter. The term is used as a convenient description of one who is a barrister but who lacks any experience of practice at the Bar. For very many years it has been common for those employed in government departments, by local authorities or in other salaried positions to join an Inn, eat their dinners, pass their examinations and then be called to the Bar. All this can be done in their spare time, without affecting their employment.

¹⁰ *Annual Statement of the General Council of the Bar*, 1961, p. 40.

¹¹ *Ibid.*

Such a qualification often proves a most valuable aid in obtaining promotion or new appointments. No doubt it is thought to be no bad thing to have a barrister on the staff; and of course the effort required is a sign of zeal. Others, too, get called to the Bar without any intention of practising. No doubt today fewer of the country gentry get called in order to help them in performing their functions as justices of the peace; but some still do, and so do many teachers of law and others, including some medical practitioners who aspire to become coroners. Doubtless a few of all these could arrange the absence from their other duties that a six-months' pupillage would entail; but the great majority could not, and so could not seek call to the Bar at all.

Injurious publicity

"That would be no loss," say some. "The paper barristers do no good. Indeed, they do some harm, for so often when there is some newspaper account of discreditable activities by a 'barrister,' it will be found that he is not a practising barrister at all; yet the public does not know the difference, or notice it, and so the Bar is discredited in the eyes of the public." There is, of course, some truth in this: "barrister" is a word with press-power. A man may earn his living as a civil servant or a company secretary, he may hold the degree of PH.D., he may be Chairman of his club or his local political party; yet if he has also been called to the Bar, the word "barrister" is of all his descriptions the most newsworthy, or so it seems. There is also the minor irritation which some practising barristers suffer when they are told that they are going to meet a barrister, or

that something was done on the advice of a barrister, and then they find that the barrister has not looked at a law book since he passed his Bar examinations a quarter of a century earlier.

Is not the Bar big enough to endure pin-pricks such as these? Is there not enough faith in the value of law and training for the Bar to outweigh them? Is it not good for the Bar that civil servants in high office, and many other influential men, should retain the feelings of kinship and a common language that inevitably follow from call to the Bar, even though faded with the years? And if there are to be changes, ought they not to be in the direction of giving a greater force and reality to the existing training for the Bar (and not least dining in hall) instead of making a change that must virtually quench the flow of paper barristers? In short, is not the paper barrister valuable and to be encouraged? Nor would the change achieve the result of equating "barrister" with "practising barrister," either in fact or in the public's view, for there would remain the large body of barristers whose pupillage had convinced them that the practice of the law was not for them, or who had given up practice after a year or two. And the overseas student would require special consideration.

Reforms

So in the end the answer seems relatively simple. In principle the present system of the undertaking on call achieves all that is really needed in the interests of both the public and the Bar itself. In detail, the undertaking should be strengthened by prohibiting practice until at

least the successful completion of an intensified post-final course in professional skills. This, coupled with a revised and broadened examination syllabus and, if possible, a real heightening of the value of dining in hall,¹² would do what is needed to make training for the Bar meet the needs of the day. Surely this much needs doing; not enough is being done; and some of what is proposed takes the wrong turning.

SOLICITORS

Further education

Let me turn to solicitors. It would not be right to end even a brief mention of legal education without an appreciative reference to the steps which The Law Society has taken in recent years to provide further education for solicitors after they have qualified. There have been regular annual lectures on the year's developments in particular branches of the law, and week-end courses have also been provided on specialised topics. These lectures and courses have proved justly popular. Even though the lectures (or notes of them) have subsequently appeared in printed form, attendance at the lectures themselves has paid tribute to the impact of the spoken word, as distinct from the dead level of the millions of printed and typewritten words which are the annual fare of all solicitors. This further education has no counterpart at the Bar, though with so small a Bar and such a high degree of specialisation this is not unexpected. For the solicitor, however, it is proving invaluable, and may well be expected to develop further.

¹² See *post*, pp. 112 *et seq.*

Articles of clerkship

That said, let me ask whether all is well with the system of articles of clerkship for intending solicitors. As with pupillage at the Bar, service under articles may vary almost infinitely in its efficacy. The principal may take care and trouble to see that his articulated clerk has experience of most types of work, and the principal's firm may engage in a wide range of legal activities. *Per contra*, the principal may be too harassed or too indifferent to give any real time to his articulated clerk; and the firm may be highly specialised and cover only a small segment of the legal field.

Principals vary greatly, too, in the degree of responsibility that they are willing to give to their articulated clerks; a Cambridge graduate has been heard to complain of spending most of her time watching her principal write letters and of having her pleas for work disregarded.¹³ A principal may find it quicker and safer to do the work himself than to supervise its execution by his articulated clerk. An articulated clerkship, however, has at least the advantage, as compared with a pupillage for the Bar, that many solicitors' offices are departmentalised, and so it is easy (and normal) for the articulated clerk to spend, say, nine months in the conveying department, six months in the litigation department and so on. The articulated clerk is less dependent upon the personality and width of activities of his principal than the Bar pupil is, and he is more likely to sample a fair range of life in the profession. Nevertheless, there are many "one-man firms," and so, with

¹³ *The Times*, May 3, 1962.

some qualifications, it may be said that articles of clerkship run the gamut from B to Y.

Service under articles is in substance the only way in which the prospective solicitor can acquire professional skills. Those skills mainly fall into the two categories set out above in relation to the Bar.¹⁴ With written work, what the student learns is limited only by his own intelligence and the skills of his principal and other members of the firm. With oral work, however, and particularly with advocacy (usually in county courts and magistrates' courts and at public inquiries) he labours under the same difficulties as the tyro at the Bar: he can watch and listen, but he gets no opportunity of practising under instruction. Advocacy, of course, is far less important for solicitors than for the Bar; probably the majority of solicitors do not practise as advocates. But most of them have had their ventures in advocacy, usually in their early years, and some have become highly skilled advocates with large practices in the courts.

Courses on legal skills for articled clerks

You can, of course, see what I am suggesting.^{14a} Is there not a place for practical courses which teach legal skills to articled clerks, on lines parallel to the "Post-Final Courses" run by the Council of Legal Education for the Bar? Could not such courses at least ensure a minimum standard of instruction for articled clerks who are unfortunate in their articles? Would not such courses help both articled clerks and their principals?

¹⁴ *Ante*, p. 101.

^{14a} As in (1961) 14 J.Leg.Ed. 33.

The articulated clerk so often does not know what to expect—indeed, what he is entitled to require—from his principal: he has no standards to go by. A course of legal skills would not only provide some standards, but should tend to raise standards where they need raising. Glimpses of the best usually speed the eviction of the inferior.

Training in such a course ought to make an articulated clerk more valuable to his principal, too. In an hour or so a skilled lecturer can teach a class the basic elements of drafting deeds and other formal documents; in life, the articulated clerk is too often left to a process of gradual realisation from many months of drafting work that common principles lie behind most of the myriads of single instances to be found in the twenty-volume *Encyclopaedia of Forms and Precedents*. In short, such courses could achieve much that is not well done at present, and much that is not done at all. Solicitors who are of the first rank in their profession may be ill-equipped by training and temperament to act as teachers, even if they can spare the time. In any case there are obvious advantages in one skilled lecturer or tutor teaching thirty or forty articulated clerks simultaneously instead of the work being done in widely differing styles by thirty or forty solicitors *seriatim*.

No doubt the difficulties are considerable. Thus geographically, in contrast with Bar pupils, articulated clerks are widely distributed. Yet The Law Society has triumphantly solved problems far greater than this. The real question is whether the experiment is worth trying. I have as little doubt about the answer as I have

about the ability of The Law Society to make the venture successful.

No substitute for articles

Once again, let me make it clear that I do not suggest these courses as an alternative to articles of clerkship. For real life there can be no substitute. Nor am I suggesting any further diversion of time spent under articles from practical to academic activities. What I do suggest is that, say, three months spent at one of these courses would teach 90 per cent. of the class much more about the techniques of practising as a solicitor than they would have learned by serving under articles for those three months; and those three months would make the subsequent period of service under articles more fruitful for articulated clerk and principal alike. This, of course, also poses one of the problems involved, namely, at what stage of articles the courses should be taken. The later this happens, the less value will the courses have during articles; yet take them too early, and the articulated clerk has too little knowledge of substantive law to make the courses really fruitful. But problems are made to be overcome.

DINING IN HALL

Let me turn to the dining in hall required of all Bar students. Broadly, for call to the Bar a student must dine thrice a term for twelve terms; until last month, six dinners a term were required of those who were not members of a university.

The ancient values

More than a century ago a student who was dining in Lincoln's Inn for the first time was asked by a brother student, after a long silence, "Pray, Sir, what is your opinion of the *scintilla juris*?"¹⁵ Each was to become Lord Chancellor, the questioned as Lord Campbell and the questioner as Lord St. Leonards; and it was the latter who was to procure the passing of the Act¹⁶ which abolished the doctrine of *scintilla juris*. Who can doubt that the conversation so auspiciously begun continued at this exalted level throughout the meal, or that all within earshot avidly joined in? Yet today, what of conversation at the students' table? Does the routine of dining in hall any longer serve any real purpose?

In theory and in other days there was much to commend the rule. Predominantly, any Bar students who were intending to practise were intending to do so at the English Bar. Numbers were relatively small, and there was some reality in the theory that in this way future adversaries would get to know each other and would pick up something of professional ideas and atmosphere. Dining in hall made some contribution to the concept of a corporate Bar.

The modern reality

Today, much has changed. Numbers have greatly increased. With over 600 a year being called to the Bar, the student population of each Inn is twice and

¹⁵ Campbell's *Lives of the Lord Chancellors*, 5th ed. 1868, Vol. 9, p. 142. For the esoteric doctrine itself, see Megarry & Wade's *Real Property*, 2nd ed. 1959, p. 199.

¹⁶ Law of Property Amendment Act, 1860, s. 7.

three times what it was. The students themselves have greatly changed. As recently as 1948 less than one-third of the students came from overseas. Today three-quarters of them are overseas students; and for many of them English is not their native tongue. An institution for a small number of mainly English students now does duty for a large number of mainly overseas students; and of course there are changes. Conversation at the students' tables tends towards the personal, the trivial and the political. How far have you got in your exams? Which lecturers are any good? What are the best exam books? And so on.

Is it to be wondered that what had some real values for one purpose now has little value for another? There are some institutions that work for the few and burst for the many. Today it is difficult to find any student who can see any value or utility in the ritual of dining in hall. The food, it is said, is poor or scanty or both, and the conversation does no more than pass the time; but the Inn requires it, and so one must go through the pointless ceremony.

Barristers at the students' tables

To their credit, in recent years the Inns have made some efforts. The obvious instrument of hope is the practising barrister; if he will dine at the students' table he can do much, by his presence and his conversation, to lift the dinner out of the trough towards the stars. He can lead the conversation away from the trivial and towards the professional. He may well be surprised at how little the students seem to know of the Bench and the Bar, of etiquette and professional life, and, indeed,

how little they seem to care; for them, the world is dominated by the towering heights of the examinations. Yet once curiosity is stimulated, once the rich complexities of the Bar and the courts are glimpsed, the barrister will find an avid audience and eager questioners; and often good discussions will begin or can be prompted. In such surroundings the practising barrister is highly catalytic.

The Inns have varied in activity. In recent years, one Inn has sought volunteers from the Bar to dine with the students on one night in each term; and there has been a fair response, with one barrister to every eight or ten students. Yet what is one night in a dining term of three weeks? Another Inn has arranged a roster which ensures much the same distribution of barristers on every night of the dining term; and this, of course, is of great value. Do odds of 20 to 1 really reflect the difference between the Inns? Is there nothing more that can be done?

Making the overseas student welcome

The last thing I would suggest is anything to discourage the overseas student. If one believes in the value of English law and the English legal system, then the overseas student must receive a true welcome, and not mere toleration or discouragement. Not only must he be made welcome, but such modifications ought to be made in the system as will permit both him and his English cousin to profit to the maximum extent from that system. This, indeed, is the inarticulate major

premise on which rests the Report of the strong committee under Lord Denning on Legal Education for Students from Africa.¹⁷

The task is not easy; but it is inescapable if education for the Bar is to be what it ought to be. The Bar Council (and, of course, members of the Bar) have done wonders in recent years in making arrangements which have enabled overseas students to enter chambers as pupils if they wish, and this is most valuable. One or two overseas pupils among ten or a dozen practising barristers will quickly perceive the standards and techniques of the English Bar; the indigenous are not swamped by the transient. Yet valuable though this is, it is not enough. Either some way must be found of restoring the value of dining in hall, or else the institution should be abolished and replaced by something that will do what it did a century ago. I have little doubt that the former alternative, though difficult, is not only possible but also much to be preferred.

¹⁷ Cmnd. 1255 (1961).

CHAPTER 4

THE COURTS

JUDICIAL APPOINTMENT

Politics

The system of appointment to judicial office in England is about as English as it could be: theoretically it is open to great abuse, but in practice it works extremely well. The Great Judicial Appointer is the Lord Chancellor; for it is he who selects all High Court judges and county court judges. Appointment to the Court of Appeal and House of Lords lies with the Prime Minister, who naturally may be expected at least to consult the Lord Chancellor.¹ As both the Lord Chancellor and the Prime Minister are political officers, might not the result be expected to be that appointments to the Bench would wear a strongly political flavour?

Time was when the answer would have been Yes. But this is 1962, and today few would answer anything but No. Examples of political opponents being appointed to high judicial office may be found in the nineteenth century, when many appointments were undoubtedly coloured by politics. But today a seat in Parliament is no longer the road to the Bench that it once was. *Per contra*, such a seat does not actually disqualify; and some hold that politics and the House of Commons broaden the outlook of the future judge. Nevertheless,

¹ See Sir George Coldstream (1959) 43 J.Am.Jud.Soc. 43.

it has been becoming increasingly rare for a person to be appointed to the Bench for parliamentary distinction rather than forensic ability, or as a reward for political services.

Even the great offices of the law such as the Lord Chief Justiceship seem to have risen above politics. In Ireland the complaint has been heard in recent years that none could hope for appointment to the Bench except the Attorney-General of the day; the Bench was closed to political opponents and non-political lawyers, however eminent. Such a cry would never be heard in England. Indeed, the record of each of the major political parties in judicial appointments since the 1939-45 war has by common consent been outstandingly good. The great majority of appointments have been non-political (in the sense that the person appointed has not been active in politics); and where a Member of Parliament has been appointed, as often as not (or so it seems) he has sat on the Opposition rather than the Government Benches. The Great Judicial Appointer has, in this sense, also become the Great Schizophrenic.

Corruption

As for judicial corruption, no breath of it has stirred for longer than any practitioner can remember. This may be taken in the widest sense. It extends not merely to simple bribery but also to the indirect approach by a friend of a litigant to the judge. Whatever the defeated litigant may suspect, any lawyer will tell him that it is unthinkable that the reason why he lost is that some friend of the winner told the judge beforehand that the winner was a decent chap and ought to win. Judges

are most scrupulous, too, about revealing to litigants any possible connection that they have with either party to an action, whether by holding some shares in a litigant company or by having in the past been lulled into unconsciousness by a litigant anaesthetist; and if either side objects, the case will be heard by another judge.

QUALIFICATION FOR APPOINTMENT

Academic lawyers

The rule that only practising barristers are appointed as judges is another safeguard for the litigant, though less obviously so. From time to time there have been suggestions that the Bench would be improved if it included some academic lawyers. Would not their knowledge and learning help to ensure a more consistent code of case law, a deeper appreciation of principle? Why should England deny herself the advantages that the United States has found in appointing an outstanding Professor of Law to the Supreme Court Bench? In theory and in the abstract, there is much to be said for this course: but examination in detail shows another picture.

Law and the facts

A fundamental distinction between academic law and the practice of the law is, paradoxically enough, shown by considering questions of fact. In a phrase, in academic law the facts are clear whereas the law is often uncertain; in the practice of the law, usually the facts are uncertain but the law is clear. A large part of the practice of the law lies in the handling and ascertaining

of the facts; for until the facts are established, there is nothing to which the law can be applied. For the practising barrister, much of his life in the law is life among the facts: he examines his witnesses-in-chief, he cross-examines his adversary's witnesses, and he tries to persuade the judge of the probability of his version of the facts and the implausibility of his adversary's case.

The academic lawyer escapes all this. For him, the facts are duly found by the judge; they are neatly and concisely stated to be the facts in an early part of the judgment. The great majority of decided cases, of course, never reach the law reports, for they involve no reportable point of law: the only question is, for example, which of two motor-cars, each stationary at the moment of impact, was the more blameworthy. These cases have given counsel and the judges engaged further practice in the handling of facts, but for the academic lawyer they do not exist.

Experience of advocacy

Each member of the Bar involved in the case has had further experience, too, of advocacy, both his own and his adversary's. When an experienced advocate becomes a judge, he has experienced so much advocacy that he has it in his bones to make suitable discounts, to detect and check any undesirable practices, and to come as close to the truth as is likely to be possible for any human tribunal. The admission in cross-examination that was obtained in reply to a loaded question, the answer that was begotten of confusion rather than confession, the moment of truth, all these he has learned to recognise and evaluate: of all these, and of a mass of

practical and procedural detail, the academic lawyer is innocent.

Appellate judges

An academic lawyer as a trial judge would thus be unthinkable. But what of the Court of Appeal or House of Lords? Would not one voice in three or one in five be capable of doing much good and little harm? This argument is more persuasive, yet not persuasive enough. The didactic life of a lecturer and author is far removed from the strife of debate and contention. The tempo of life is quite different. It is one thing for ideas and theories to evolve and be tested over the years in the study and the lecture-room, and another thing to judge competing theories in the hot-house of the court-room. True, judgments can be reserved, and some commend the practice. Mr. Justice Holmes had the answer: "If a man keeps a case six months it is supposed to be decided on 'great consideration.' It seems to me that intensity is the only thing. A day's impact is better than a month of dead pull."² A life at the Bar is a life of intensity, and that is no bad prelude to the Bench.

I have said nothing of quality. For myself, I would readily assume that the academic world housed intellects and characters fully equal to the demands of the Bench. For myself, I would be happy to see the experiment tried. But in the end I would not be unduly astonished if what seems to be the predominant view at the Bar were proved to be right. I would also harbour the suspicion that the academic mind, accustomed to contemplating

² *Holmes-Pollock Letters*, 1941, Vol. 1, p. 154.

the great verities of the law, might recoil from the great bulk of the humdrum work, devoid of academic interest and ranging over territory little honoured in the academic world, which forms the daily fare of even appellate courts. Daily practice in the courts strengthens and develops not only the innate qualities of intellect and character but also those of patience, temper and resilience which are so important in the practice of the law. The fire purifies those whom it does not destroy. And, some practitioners would say, it also smokes out any bees that there may be in the bonnet.

Nevertheless, a case might well be made for giving power to the Court of Appeal to sit with an assessor from the academic world, to assist the court in cases where an important point of law arises. Yet no sooner is this suggested than one realises that something of the same result is already informally achieved. Food is again the answer. The great case is being argued, the judges lunch in their Inns, they discuss the point in issue with some distinguished academic lawyer that they are likely to find there, and they have the benefit of his views. This, of course, falls far short of having an assessor in court who can follow and perhaps take part in the argument as it develops and grows; but it does do much to ensure that no important idea is overlooked. Nor is the academic pen idle; and in books and comments in legal periodicals most of the valuable fruits of the academic world (with some others) can be found. In the end, is there much wrong with things as they are?

Solicitors as judges

These difficulties do not arise with solicitors; for they live their professional lives among the facts. From time to time the cry is accordingly raised that they, like barristers, ought to be eligible for appointment to any judicial office. Is it not an unfair discrimination against solicitors that they can hope for no higher full-time appointments than those such as Chancery Masters, Taxing Masters, County Court Registrars and, since 1949,³ stipendiary magistrates? Are there not to be found among the 22,000 practising solicitors men as good as those to be found among the 2,000 practising barristers?

The answers, surely, are No and Yes, respectively: it is no unfair discrimination, even though there are many solicitors who doubtless are "as good as" many barristers. These questions miss the point. The real question is what sort of professional lives have they led? Success on the Bench depends not only on the quality of the man but also on the richness of his experiences in court. The barrister is essentially a creature of the courts, the solicitor a denizen of the office. True, there are some solicitors who do much advocacy: to them the magistrates' court and the county court rather than the office are their natural habitat. Why not appoint them? The answer is that their curial experiences are unduly circumscribed. In the appellate courts (except for some quarter sessions) they have no audience; if there is an appeal, counsel will have to be briefed, and so the solicitors of

³ Justices of the Peace Act, 1949, ss. 29 (1), 31 (1). For a list of appointments open to solicitors, see 36 Halsbury's *Laws of England*, 3rd ed. 1961, pp. 52-54.

necessity lack the experience of striving with the Bench in the superior courts. Should a man be appointed to the Bench of the High Court when he has never argued a case there? The question answers itself. Nor, indeed, are the giants of the solicitor's branch usually to be found practising as advocates in the lower courts.

The solicitor's right of audience

Yet is this not another example of prejudice and tradition? Why should not solicitors be entitled to appear as advocates in any court? This question goes to the root of the English system. Grant such a right of audience and the whole English system, as such, collapses. One man can practise as office lawyer and as advocate in any court; the profession is no longer divided. With the resulting fusion of the two branches into one would go the whole English system of specialisation of function; and that would be an intolerably heavy price to pay.

Whether a successful silk or High Court judge would be worse as an office lawyer than a successful solicitor would be as a silk or High Court judge is impossible to say; the mind boggles at each flight of fancy, and I will not attempt to equate the incommensurable. Catch the same man young enough, and he may become a success in either branch, depending on his talents, his inclinations and his opportunities. But let him not live his professional life as one and then yearn for the other. He would not want a dentist as his doctor, or his doctor as his dentist. The question is not one of the "senior branch" and the "lower branch" of the profession, nor of social standing, nor yet of qualities of character

and personality; it is a matter of training, of experience and of skills. Practice at the Bar does something to a man that the office and the library cannot do.

Career judges

An alternative system, to be found on the Continent, is that of career judges. Under such a system an early election must be made between practising law and becoming a judge; and there are regular ranks in the hierarchy through which the successful progress with the years, rising from magistrate to appellate judge. Would not such a system be valuable in England, with its emphasis on specialisation of function? After all, he who has been judging for twenty years ought to make a better judge than a mere beginner, appointed to the Bench after twenty-five years in practice.

Difficulties

There are serious difficulties. The English legal system has no convenient hierarchy of judicial office at hand. Posts suitable for junior officers in the Judicial Civil Service (as it might be called) could be created only by a drastic revision of, say, magistrates' courts; and the English public has become so accustomed to its judges looking mature that confidence in the new magistrate might be slow to grow. Furthermore, promotion within a unified system might well strike against (or be thought to strike against) true judicial independence; a junior magistrate who decided cases against the police or the government might find, or suspect, that his personal file at the Ministry would contain entries ensuring that his promotion would be retarded.

At present, magistrates, whether stipendiary or otherwise, have no hope or fear of accelerated or retarded promotion; for there is none. With a few exceptions, county court judges have not been promoted to the High Court. Masters, Registrars, and (with one exception) Official Referees similarly have not been promoted. Only in the higher judiciary is promotion regular and normal, and even then translation from the High Court to the Court of Appeal brings no increase of salary to compensate for the wide new range of work⁴ to be comprehended and done. There have been grumbles, too, that at times the judiciary is not sufficiently proof against being executive-minded; and the creation of a regular hierarchy of judicial offices with appropriate gradations of salary is not the best way to remedy this.

Yet again, there are the problems of selection. A man does not make a good judge just because he thinks he would like to be one; nor are there any known tests for determining judicial ability at an early age. Under the English system appointment to the Bench before the age of fifty is unusual, though not unknown; Lord Hodson and Lord Devlin were each forty-two when appointed to the High Court, not long before and not long after the last war respectively. By the age of fifty a man will have served a quarter of a century of practice at the Bar before many judges and against many adversaries; and by then his qualities of heart and head and spirit ought to have become both fixed and manifest. Life at the Bar does the winnowing, and the Bench should reap the benefit.

⁴ See the characteristically witty and illuminating paper by Asquith L.J. at (1950) 1 J.S.P.T.L.(N.S.) 350.

Irreversible mistakes

Nevertheless, is there not a contrast, to England's disadvantage, in the "once for all time" system of appointment? Instead of regular consideration for promotion, after trial and error, there is the single act of appointment; and if a mistake is made (and mistakes there have been⁵) it cannot be rectified. Does not the English system stake too much upon a single throw based on surmises of how the advocate will succeed in the quite different life of the Bench?

Experience

There is, indeed, much truth in this; yet the picture is not so stark as these words might suggest. At the common law Bar, most silks and many juniors with criminal practices are appointed as recorders or as chairmen or deputy chairmen of quarter sessions, and receive judicial experience in this way. Further, at the High Court level judicial strength at assizes is often supplemented by the appointment of a silk as a commissioner of assize for part or all of a circuit; and such experience often proves a prelude to appointment—or non-appointment—as a High Court judge. But it is true that there is no going back once a mistake has been made. He who was a silk yesterday is a High Court judge today; and however unsuitable he proves, in all probability he will remain a High Court judge until he voluntarily retires or reaches the age of seventy-five.⁶

⁵ See *post*, p. 129.

⁶ See Judicial Pensions Act, 1959, s. 2.

The Chancery Division

It is in the Chancery Division that appointments must be made with the least help; for there will be no recorderships or any of the other aids to judgment. Yet it is of the Chancery Division that the fewest complaints will be found. I, of course, would assert that this is due to Chancery lawyers being better than common lawyers—and no damned nonsense about “other things being equal.”⁷ If there are other explanations, I do not know them. But certainly it would be hard to collect more than one or two Chancery candidates for twentieth-century badges labelled “It was a mistake to appoint him; he lacked the judicial quality.” For that matter, so specialised and esoteric is the work in the Chancery Division that it is impossible to envisage a Chancery judge who had spent his formative years as a junior magistrate in a Judicial Civil Service; for both in method and in subject-matter there are almost no points of contact.

Merits in practice

In the end, one may well be doubtful of the merits, and convinced of the disadvantages, of altering the present English system of judicial appointment, so long as it is operated as well as it has been in recent years; for that is the crux of the matter. Theoretically, appointment to judicial office may seem to be an undemocratic leap in the dark; in practice, the leap is made with assurance, the darkness is at most twilight, and the appointment is in the best interests of the public.

⁷ I have adapted Lord Birkenhead's dictum about Gray's Inn.

Failures

There have, of course, been failures. In 1944, Lord Justice MacKinnon wrote that Mr. Justice J. C. Lawrance was "a stupid man, a very ill-equipped lawyer, and a bad judge. He was not the worst judge I have appeared before: that distinction I would assign to Mr. Justice Ridley. Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach."⁸ In 1958, Cyril Harvey, q.c., wrote: "In my time at the Bar there have been some dreadfully bad judges. None was worse than Lord Hewart C.J. Here was a man marvellously quick-witted, with a superb command of the English language, with a vast knowledge of public affairs and with a flair for advocacy which had brought him to the front rank in law and politics. He lacked only the one quality which should distinguish a judge: that of being judicial. He remained the perpetual advocate. The opening of a case had only to last for five minutes before one could feel—and sometimes actually see—which side he had taken; thereafter the other side had no chance. . . . Another real shocker was Mr. Justice Darling. He would lie back in his chair staring at the ceiling with the back of his head cupped in his hands paying scant attention to any argument but waiting until some footling little joke occurred to his mind. When this happened he would make the joke, the court would echo for about thirty seconds with sycophantic laughter, and then the process would start over again."⁹

⁸ (1944) 60 L.Q.R. 324.

⁹ C. P. Harvey, *The Advocate's Devil*, 1958, pp. 32, 33.

JUDICIAL QUALITIES

That, of course, brings me to the subject of judicial qualities. What is it that a litigant expects of a judge? A sufficient knowledge of law he takes for granted. To counsel, of course, much may turn on whether the judge is essentially a good lawyer or whether he is primarily a man of character with merely a sufficiency of law. But the litigant, I think, is concerned far less with questions such as this than with the way in which the judge behaves while his case is being heard; and what happens in previous cases in progress while the litigant is in court is usually regarded as a portent of things to come.

Quickness of apprehension

One of the qualities most highly regarded by the litigant is that of understanding, of quickness on the uptake, of ability to grasp the facts and see the point without it having to be explained to him several times. This, of course, is only part of the picture; quickness of apprehension by the judge must be matched by clarity of exposition in the advocate. The question, in short, is one of the efficacy and accuracy of communication.

Few things I know of reduce litigants closer to impotent fury than a patent misapprehension of the facts by the judge. If counsel gets something wrong, the litigant can see that it is put right: a word with his solicitor, a scribbled note from the solicitor to counsel, a glance by counsel, and all will be well. But about judicial misapprehension the litigant can do nothing himself; it must be done by counsel. It matters little

to the litigant that the fact misunderstood, or not understood at all, is in reality of little or no relevance. The litigant often has little appreciation of what facts are or are not really relevant, apart from the great central facts of the case. Often in the litigant's mind there seems to be some feeling that to demonstrate the obloquy of his opponent on another occasion is to demonstrate the infamy of his cause on this. The maxim which begins "Give a dog a bad name" seems to run deep in human nature as truth and not irony; and the litigant often seems puzzled and disgusted by the perverse and wilful refusal of the law to give effect to it.

Whether for this reason, or some other, failures of this kind seem to cloud the whole of a litigant's appreciation of the judicial process. After the seemingly interminable process of preparing for trial, the taking of proofs of evidence from the witnesses, the conferences with counsel, and waiting and waiting, surely there has been time enough, and money too, to get the facts right. Are not the courts the dwelling-places of the verities? Above all, if the judge gets this point wrong, how do I know that he has not gone wrong also on other—and perhaps more important—points? Questions of this kind loom large in many a litigant's consciousness, especially if he has been defeated.

Relevance

In a sense he is both right and wrong. The courts ought to get all the facts right. There is, of course, a right of appeal, and if need be a new trial can be ordered. But these truths do not alter the fact that a trial is usually a final process, not to be repeated: and

finality ought to be recognisably final and free from error.

Nevertheless, the litigant with these views overlooks much. Any lawyer, and any layman on reflection, will classify facts into facts of identification or explanation and facts of relevance. Names, places, documents, events and many other matters have to be given in evidence and referred in judgments so that the case may be intelligible and so that it may be known by all precisely what matter is being dealt with. In most cases, none of them matter. Change all the names and places, alter all the dates (though not their sequence), replace one event by another, and the legal issues would usually remain entirely unaltered. All these are facts of identification or explanation—narrative facts—and to a lawyer a mistake in any of these is of very little consequence. Any that survive into the formal order of the court will have to be put right in drafting that order; but that is all.

Lawyers, it has often been said,¹⁰ are experts in relevance. Their attention and their efforts are concentrated so fiercely on the facts which really are relevant that often there is some impatience with other facts. What to the layman appears as a sign of inattention is in fact usually a sign of concentration: in his anxiety to reach the facts that really matter the judge may be giving less than his full attention to the dull but necessary recital of the other facts. I am not saying that judicial mistakes as to irrelevant facts are to be commended; a judgment that misnamed the parties, transposed the witnesses and

¹⁰ See, *e.g.*, *per* Frankfurter J. (1948) 34 A.B.A.J. 656 at 747.

misdated all the documents would, by so gross a collocation, at least arouse the suspicion that all was not well on the Bench. Nor, of course, am I speaking of those deplorable rarities, cases in which a reserved judgment in a divorce case, *Jones v. Jones*, is based on the facts found to have existed in another case, *Smith v. Smith*, heard on the same day; for here the error is error as to relevant facts. But I am saying that mistakes of fact which fall short of these categories ought not to affect the litigant's mind; yet they do.

Vocabulary

Sometimes the difficulty is merely one of vocabulary. "Last week the landlord rose my rent" will puzzle few. But "He came just as I was having dinner" must be understood according to the speaker; a supplementary question referring to the early evening may well baffle a witness to whom "dinner" is at noon. "It's not that I minded him going," says the deserted wife, "but he took the home with him." The lawyer must not look bewildered but must understand—and must make explicit—that to this wife "the home" means the furniture that goes to the making of a home, and not the bricks and mortar (or, for that matter, the caravan) that house it. A highly respectable middle-aged woman may seek a divorce on the grounds of what appears to be no more than an innocent flirtation of her husband, and repeated questions may fail to elicit any other "misbehaviour" or "misconduct" by her husband; yet a chance question at the end of a long interview may bring out an occasion when her husband was "fooling around," and, on examination, this occasion may emerge

as one of astonishing and ingenious depravity. Some words in the English language, too, offer powerful emotional barriers to communication. But Bench, Bar and solicitors alike all become skilled in detecting and uncovering such traps; and they rarely lead to more than a momentary hesitation.

Effective communication

Words, then, are not the trouble: but what of the rest? What is the overall picture? How far does the English legal profession meet the demands upon it for skill in communication? The question is one for all lawyers, for the Bench cannot apprehend speedily and correctly if the Bar does not inform clearly and accurately; and the Bar cannot play its part unless the solicitors give plain and precise instructions. From time to time there are, of course, unhappy exceptions. But the general answer must, I think, be that the litigant gets an exceptionally good service. Again and again litigants may be heard to speak with glowing admiration of the way in which their case has been put by counsel, and in particular of the clarity with which their contentions have been expressed; and this says much for the joint efforts of solicitors and the Bar. Quickness on the uptake and scrupulous accuracy as to the facts are badges that nearly all lawyers may wear with pride.

Of course, there are differences in degree. Speed on the uptake is not so necessary for solicitors as it is for the Bench or Bar, though by experience and training it will nearly always be higher than the average existing in most other callings of life, and it will almost inevitably be supported by exceptional thoroughness as to the

facts. There are times when the Bench is not seen to advantage: a judge nearing his retiring age, at the end of a long day near the end of a long term, may be faced with complicated facts in an unfamiliar field of law, and may try the patience both of counsel and of all others in court. But it must be remembered how high the standards are. Judges may get confused,¹¹ but they are living in regions of complexity, and they are judged by the professionally lucid.

In the sphere of communication, then, the litigant has little to fear. There may be some temporary failures, though these are usually quickly put right; only very occasionally is there anything more serious. The English practice of the judge delivering an oral judgment with a full explanation of his reasoning is at the heart of the matter. Such a judgment will nearly always not only give the defeated litigant the reasons for acceding to the arguments advanced by the other side but also explain why the arguments to the contrary could not prevail. In the statement of these latter arguments the judge will, in effect, be demonstrating to the defeated litigant that he really understood and appreciated what his case was. It is difficult to over-estimate the importance of this. To be condemned without being understood is as bad as to be condemned unheard. A sense of injustice may well flourish if a litigant thinks or suspects that the judge has not really understood his case. It is very hard for it to exist at all if the judge has demonstrated that this is not so.

¹¹ See, *e.g.*, the example given in C. P. Harvey's *The Advocate's Devil*, 1958, pp. 36, 37.

Exclusion of the extraneous

A second quality in a judge that litigants hope for is the exclusion of the extraneous. This arises in various forms, but mainly in the form of the litigant's hope that he will not be unnecessarily held up to public criticism or ridicule, and that he will emerge from the case with his dignity impaired as little as possible. I do not suggest that litigants often express themselves thus, for I am generalising from the fear of appearing foolish, the fear of doing something wrong, the fear of the unkind word spoken in public. Sometimes the litigant says that he hopes that the judge will not make jokes; sometimes there is a fear of unkind comment on some side issue, such as the existence of unwedded bliss enjoyed by a couple occupying a rent-restricted house; sometimes there is the fear of "being made a fool of" in the witness-box.

On this score it is difficult to give an unqualified answer. In general, judges are careful to say no more in their judgments than is necessary for the decision of the case. In general, judges restrain themselves from making comments during the course of a hearing that are hurtful but unnecessary. But some say that there are too many exceptions to the rule. Some of these exceptions are debatable: is it very wrong that a judge should castigate immorality where he finds it?

No General Eyre

As always, I leave criminal cases on one side. In civil litigation, one of the parties concerned has brought the dispute to the court for determination. It is that

dispute, and that alone, which the judge must determine. Go back some seven centuries, and you will find judges sent out all over the country under Commissions of General Eyre, to uncover whatever wrongdoing or mismanagement there may have been. Today the judge's function is far more closely circumscribed. Is there not much to be said for the view that judicial self-restraint ought to prevail, and that, so far as humanly possible, the judge ought to say nothing more than is necessary for his decision either during the hearing or in his judgment? One of the parties to the proceedings, or one of the witnesses, may have behaved stupidly or greedily or immorally or revengefully: the judge certainly is not called upon to express approval, but equally ought he not to refrain from any condemnation unless that is necessary to his decision? Litigants ought not to be compelled to risk their reputation in order to enforce their rights; and *a fortiori* as to their witnesses.

Not long ago, a High Court judge began to take a strong line about a case while the plaintiffs' counsel was opening it; he frequently interrupted counsel's speech, with comments critical either of the plaintiff or of counsel. When the plaintiff came to the Book to be sworn before giving evidence, he said: "I am an atheist," whereupon the judge commented: "And no morals either"; and the plaintiff was affirmed instead of being sworn. This comment by the judge formed part of the grounds upon which a new trial was sought. In delivering the judgment of the Court of Appeal, Lord Justice Denning said: "We are a Christian country. The denial of God is no commendation in a witness;

but it is not to be taken against him. Believer and unbeliever are each alike entitled to justice in our courts. If the thought flashed through the judge's mind, 'and no morals either,' he ought to have put it aside as unworthy and not to have given voice to it. Once it had been spoken, no one could regard the trial as fair, at any rate not after what had taken place before. Likewise with the other interventions. Whatever the provocation, the atmosphere at the trial was so stormy that it was impossible for the judge to bring to the case the calm and unprejudiced outlook which is the essential foundation of a sound judgment. The court has no alternative but to order a new trial."¹²

Wounding irrelevancies

I say nothing at this point of a topic which in some respects is closely allied, namely, that of decisions being reached on moral rather than legal grounds, nor yet on judicial comments being made on moral questions which necessarily arise as part of the case itself. Each of these matters is dealt with elsewhere.¹³ Here I am concerned with incidental comments which do not affect the result of the case yet which may be deeply wounding. Perhaps it has emerged that someone connected with the case has changed his name or nationality or both; perhaps he has been bankrupt, or a patient in a mental hospital. These facts may have no possible bearing on the result of the case, and yet the judge may more than

¹² *Bunting v. Thorne R. D. C.* [1957] *The Times*, March 26.

I have changed the *oratio obliqua* of the report into *oratio recta*.

See also *Jones v. National Coal Board* [1957] 2 Q.B. 55.

¹³ See *post*, pp. 149, 150; 151 *et seq.*

once refer slightly to them. To the judge these remarks may be of little moment, to be forgotten soon after the case is over; yet the litigant or his witness has been seared.

Judicial humour

Judicial humour is—or may be—closely allied. There is humour and humour. One type produces a laugh at someone's expense; and if the someone is a litigant or a witness, the evil is closely allied to the moral comments that I have just been discussing. It ought to be unthinkable that a person in the position of power of a judge should make one of the laymen before him a butt for his humour; and today this very rarely occurs. Counsel are another matter: within limits (in which I include Mr. White-Wig) they can stand up for themselves.

Quite apart from humour of a personal nature, there is the humour of the situation. To this, none could object. For example, earlier this year, in a case about whether certain decorative repairs had been carried out to a sufficiently high standard, counsel for the tenant asked one of his witnesses what a representative of the landlord had said when the witness had told him that he proposed to have the decorations carried out by a particular firm of decorators. The point of the question was to elicit the expected answer that the landlord's representative had expressed his satisfaction with the high standing of the firm of decorators. Before the question could be answered, counsel for the landlord had objected to it on various grounds, and a spirited argument followed. Finally, it was ruled that the

evidence was admissible, and on the tenant's counsel triumphantly repeating the question, the witness answered: "He didn't say anything." This substantial repetition in fact of a similar barren victory in fiction¹⁴ naturally amused all concerned, including the judge, who said to the tenant's counsel: "There's your answer, Mr. Blank."

Yet even though none can very well object to such innocent merriment, nor to the wit or verbal dexterity that often enlivens an otherwise tedious case ("The court," said Erle C.J., "is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity"¹⁵), there is much truth in the saying that Englishmen like their law dull. To the anxious litigant the whole thing is serious. With the final result of the case still in doubt, and with the prospect of perhaps having to pay for every minute of the hearing, and much more besides, how can judge and counsel be so insensitive as to fritter away valuable time in idle jesting? How can so serious a matter as this action be a fit subject for humour? Are judge and counsel who amuse themselves in this way to be trusted to treat the case with the earnestness that it deserves? Counsel, indeed, may be recognised as having little choice, for he must humour the judge; and so ultimately it is the judge who is judged.

It is not easy to generalise on this subject, for wit and humour among judges vary greatly. "Humour"

¹⁴ See *Forensic Fables* (Complete Edition, 1961), p. 341 ("The Erudite Judge and the Question of Doubtful Admissibility").

¹⁵ See my *Miscellany-at-Law*, 1955, p. 48.

of the type so often displayed by Mr. Justice Darling¹⁶ is now fortunately almost dead; so often it was cheap, or contrived, or both. Tastes change, and today few enjoy such joking. Wit and verbal felicity, which are, of course, very much another matter, continue to flourish in varying degrees; and some of the examples are so esoteric and referential, and are conducted with such straight faces, that even the sternest of litigants can hardly detect that anything is amiss. On the whole, apart from a few unhappy outcroppings, there is probably very little that litigants can justly complain of today on this score. Proceedings are nearly always conducted with a dignity and decorum that could give offence to none save the hypersensitive.

Talkativeness

One of the most easy of judicial vices is that of talkativeness. In one divorce case—and maybe in others—Mr. Justice Wallington put to the witnesses many more questions than all the counsel in the case together. In the classic words of Lord Greene M.R.: “A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict.”¹⁷ Asked to estimate the length of a case, many a junior has been

¹⁶ See *ante*, p. 129.

¹⁷ *Yuill v. Yuill* [1945] P. 15 at 20.

tempted to say: "Two days; but four before Mr. Justice Blank."

Silence

Silence, however, can be nearly as bad as talkativeness, or worse. Counsel is left without any indication of what to press and develop, of when he is pushing at an open door, and on what he must confess and avoid. He may sit down and find that the judgment turns on a point that he thought too clear for argument, or on an imperfect appreciation of one of his main contentions which he would have developed more fully if he had not feared to seem to be belabouring it. It is often far from easy for the advocate, zealous that each of his points should be appreciated in its full beauty, to do this and yet sustain interest. Without help from the Bench it is often impossible. Let the judge but say at a suitable point of rest: "As I see it, your argument, Mr. X, is that . . .," and counsel will know the best, or worst; the argument, for what it is worth, is home, or else it is not, and it must be put again in different language.

The balance is nice: too much stifles, too little baffles. The general opinion at the Bar seems to be that, with few exceptions, that balance is achieved. The High Court Bench and Court of Appeal today exhibit few of the vices that I have mentioned; we are fortunate and grateful. There are few complaints from the client that the judge was partisan, or stupid, or facetious. Certainly there is no place in England at present for the celebrated denunciation that the future Lord Kennedy unleashed in 1896 against the Second Division of the Court of

Session, a court of four judges which broadly corresponds to a division of the Court of Appeal in England. The first two counts in the indictment were:

“1. That by a system of constant interruption from and conversation upon the Bench, the arguments of counsel are torn to tatters; that it is frequently thereby rendered impossible to state an argument with intelligence or connection, and sometimes counsel who have a strong case are hunted to earth without any opportunity of stating it.

“2. That as the judges will not listen with patience to statements which do not at the very outset make clear the nature of the dispute, or to the reading of any considerable portion of the evidence, they form hasty impressions, which dominate them throughout the hearing, and prevent their giving attention to arguments or evidence which tend in a contrary direction.”¹⁸

In giving particulars of the complaints, the author wrote: “The most experienced practitioner cannot form any confident opinion as to how the Second Division will decide any case whatever. He cannot predict what argument they will listen to, or whether they will listen at all. . . . How can counsel perform their duty if argument is turned into dialogue in which they play the part of targets or occasional interlocutors? If counsel is stating the facts, the court are instantly curious to put legal conundrums; if he is citing precedents, nothing will serve them but the exact age of the most unimportant witness. One often sees an unfortunate counsel trying to face four questions at once, all

¹⁸ (1896) 8 Jur.Rev. 269; and see Lord Macmillan, *A Man of Law's Tale*, 1952, p. 46.

on different points, like the early Christian exposed in the arena to fight simultaneously with an elephant, a tiger, a leopard, and a bear. But even when the Division has 'amiable intervals,' a counsel is often reduced to the dilemma of either leaving important points unstated and leading cases uncited, or of drawing down thunder and lightning on his devoted head."¹⁹ The article ended by stating that "it is written in *The Mirror of Justice*, a work of didactic excellence but doubtful accuracy, that Alfred, 'England's darling,' in one year hanged forty-four judges for having vexed the people by unrighteous decisions."²⁰ That method was effective, if barbaric; and some of us, in our more indignant moments, are inclined to cry, 'Oh, for one hour of Alfred!'"²¹

Perhaps we are not the men our ancestors or our Scottish cousins were; but most lawyers would, I think, ascribe it to judicial excellence rather than softness of living that there has been no such outcry in recent years in England. The suggestion has, indeed, been made, though not very seriously, that the Bar should have the privilege of from time to time electing a judge for appointment to a position of great eminence and no power; and enough candidates have been proposed to make such an election a contested one. There was also once a proposal, again not very serious, that three judges who were not silent (one in each Division of the High Court) should be banded together to form a mixed

¹⁹ 8 Jur.Rev. at p. 273.

²⁰ See *The Mirror of Justices*, Book 5, Chap. 1, para. 108; 7 S.S. p. 166; but cf. p. xxvi.

²¹ (1896) 8 Jur.Rev. 277.

Divisional Court which could "hear" one case a term, with counsel occasionally looking in to see whether there was any opportunity to speak.

The Bench, indeed, has not shown itself to be unconscious of this failing. In 1927 Lord Justice Scrutton wryly observed of a court consisting of Lord Hanworth M.R., himself, and Mr. Justice Romer, that "the court, with occasional assistance from counsel, took more than a day in discussing the case."²² A year or two later in Australia, Mr. Justice Starke began a judgment by saying: "This is an appeal from the Chief Justice, which was argued by this court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties. The evidence was taken and the matter argued before the Chief Justice in two days. This case involves two questions, of no transcendent importance, which are capable of brief statement, and could have been exhaustively argued by the learned counsel in a few hours."²³ It is unlikely that the Bar would dissent.

The fact that the subject is one for gentle jesting, albeit a trifle rueful, shows, I think, that the mischief is not great. If for two decades judicial appointment had been subject to renewal every five years on a vote of the Bar, few would suggest that there would have been gaps to be filled. If the Bar is strong enough and the appellate courts sufficiently percipient and vigorous, the mischief ought to be kept within bounds. It is, after all, a small price to pay for a truly independent judiciary.

²² *Elliott v. Duchess Mill, Ltd.* [1927] 1 K.B. 182 at 201.

²³ *Federal Commissioner of Taxation v. S. Hoffnung & Co., Ltd.* (1928) 42 C.L.R. 39 at 62.

Every judicial appointment is a leap in the dark, and the wonder is that we do not more often fall into a crevasse. As Lord Coleridge C.J. wrote in 1891, "It is one of the curious things about our profession that you can never tell what sort of a judge a man will be. One of the very worst judges I ever recollect was Crompton, yet, I am sure, if it had gone by election the profession would have elected him when he was made; and Blackburn, of whom no one thought anything, made, with some grave defects, one of the very best judges of my time."²⁴ It is no different today.

The judicial quality

In the layman's eyes, a judge is almost by definition a profound lawyer. Like so many lay views of the law, this is far from universally true. None save good lawyers can hope to sit in the Court of Appeal or in the Chancery Division. But elsewhere, though an extensive knowledge of law may be no handicap, it certainly is not an essential. In crime, law plays a smaller part; the question is nearly always "Did he do it?" with the meaning of "it" taken for granted by all. For the most part the knowledge of evidence and procedure that comes from a lifetime of practice suffices for crime.

What is needed is the indefinable judicial quality. Is the man big enough, sure enough, balanced and broad enough? Has he zeal without passion, tolerance without laxity, and an infinity of patience? Will he sit in the middle of his chair, neither poised nervously on the

²⁴ E. H. Coleridge, *Life and Correspondence of John Duke Lord Coleridge*, 1904, Vol. 2, p. 370.

front of the seat nor reclining carelessly at the back? Let me quote Italian words. "A judge does not need superior intelligence. It is enough that he be possessed of an average intellect so that he can understand *quod omnes intellegunt*. He must, however, be a man of superior moral attainments in order to be able to forgive the lawyer for being more intelligent than he."²⁵ Perhaps the words "average intellect" go a little too far; but subject to this, it is in England much as in Italy.

Social contacts

Doubtless the judicial Bench, as well as the Benches of the Inns, are excellent incubators of the judicial quality; but of course an incubator avails only the fertile egg. The appointments of recent years are no small triumph in judicial selection. There is, however, an especial difficulty for those appointed to judicial offices not based on London. Judges of county courts and other courts outside London are denied the undeniable benefit of regular social contacts on equal terms with their brethren and the Bar; and isolation or seclusion are enemies of the best judicial qualities.

Every High Court judge is a Bencher of his Inn, and the majority regularly lunch in their Inn. There they mingle on terms of relative equality with their superiors in the Court of Appeal, and with those silks and senior juniors who are Benchers. A junior sitting behind a silk in a case before Mr. Justice A may sit next to the judge at lunch and call him by his Christian name. Needless to say, this association is not abused. Indeed,

²⁵ Calamandrei, *Eulogy of Judges*, 1942, p. 28.

it is most valuable. "Men who make their way to the Bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."²⁶ Weaknesses such as these flourish the less when the observers or victims may be one's lunch-time companions or may be seen talking (about what?) to one's colleagues at the other end of the table. Communal food is at the heart of good justice—or do I mistake the organ?

Judges outside London

Judges of county courts and other courts outside London miss nearly all this. The convention seems to have grown up that a county court judge is not elected a Bencher of his Inn even though his seniority would otherwise carry him there. A few become Benchers before they are appointed county court judges, and they of course remain Benchers. But most county court judges are appointed when they are only a few years in silk, or are senior juniors though not senior enough to be Benchers. Except in Gray's Inn, where promotion is more rapid, few silks become Benchers until they have been six years or more in silk, and few juniors are elected before they have been well over twenty-five years at the Bar.

This relative isolation of provincial judges is at least in some part geographical and inescapable. A judge whose circuit is in Northumberland or Cornwall could not hope to play his full share in life on the Bench of his Inn. A few of the London county court judges lunch

²⁶ *Sacher v. United States*, 343 U.S. 1 at 12 (1952), *per* Jackson J.

in their Inns from time to time, often when they have been sitting as Divorce Commissioners at the Law Courts; and they are most welcome. But most of them escape even the gentle comments and decorous questions of their fellows and juniors that show the way that the winds of opinion are blowing. Occasional dinners with local law societies and with the circuit are doubtless pleasant, but any impact must be small. It cannot be merely a coincidence that it is mainly from outside London that most of the anxieties for the cause of justice have come. Few—very few—on the Bench are involved; the pity is that there are any. I am not alone in believing that there would be even less to complain of if in some way provincial judges were less insulated from professional opinion.

THE MORAL FORCE OF THE JUDGE

I turn to one feature of the law as administered by the courts which is little known by the public and little understood by the student; yet it is of vital importance. I can only call it the moral force of the judge.

Let me take a simple illustration, drawn from life, though with some variation of the facts. Shortly after the war a professional man bought a leasehold house. That is, he paid some £4,000 for the grant of a ninety-nine years' lease at a rent of £50 a year. The rent was just under two-thirds of the rateable value of the house, so that the Rent Acts did not apply to it; or so it was mistakenly believed by all concerned. After a year or so the purchaser discovered that the rateable value was

a few pounds less than he had believed. This transformed the situation at law. The Rent Acts applied, and so the £4,000 was an illegal premium which the purchaser was in law entitled to recover from the vendors. The vendors offered to reduce the rent by five pounds or so and so make all as it had been believed to be, with a small advantage to the purchaser; but instead the purchaser demanded the return of the £4,000, and ultimately issued a writ for it.

With two qualifications, the law seemed clear: the plaintiff must win. The first qualification was the possibility of the defendants having the transaction rectified so as to make it accord with the common intention of the parties. This possibility existed, and involved arguments of law that would have made a pretty examination question. The second qualification was the moral force of the judge. Would he permit the plaintiff to keep his lease for ninety-nine years at a rent of £50 a year and yet recover his £4,000? It early became plain what choice lay before the plaintiff. He would probably succeed if he insisted on the case proceeding to its bitter end; but a bitter end it would be. The rectification point might well make the case into a reported case; and there would be the judge's views of the plaintiff, for all posterity to read. Before the case had gone a day, the plaintiff had accepted advice that previously he had rejected, and had taken the proffered reductions in rent and an indemnity against costs as the price of discontinuing his action.

The rules of law must inevitably be generalisations. In the great majority of cases the fair application of these rules produces justice. In the inevitable minority

they will produce injustice, or a disproportionate penalty for a venial error. In this minority of cases, the judge will sometimes use his high office and moral authority to drive the unworthy from the judgment seat. One of the most unhappy roles that counsel may have to play is to assert a claim sound in law but ethically deplorable in the face of the moral indignation of the judge. Clients may be advised, but only some accept the advice; and the others, like all citizens, are entitled to their rights according to law, whatever counsel may think of them. With such clients it is counsel's duty to be courteous, though there is no obligation to show enthusiasm. Indeed, if in the example I have just given the client had not been a professional man, it may be that the case would have been fought to a finish, and the law reports enriched by a further authority on the law of rectification.

Within such limits, the moral force of the judge is wholly for the good; one would not have it otherwise. The litigant will be given his legal rights, but he will have to pay for them. The only fault is that the lower the ethical standards of the litigant, or the less vulnerable to public opinion his occupation, the more frail is the judge's influence.

DECISIONS BASED ON THE MERITS

Perhaps it is this which has led, particularly in recent years, to what has been a striking application of the moral force of the judge; and there are some who would regard this as a misapplication. In bald terms, it lies in yielding to the temptation to decide a case on the

“merits,” and to fit the law to those merits. Among lawyers, “merits” in this context is a word that is well understood but ill-defined. Broadly, the merits of a case are said to lie with the party who is the more morally deserving, not only in regard to the facts of the case itself but also generally.

The range is immense. For example, sometimes sympathy is the mainspring; an impoverished widow with young children is suing a wealthy and impersonal company. Sometimes the balance of social values is all one way; the tenant of a house, with nowhere else to go, is being evicted by a landlord who has no real need for the possession that he is legally entitled to. Sometimes the approach is “there but for the grace of”; the plaintiff has acted rashly and on human impulses whereas the defendant has been correct but ungenerous. Sometimes there is a smell of sharp practice; one party has deliberately taken advantage of one of the many technicalities of the law, and a rule made to protect the many has been used to entrap the individual. In all cases, the “merits” mean elements that would not be mentioned if the problem before the court were to be set out with the chaste brevity of an examination question. The merits tend to be human and individual, the law intellectual and general.

Let me give an illustration. One day several years ago a member of the Bar heard accounts of two decisions of different divisions of the Court of Appeal. In the first he had been puzzled by several aspects of the law appearing in the report. The explanation, it seems, was that the activities of one party were an elaborate but barely provable fraud. It was right that he should be

frustrated in his purpose, and the law laid down did just that. In the second case a friend of his at the Bar had just been defeated; and out of court one of the judges, meeting him, had said: "Ah, it was those letters, you know"; and this referred to some ill-advised correspondence of the client.

I do not know whether the second case was ever reported; but the first was. Not a word about the suspected fraud appeared in the judgment in that case, and little was said about the letters in the second case. The true *ratio decidendi* in each case thus lies hid, and each judgment is something of a concealed trap.

Dangers

None would deny that virtue ought to triumph over vice, or that the courts are no bad places for this to happen. But is there not something to be said for the triumph being open instead of covert? Ought the law on an undecided point to depend on how the merits happen to lie in the first case that raises it? What if in the abstract the better rule seems to be in favour of the plaintiff, but in the first case to raise the point the plaintiff be devoid of merit and the defendant the soul of reasonableness and patience? A court that follows the merits and lays the law down in favour of the defendant may a year later be faced with the same point, but this time with an innocent and guileless plaintiff and a defendant as black as sin. The earlier decision is binding, so that there is no escape save by the "discovery" of some fine "distinction" between the cases; and behind this distinction in law will lie, perhaps concealed, a moral rather than a legal judgment. Is it not

the true path of the judge to free the law from the shackles of individual events and seek the rule that, on equal merits, will be the most just?

When I speak of merits, I am not, of course, speaking of those merits which properly enter into the *res gestae*, as it were. If the plaintiff by fraud entrapped the defendant into signing the contract, or if with unclean hands he seeks to enforce his equitable rights, his moral guilt is parcel of the law. By law the fraud will vitiate the contract, in equity the unclean hands will bar him from relief. What I have in mind particularly is the ungenerous attitude, the insistence on the letter of the law, the attempts at "cleverness," evinced after the cause of action has arisen, and so in most cases legally irrelevant. I have also in mind past history in previous transactions between the parties. Perhaps in a more perfect world some doctrine of justice could be founded on matters such as these; but here below they only divert and confuse. And they lead to mischief.

Difficulties

I say this because counsel, well knowing the powerful effect that the "merits" may have, must at the trial strain to drag in as many as he can to aid him both before the judge, and later, if need be, on appeal; and apart from this lengthening the proceedings and perhaps adding to the costs, the English legal system is not equipped for a general trial on merits. The trial judge may have some chance of getting at some of the truth as to the general merits, especially if the parties give evidence before him; but on appeal it is a different matter. The Court of Appeal has before it at most the

still life of the transcript of evidence, and such of the merits as have filtered through the system. A complete hearing of competing merits it cannot be. If neighbour sues neighbour, and the plaintiff has written some very unneighbourly letters, it may be that the defendant's deplorable conduct on nine previous occasions on other matters has at last stung the plaintiff out of his mild and courteous self; or it may be that this is the plaintiff's tenth wanton attack on the peace-loving and reasonable defendant; or it may be six of one and half a dozen of the other.

Perfect justice would demand an inquisition into the whole life and behaviour of each party that would leave each crippled financially and the court exhausted. Perfect law would rigorously exclude all save the subject-matter of the suit. What tends to happen in practice is that the side with most of the merits manages to smuggle some of them past the other side, and that the party who was incautious enough to commit himself in writing is most smuggled against, via the inevitable bundle of correspondence. A good bundle of correspondence may be worth half a dozen witnesses; and by a "good bundle of correspondence" I mean a bundle that shows your client exhibiting the patience of Job and the reasonableness of an archangel, and reveals the other side as descended from Cain.

Moral arbitrations

Perhaps the picture is overdrawn; but few would deny that the tendency is there. If the parties want a moral arbitration, they can, I suppose, have one. Indeed, within the last decade one of the Church Commissioners

actually sat as a moral arbitrator to determine on ethical principles, and not according to law, whether an ecclesiastical body was entitled to retain a profit that it had fortuitously made. Counsel on each side were understandably a little puzzled to know what authorities to cite; and I do not suggest that such a jurisdiction is often invoked. But at least let a decision which in substance is based on the "merits," or is materially influenced by them, be based on all the merits and not merely the haphazard selection which have survived a judicial process not ordained for such an investigation. If, as is usual, this is not practicable, let the law to be laid down be mass-produced for the millions and not hand-tailored to the incomplete moral shapes of the individual litigants. The danger of yearning after the merits in a court of law is that what emerges tends to be neither true law nor true justice; and the Greeks were not alone in having a word for this.

A SENSE OF INJUSTICE

Apart from the law and the merits, there is the conduct of the hearing. This, of course, is of great importance to what in many ways is the most important duty of any court, namely, to prevent the parties to any litigation from departing with any justifiable sense of injustice. The crank and the fanatic can never be satisfied; but with most ordinary litigants in England there seems to be a remarkable attitude of philosophical acceptance of an adverse decision if only they feel that they have had a full and fair hearing. They are disappointed at losing;

but if they feel that their case has been fully and effectively put and that they have had a fair and receptive hearing, they will often accept the result more philosophically than counsel. Indeed, for a defeated client to console his disconsolate counsel is no mere figure of fiction.

One likes to think that in the great majority of cases in the English courts defeated litigants have such a feeling of acceptance; and broadly it seems to be so. But there are two judicial vices, still occasionally exhibited, which do more harm to the law as seen by the layman than perhaps is generally realised by lawyers. These may briefly be labelled as the Short Cut and the Judicial Assertion. Let us look at them in turn.

THE SHORT CUT

The Short Cut may conveniently be illustrated by a hypothetical example derived, with variations, from an actual case. A business man was a tenant of property under a lease which gave him an option to renew on certain conditions. He duly sent the landlord's agents a letter exercising the option, as he thought. When the time came, the landlord refused to renew the lease; and ultimately the tenant sued the landlord for specific performance of the agreement constituted by the option and his exercise of it. The landlord's defence was threefold:

- (1) Even if the letter had been sent, the agents had never received it.

(2) In any case, even if the agents had received the letter they were mere rent collectors and had no authority to deal with renewals of the lease.

(3) Even if the letter had been received by duly authorised agents, it was a mere inquiry about renewal and was not worded so as to exercise the option.

The tenant was duly advised by counsel on his prospects of success under each of these heads. As the judge later held, the letter was quite hopeless as an effective exercise of the option; it inquired but did not exercise. A decision to this effect would dispose of the whole case, and the temptation to the judge to take this short cut must have been great. The question was purely one of construing the document; if the decision went against the tenant, none of the evidence on the other two issues need be heard at all, for it could not matter whether the useless bit of paper had been received, or what was the ambit of the recipient's authority.

In fact, the judge resisted temptation. He patiently heard the whole case through, found in the tenant's favour on the first two points but against him on the third, and accordingly dismissed his claim. Probably the evidence and argument on the first two points added two or three hours to the hearing; but it was time well spent. The tenant came into court with a burning sense of grievance on the first two points. It was bad enough to be told by counsel that the letter was ineffective and that there was virtually no chance of obtaining a renewal; but it was past endurance for it to be said that the letter had never been posted, or if it had, that it

had never arrived. And it was utter nonsense to say that the agents, who in the fullest sense had been managing the property for many years, were no more than rent collectors. The tenant, it will be seen, was a man of strong feelings; but men of strong feelings are as much entitled to justice as those who are more equable, and they probably need it more. In the upshot, the result of the judge's conduct of the case was that the tenant accepted that justice had been done.

Judicial time

This was a case where the temptation to take a short cut was resisted. It is not so always. The heavier the lists, the greater the pressure on judicial time, the stronger the temptation. Remove the pressure, and even fewer judges would yield. In the end, almost the whole of the answer lies in having enough judges, and in ceasing to treat every available minute of judicial time as if it were spun of gold.

From the litigant's point of view, a judicial short cut is often extremely wasteful. The litigant has assembled the whole apparatus of litigation; counsel, solicitors and witnesses are all there, and the chance of having the point decided will never occur again. With all this initial expenditure of time and money, why begrudge the extra hour or two needed to wipe the slate clean? Would not a refusal to do so be as wasteful as the refusal of travellers to make a detour of a few miles to see some splendid view or beautiful cathedral when they have journeyed thousands of miles to the country and are unlikely ever to return? Is it not worth an extra hour or two to prevent a litigant harbouring a grievance

against law and lawyers for the rest of his life? There must, of course, be limits; and there are times when attempts to drag in side issues are beyond reason. But when in doubt, include.

THE JUDICIAL ASSERTION

Let me turn to the Judicial Assertion. This is less definable. Broadly, the vice is the use of words by the judge during the argument in such a way as to lead the litigant to feel that his cause is lost before he has been fully heard. Once this has happened, the litigant is very slow to believe that from that point onwards he is getting a fair hearing. The difficulty is that on this point lawyers and laymen talk a different language, in more ways than one; for the problem is merely linguistic.

Nobody would suggest that the judge should be precluded from testing the strength of an argument by putting questions to counsel; but let them be questions and not assertions. The type of statement that does the damage is: "Mr. Smith, you won't persuade me that . . ." It may be that this particular point would not be fatal to the case of Mr. Smith's client, and lies only on the edge of the issue; but Mr. Smith's client may all too readily at this stage assume that the judge is "set against him." Let the judge rephrase his comment, and say: "Mr. Smith, are there not difficulties in contending that . . . ?" and the effect is quite different. Even the greenest of litigants observes how the judge questions counsel on each side, and tests their arguments; but questioning is one thing, assertion another.

True, the point in one sense is small; it is but a matter of phrasing, and sometimes only a question of the tone of voice. Did the litigants not observe the question-mark implied in each and every assertion? Surprisingly often the answer would be No. It matters so much to the litigant that it should be made plain and clear beyond a peradventure that the judicial mind stayed open until all argument had ended.

INSULARITY

It is an old complaint that the English are insular, and an even older complaint that lawyers are conservative. Do these complaints run as to the Bench? One particular aspect of this matter is of especial importance, and that is the attitude to decisions of the other courts in the Commonwealth, and particularly those of Australia, Canada, Ireland, New Zealand, Northern Ireland and Scotland (the order, you will observe, is strictly alphabetical); and similarly as to the U.S.A. In these countries there are courts of high repute deciding points of law which on many matters are common to all. In Scotland, the link is mainly that of statute law, whereas in the others the common law is the great bond.

The attitude of English judges to the citation of relevant decisions from such jurisdictions varies in high degree. Some judges seem indifferent to them; others attempt to brush them aside or distinguish them; and yet others welcome them warmly. It is pleasant to record that it is this last attitude which seems to be in

the ascendant.²⁷ Nevertheless, such decisions are still not cited by counsel as often as they should be; and this is at least in part due to the failure of so many of the current English practitioners' textbooks to refer to them, either at all, or at least at all adequately.

Surely this is very much to be regretted. It cannot be right to allow an English judge to decide a point of law one way in ignorance of the fact that, say, the High Court of Australia or the Supreme Court of Canada has recently decided just the opposite. What, for example, will the defeated litigant think when a year or two later some article in a legal periodical points this out? Put at the lowest, such decisions at the very least crystallise the point of law involved, and give a point of departure. Australian and New Zealand decisions in particular are usually mines of information, in the sense that quite apart from the process of reasoning displayed in the judgment, the report is likely to have collected together references to all the English and other common law authorities bearing on the point. To English counsel, the industry of his brethren at the various Australian and New Zealand Bars is indeed a matter of awe. If a brash generalisation is permissible, it could be said that English judgments tend to be stronger on principle and reasoning than they are exhaustive of the authorities, whereas Commonwealth judgments devote more

²⁷ See, e.g., *Scruttons, Ltd. v. Midland Silicones, Ltd.* [1962] 2 W.L.R. 186 (Australia and the U.S.A.); *R. v. Patents Appeal Tribunal, ex p. Swift & Co.* [1962] 2 W.L.R. 897 (Australia and New Zealand); *Abbott v. Philbin* [1960] Ch. 27; [1961] A.C. 352 (where the Court of Appeal doubted but followed a Scottish decision, and the House of Lords preferred the doubts to the decision).

space to the authorities. On this footing, what could be more admirable than a marriage of the two?

The remedy must be a combined operation. It is difficult for the Bar to cite what is not to be found in the books, and pointless to do so if it will be ill-received by the Bench. Let authors and editors be more industrious, let the Bar be more comprehensive, and let the Bench be more uniformly receptive: all three contributions must be made.

Sabbatical years

Divided responsibility so often means that what all ought to do none in fact does. Could an initial impulse in the right direction be given by means of a judicial sabbatical year? As a modest beginning, could not each member of the Court of Appeal be given leave of absence for every seventh or tenth year, with encouragement (both financial and social) to spend at least a substantial part of that time in other Commonwealth jurisdictions and in the United States of America? No doubt such an arrangement could be stigmatised as a busman's holiday; but lawyers are incorrigible busmen.

Of the welcome that the sabbatical judges would receive no lawyers who have visited these countries could for an instant doubt. Nor could there be any question of the value that the inevitable links of personal friendship would have. But the real value of such visits would lie in the freshening of approach and arousing of interest that would result. Indeed, such a sabbatical year might be at its most valuable if it came when the judge had sat in the Court of Appeal for three years or so—long enough to become seised of the work and also, after

probably many years as a trial judge, more than long enough to have earned the relief. The presence of such judges in the Court of Appeal would, almost of necessity, affect the outlook of trial judges on such matters; for if in the Court of Appeal it became a matter of course for the citation of Commonwealth decisions to be welcomed, judges at first instance would surely be slow to discourage it. In any case, quite apart from any question of citing authorities, ten years or more on the Bench deserves a sabbatical year in its own right; and success with the Court of Appeal would probably justify extending the practice to all on the Bench.

It is true that in recent years English judges have been making more frequent trips abroad to legal conferences and conventions than they did, say, thirty or fifty years ago. But it is one thing to make a short trip, probably during the Long Vacation, deliver a few set speeches, make many brief social contacts, and return; it is very much another thing to go and live in a country for several weeks or months at a time, to take part in its daily round, and, above all, to get the feel of its legal and professional life. It is also true that sabbatical years would cost something. To sabbaticise the Court of Appeal (if the word does not exist it ought to) might require the appointment of one or two supernumerary Lords Justices of Appeal, at a cost to the Treasury (gross) of £8,000 a year each. But would not the nation receive value for money?

Availability of law reports

Let me make one further requisition on the Treasury. Is it not astonishing that if in the Law Courts counsel

cites (say) an Australian or Canadian decision, the judge will in all probability not have any copy of the report before him? The Law Courts have an adequate official library of all the English law reports for use by the judges; but there seem to be few, if any, of the Commonwealth reports in this library. Even more remarkable is the fact that, at any rate a few years ago, the official library of the Judicial Committee of the Privy Council, though adequately provided with Commonwealth reports, lacked any complete set of Scottish reports.

These deficiencies have at least two disadvantages. First, the impact made by a decision is always far greater if judge and counsel can each read a copy when the case is cited. The combination of counsel's voice with the printed word (which can be underlined), and the ability of the judge to see at a glance that the passages which counsel omits are not relevant, together enhance the judge's appreciation of the case. For counsel to have his borrowed copy of the report handed to the judge after he has read from it is not the same. Secondly, any individual research by the judge is hampered. Perhaps the case cited refers to another Commonwealth case. If that case is in the official library in the Law Courts, the judge can easily refer to it; if not, then there is the inconvenience of having to find which Inn of Court has the report, and borrowing it: and inconvenience is often a powerful deterrent to action.

Is it, then, too much to ask that these deficiencies should be met? To do so might cost £10,000, or even more: but after all I speak of the Supreme Court of

Judicature. Ought a court with its world-wide reputation to be open to this possible reproach? Surely this is a question that needs no answer.

THE BENCH: A SUMMARY

You will observe that I am beginning to turn from the judges themselves to the system within which they operate. In this, as in many things, it is scarcely possible (and certainly not profitable) to attempt to maintain watertight compartments. Yet before I go further, let me attempt a brief summary.

I believe the consensus of professional opinion to rank the English Supreme Court Bench as high as tradition would put it; and that is very high. By common consent the standard of the county court Bench has risen in a striking way over the last thirty years or so. There are well-authenticated stories of some occupants of the county court Bench in the 1920s that seem scarcely credible today; and the removal of the great pressure of work on individual judges has carried with it some of the less satisfactory progeny of zeal out of pressure of time. Favouritism among counsel, sometimes complained of in Victorian days, seems nearly as dead as the dodo; and antipathy towards a particular barrister is almost in like case. True, Erle C.J. once said: "It is easy for a judge to be impartial between plaintiff and defendant, indeed, he is almost always so; it is difficult to be impartial between counsel and counsel."²⁸ But today most judges seem to surmount this difficulty.

²⁸ N. W. Senior, *Conversations with Distinguished Persons During the Second Empire*, 1880, Vol. 1, p. 321.

When counsel and solicitor can assure the client that he will get a fair hearing by a patient, courteous and able judge, and feel little apprehension that their prophecy may be falsified in the event, there cannot be much to complain of. Any traces of prejudice whether racial, religious, social or otherwise, are now of great rarity; and when they appear, they are not taken for granted but are the subject of publicity and criticism. In particular, coloured litigants often fear that they will not be treated fairly; yet it is very rare for their fears to survive the actual hearing. England has good cause for pride in its judicial Bench.

COMPREHENSIVE ORALITY

From the Bench I must turn to the courts and the legal process. One of the most striking features of proceedings in an English court, whether original or appellate, is its comprehensive orality.²⁹ The whole of the case, from beginning to end, is conducted by word of mouth. The judge or judges do not come into court and announce that counsel can take certain documents in the case as read, and continue from that point. There are no pauses while Bench and Bar silently read the written word; a copy of the document is handed to the judge, and counsel reads out the relevant passages. If a case is cited, counsel gives the name and reference of the case, the usher hands the judge a copy of the report (a list of reports to be cited will have been given to the usher before the case begins) and counsel reads out all

²⁹ See C. J. Hamson (1950) 10 C.L.J. 417.

that he relies upon. An affidavit does not become evidence before counsel has read it to the court. When judgment is given, it is given by the judge's spoken word, and not by handing down a typewritten or printed document. From beginning to end, the intelligent listener can follow everything. Proceedings are public in the fullest sense of that word.

Certainty of judicial apprehension

Yet what is the advantage of this to the defeated litigant? Does he not suffer the public discussion of his private affairs without any countervailing advantage? The answer, I think, is that he has two very great advantages. First, he has the reasonable certitude that the judge really has heard and applied his mind to all that is relevant to his case. It is one thing to set out an argument or a statement of facts in a typewritten document, and be told that the judge has read it; it is another to observe the judge, and to see and hear his reactions, while that argument or those facts are orally set before him. Justice is not only done: it is seen in the doing. A judge may indeed conscientiously read a document in solitude, missing no word throughout: but has he fully appreciated the force of this argument or the significance of that fact? He may well have done this: yet from the litigant's point of view, he has not been seen to do it. Deep and perhaps quite unjustified suspicions may be harboured.

The orality of the English judicial process does all that human skill can do to make these suspicions impossible. True, counsel may be so devious, or the judge so lacking in percipience, that the point may not

be taken. No process can escape the human element. But within the bounds of reason and of the frailty of man, no defeated litigant should leave an English court with the feeling that the judge has failed to appreciate his case. This view is reinforced by the fact that under the common law system the judgment is no mere formal document, but a reasoned speech, often of considerable length, explaining just what are the facts, the issues, the rival contentions and the reasons for the result.

Certainty as to the adversary's case

The second advantage of comprehensive orality is in a sense complementary. It is that of knowing that no argument or statement of facts advanced by the adversary has had a greater effect than it has been seen to have. The litigant will be as anxious to see that his adversary's case has not been over-valued as he is to see that his own case has not been under-valued. Given a reasonably responsive judge and not a block of stone, the litigant and his counsel can perceive which counter-thrusts were hits and which were not. Above all, the litigant knows that all is there. He has seen and heard everything that has been put before the judge and on which his decision will be based.

Petitions

For the great majority of cases these propositions are true: and for most English lawyers they are part of the essence of English justice. But especially in recent years there have been some qualifications to these propositions. First, it has for some while been common on the hearing of petitions for leave to appeal (as distinct from

actual appeals) to the House of Lords or to the Judicial Committee of the Privy Council for counsel to be informed at the outset that their lordships have read the documents in the case, and to be asked whether there is anything that they wish to add.

This, of course, effects a very considerable saving of judicial time. Yet sometimes the effect on counsel (and at times on the litigants) is somewhat unhappy. Their lordships, thinks counsel, have read the papers, and must have come to some sort of conclusion, however tentative; how far shall I be pushing at an open door, and boring their lordships with my arguments, and how far will I be straining against a door already tentatively closed? They have read all the documents, yet do they really appreciate the importance of, say, the second ground of decision in the court below? And so on. The problems of technique are akin to those of trying to tell a long but funny story to an audience which has announced that it has already heard some, if not all, of it, but politely inquires whether you wish to make sure that they have seen the point.

The Court of Appeal

Secondly, the Court of Appeal has recently, as an experimental step, announced that on the hearing of appeals the members of the court will previously have read the pleadings and formal documents and the judgment under appeal.³⁰ This presents similar difficulties. Counsel for the appellant does not know how far the court is provisionally with or against him, and on what

³⁰ See [1962] 1 W.L.R. 395.

points, and, above all, how far these provisional views are based on a correct appreciation of the facts or the relevant law. If a storyteller writes on a blank sheet, he can see that all is told, fully and comprehensibly, and that misunderstandings are removed as they arise; if he seeks to write on a sheet on which there is already concealed writing, he does not know how much of the new writing must be corrective, how much expository and how much sheer repetition. True, exchanges between Bench and Bar do much to remove the difficulties; any misunderstandings in the end stand revealed; and ultimately all is well. But to the onlooker the difference between this sort of referential argument, often unintelligible to anyone not in possession of the documents in question, and the ordinary case in which every relevant word is spoken, must be striking.

Uncited authorities

Thirdly, there are judgments which refer to arguments or authorities which were never put before the court in argument. A good law report, almost by definition, refers to every authority that has been put before the court; and it has long been a commonplace for reports to contain a list of authorities which were cited in argument but were not referred to in the judgment. Understandably, not all that counsel thought to be of possible relevance has appealed to the judge as being truly in point. However, in recent years reports of cases have occasionally carried a second list of authorities, namely, of those referred to in a judgment but not cited in argument.

The objection, so far as counsel and the litigants are concerned, is that a decision has been made, or views have been expressed, upon the basis of authorities which were never put to counsel. Given the opportunity of comment, he might object that there were valid reasons for distinguishing the cases, or that some of them had been adversely commented upon in other cases, or that some statute deprived them of force, or that they bore upon a point never taken by the other side. Yet from the judge's point of view it must indeed be disturbing, especially on an appeal to the House of Lords, to find that counsel had failed to cite cases apparently in point. Future generations might well wonder whether the decision would have been the same had those cases been referred to; and so to resolve the doubt, let them be mentioned.

Difficulties

The problem is the familiar one of a choice of evils. Doubtless the counsel of perfection is to notify counsel of the uncited cases and restore the case for further argument, if need be, on those cases. If the cases indeed bear on the essence of the decision, then this, indeed, seems to be the only really satisfactory course to adopt. The expense and delays of doing this would in themselves be an evil, though sometimes, no doubt, counsel on each side would agree to rest on their existing arguments with, perhaps, a brief written comment on the cases in question.

If, on the other hand, the cases are only marginal in their bearing, then it may be best to omit any reference to them from the judgment, or at all events to make it

explicit that, although no argument on them had been heard, they could not affect the result of the case in any way. Such a *caveat* would remove the sting. Much of the strength of the common law has lain in it having foundations which consist of law laid down in actual cases decided after hearing arguments on each side, rather than it being based on the writings of authors, however eminent, whose views have in the main been evolved from the abstract and the unargued. The same must apply to the dicta of judges, as has been consciously recognised in many a judgment referring with great caution to points unargued.³¹

Professional opinion has been critical of all three of these qualifications to the principle of comprehensive orality. The inroads are not great; the principle remains predominant: but let the existing qualifications be narrowly watched, and all new incursions critically tested. In a sense, many of the objections may be dismissed as merely constituting problems of technique for counsel. Yet that misses the point: difficulties for counsel may result in a less effective presentation of the case that in turn produces a justifiably disgruntled defeated litigant. Short cuts often save time: but is time worth saving in nine cases if in the tenth the short cut leads to a bog?

PROCEDURAL FLEXIBILITY

A further point worthy of consideration is that of achieving a greater flexibility in procedural matters. Let me give an example. The ordinary course of a civil

³¹ See generally *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379.

trial is that the plaintiff's counsel makes his opening speech, and outlines not only the facts he hopes to prove by his evidence but also the law that supports his case. After this, he calls his evidence, and then the defendant's counsel calls his evidence and makes his speech, dealing with the law and facts of the case. Plaintiff's counsel then has a final speech, and judgment is given.

Sometimes it happens that when the defendant has heard the plaintiff's opening speech he realises that the law and the facts are more strongly against him than he had realised, and that he would be well advised to seek a settlement; and the plaintiff, aware of some of the frailties in his own evidence, may well agree to the settlement. But as the present English procedure stands, there is no corresponding possibility of achieving a settlement on the unrevealed strength of the defendant's case until late in the proceedings, perhaps after evidence has been given for days, and the bill of costs is becoming formidable; for it is not for the defendant to speak until the plaintiff's case has closed. Furthermore, if the case is of any public importance or notoriety, the public hears the whole of the plaintiff's side of the case before it has any inkling of the defendant's; and often recollections of reading the coherent tale of villainy in the plaintiff's opening speech outlive the defendant's conclusive answer, given many days later.

Is there not, then, some advantage to be found in permitting, or encouraging, the defendant to make, in addition, an opening speech immediately after the plaintiff's opening speech, and before any evidence has been heard? Such a procedure might pave the way to settlements, give the public a more balanced picture of

the case, and define and narrow the issues, to the advantage of all concerned. True, the formal pleadings in the action ought to have defined the issues; but often many a point that has been pleaded has to be abandoned before or at the trial, and the real issues in the case are frequently not only narrower but also more detailed than are suggested by the pleadings.

Such a procedure obtains, I believe, in at least some jurisdictions in the United States. I have met it but once in England, where a county court judge suggested it, counsel agreed, and after the defendant's opening speech had been made, the case was by consent adjourned *sine die* for a settlement to be worked out. Hidden strengths in the defendant's evidence, revealed at an early stage, thus reduced a probable three-day case to half a day, to the ultimate satisfaction of all concerned.

This is but a single instance; but change is in the air, and today a spirit is abroad which shows lawyers as being more ready to make innovations, whether tentative or firm, than were their grandfathers. The Final Report of the Committee on Supreme Court Practice and Procedure ("the Evershed Report") appeared in 1953,³² with many recommendations in its 380 pages. Since then, there have been reciprocal visits between English and American appellate judges and others in order to study appellate procedure in England and the United States of America³³; and experimental changes have followed in England.³⁴ Such changes may succeed

³² Cmd. 8878.

³³ See Delmar Karlen (1962) 78 L.Q.R. 371.

³⁴ See [1962] 1 W.L.R. 395; *ante*, p. 170.

or they may fail; but at least there is the willingness to try.

COURT FURNITURE

This brings me to a rather different type of change. Recent increases in the number of judges have made inescapable the building of much-needed additional court-rooms at the Law Courts; and outside London a number of new courts have been erected in the last thirty years. Has not the time come for something better to be provided for counsel in the way of court furniture?

Line Astern

At present the standard arrangement at the Law Courts is *Line Astern*: the leader sits in the front row, his junior behind him, and behind the junior (or more often in front of the leader) sits the solicitor, perhaps with his client. If the solicitor sits in front of the leader, he has a table of reasonable dimensions on which to put his papers; but with this exception, the only space provided for all the books and papers that must be in court is a desk in front of each seat, not much over a foot in depth and (until recently) gently sloping towards the seat.

The slope, of course, meant that the smoother books or documents from time to time fell to the floor. The inadequate depth makes an ordnance survey map or architect's plans a nuisance not only to counsel but also to all within reach. Adequate space laterally is no compensation for hopelessly inadequate space fore and aft. The management of bulky books and papers in a

confined space is one of the techniques of practice at the Bar. For if it is not learned, and some document cannot at once be found, or books crash to the floor, counsel may well become flustered, or seem to be so. Whether in fact he consequently fails to do himself justice, or whether his client merely imagines that this is so, the mischief is there: the client, with reason, thinks that his cause has suffered.

Within the last few years most, if not all, of the desks at the Law Courts have been made flat; and for this the Bar is grateful. In any new or refitted courts no doubt the same course will be followed. Doubling the depth of the desks sounds equally easy: but if this were done, it would become correspondingly awkward for the leader to have a word with his junior, or for either to consult the solicitor, while the case was in progress.

The American model

Would it be beyond the bounds of possibility for this part of the court furniture to be based on the American model, made so familiar to us by film and television, of a large table for each side? True, there would no longer be a front row for leaders and a second row for juniors: but leaders and juniors have long been inured to sitting side by side in county courts, before the Lands Tribunal or Official Referees, often at Assizes, and before the House of Lords.³⁵ Moreover, the Lands Tribunal and the Official Referees have long provided

³⁵ Save for the rare occasions on which a case is heard in the House itself instead of in a Committee room: in the House there is a cramped line astern.

tables of generous dimensions. No doubt token front rows and second rows could be provided for ceremonial occasions and for the many short and often formal applications that have to be made to the court. But for the serious business of trying an action or hearing an appeal, the case for the table seems to be unanswerable. So, too, is the plea for less vertiginous public galleries.

As an aside, I may perhaps add a word of gratitude for the rubber padding that has quite recently found its way on to most, if not all, of the seats in counsel's rows at the Law Courts. In my junior days another of the techniques of the Bar was learning how to endure a plain wooden seat for two daily sessions of nearly two and a half hours each. Nature has not endowed all counsel equally in this respect, and although the years brought their ischial callosities, psychologically if not physiologically, prevention is better than endurance.

CHAPTER 5

COSTS

I HAVE left until the end the important subject of costs. This is large and complex, and I cannot attempt a comprehensive survey. The complaints of litigants fall under two heads. First, the costs are too large, and secondly, the English system works unfairly.

THE AMOUNT OF COSTS

Lawyers' earnings

As to quantum, the complaints are basically twofold. First, lawyers are paid too much; secondly, legal proceedings are too complex. In essence, the answer to the first point is simple: if lawyers are in fact over-paid, why is the profession not swamped with new entrants, all eager to graze the lush pastures? The facts are simple enough. Earlier this year, the appointments bureau of The Law Society had "about ten vacancies for each solicitor looking for a job. . . . The profession has failed to expand fast enough. In 1912 there were almost 17,000 solicitors in England and Wales with practising certificates; today, half a century later, the number has increased by only 3,000. But in this time the solicitor's importance has increased out of all recognition;"¹ and the population has increased by well over 25 per cent.

¹ *The Times*, May 3, 1962, p. 15.

The Bar

As for the Bar, the picture is complicated by the numbers of those seeking call to the Bar with the object of practising not in England but overseas, and of those who do not intend to practise at all. Whereas the great majority of those admitted as solicitors intend to practise as such in England, the Bar not only lacks any corresponding picture but also displays many changes with the years. During the legal year 1947-48, 481 were called to the English Bar, and of these 33 per cent. were domiciled outside the United Kingdom. By 1954-55, the total was 601, and of these 52 per cent. had an overseas domicile. In 1959-60, the total had risen to 682, with nearly 72 per cent. domiciled abroad. With overseas calls leaping from 159 in 1947-48 to 490 in 1959-60, and United Kingdom calls dropping from 322 in 1947-48 to 192 in 1959-60, it is not surprising to find a small but persistent decrease in the numbers practising at the English Bar.

With some fluctuation, over the period 1954-59 the picture has been fairly constant. On an average 113 have left the Bar each year as against ninety-eight who have started in practice. Of those who have left, just over half had been called less than ten years; broadly, they were those who, having tried to practise at the Bar, had found brighter prospects elsewhere. The other half were those of over ten years' standing at the Bar. Many of these were no doubt counsel who retired by reason of age; but some were probably those in their thirties or forties who had taken longer than others to become convinced that the Bar was not for them, or who

had received some unexpectedly good offer of other employment.

Not until 1960-61 was there any change in these trends. In that year there was a slight reduction in the predominance of the overseas domicile. This fell from a little under 72 per cent. to 68 per cent., with the numbers of those of United Kingdom domicile called to the Bar rising from 192 to 217. For the first time for some years, more started to practise at the Bar than left it: the number in practice rose by sixteen (from 1919 to 1935).² Again, during the legal years 1954 to 1959 (*i.e.*, beginning on October 1 in each year) the number starting in practice each year steadily decreased from 114 in 1954 to eighty-five in 1959; not until 1960 was there a leap to 108,³ and by then recent increases in the number of judges were emphasising the shortage of counsel.

For new entrants to either branch of the legal profession, probably no time within living memory has been more propitious than the present. Even at the Bar, where "waiting to get a start" is traditional, there is now often difficulty in finding a sufficiently under-employed member of the Bar to do any of the less-well-paid incidental work in connection with the editing of law books and the delivery of lectures which used to be the staple fare of those that waited. Rich though the upper meadows of silk may be, neither they nor the greater prospects of present employment are proving strong enough to lure the young away from other

² See *Annual Statement of the General Council of the Bar*, 1961, p. 47; and see *ante*, p. 97.

³ *Annual Statements of the General Council of the Bar*, 1960, p. 44; 1961, p. 47.

careers. Indeed, the standard of earnings in early years at the Bar is such that commerce and industry have come to regard the Bar as one of the best sources of relatively cheap but skilled recruits. In these matters standards are comparative rather than absolute, and with the freedom of choice which post-war educational arrangements provide, the ultimate test of the adequacy of professional remuneration must largely lie in that profession's power to attract.

Silk

As for the large earnings of fashionable silks, taxation progressively makes the higher slices of income little more than paper figures. There are no expense accounts or entertainment allowances for the Bar, nor any of the benefits in kind or in amenities which commerce can provide for its employees. All that the barrister enjoys must be paid for out of his taxed income. A jump in income from £15,000 to £30,000 a year sounds magnificent but means little. In such regions high fees are mainly a means of preventing the burdened becoming hopelessly overburdened, though of course the clerks concerned also see an additional advantage. In any case, this is the stratosphere of the Bar, and few move in it. Newspaper gossip columns vary from a generous rounding up of reality to wild flights of fiction. Much of the money is paid not by private individuals out of their private purses, but by companies for which such payments are a proper revenue expense; they mind little whether they pay the money to the tax gatherer direct or via counsel, and it makes little difference to counsel.

The broad picture

In the end, the broad picture seems to be that, judged by the standards of other occupations today, a few lawyers are overpaid, though it does them little good. The majority are paid adequately, or a little more; and quite a number are under-paid. In this last category I would include not only members of the Bar who are slow in making a real start but also many skilled solicitors of much experience who, because of the districts in which they practise, or by reason of the conditions under which they work, do not receive an income commensurate with their value to the community.

Statistics

This general impression is supported by the detailed figures. Oddly enough, the best modern survey of net earnings in the law is to be found in the Report of the Royal Commission on Doctors' and Dentists' Remuneration,⁴ published in 1960.⁵ The figures are in general those for 1955, and no doubt adjustments must be made for changes since then. Nevertheless, the survey probably remains substantially valid today. Let me give you some extracts from these figures, rearranged so as to bring out the salient points for my present purposes. By way of comparison with barristers and solicitors, we may take medicine (divided into general practitioners and consultants), dentists ("general dental practitioners") and accountants.

Four positions in the scale of earnings are given in each case. Mr. (or Dr.) Lower Quartile stands a quarter

⁴ Cmnd. 939 (1960).

⁵ See pp. 30-40.

of the way up the scale of earnings, with 25 per cent. of his brethren earning less than him and 75 per cent. more. Median is half way up the scale, and Upper Quartile is only a quarter from the top. Finally, there is the very successful Highest Decile, whose earnings are more than those of 90 per cent. of his brethren, and less than those of only 10 per cent.

Lower Quartile does much worse at the Bar than anywhere else. Arranged according to age groups, and in order of overall earnings, the figures are as follows:

LOWER QUARTILE

Age group	Overall (30-65)	30-34	35-39	40-44	45-54	55-64
	£	£	£	£	£	£
1. Consultant	2,560	1,890	2,190	2,710	2,890	3,000
2. G.P.	1,620	1,250	1,650	1,780	1,900	1,600
3. Dentist	1,530	1,740	1,850	1,940	1,750	950
4. Solicitor	1,210	870	1,090	1,380	1,610	1,850
5. Accountant	1,020	790	910	1,180	1,300	1,230
6. Barrister	720	400	790	1,300	1,160	680

You will notice that the barrister is at the bottom of the table, and that after the shallow peak at age 40-44 his earnings droop sadly, whereas the solicitor climbs from strength to strength. This illustrates the extent to which a barrister's practice is personal, whereas the solicitor has the security given by a senior position in a partnership. Both absolutely and relatively the not-very-successful barrister has little to congratulate himself on.

Now let me turn to Median. Here barristers have moved up one place in the table, and the droop in

earnings is both ten years later in time and substantially less severe in amount.

MEDIAN

Age group	Overall (30-65)	30-34	35-39	40-44	45-54	55-64
	£	£	£	£	£	£
1. Consultant	3,130	2,100	2,460	3,110	3,440	3,600
2. Dentist	2,190	2,270	2,500	2,540	2,300	1,600
3. G.P.	2,160	1,710	2,120	2,260	2,460	2,180
4. Solicitor	1,850	1,120	1,390	1,980	2,290	2,770
5. Barrister	1,620	780	1,310	2,300	2,340	1,990
6. Accountant	1,490	980	1,250	1,580	1,950	1,900

For Upper Quartile, the solicitor remains in fourth place, and continues, in even more striking form, the increase of income with the years. The barrister moves up to second place, and although there is a marked droop after he is fifty-four, a substantial income remains.

UPPER QUARTILE

Age group	Overall (30-65)	30-34	35-39	40-44	45-54	55-64
	£	£	£	£	£	£
1. Consultant	3,820	2,290	2,820	3,670	4,290	4,740
2. Barrister	3,130	1,450	2,630	4,720	4,940	3,310
3. Dentist	2,940	3,040	3,330	3,320	3,110	2,310
4. Solicitor	2,870	1,620	2,130	2,760	3,560	4,310
5. G.P.	2,700	2,160	2,610	2,730	2,960	2,730
6. Accountant	2,280	1,240	1,750	2,120	3,000	2,860

Finally, there is Highest Decile. Here the barrister moves to the top of the table, though unfortunately there seems to be no information as to his earnings by age

groups. The solicitor moves up a place, and maintains his steady increase of earnings with age.

HIGHEST DECILE

Age group	Overall (30-65)	30-34	35-39	40-44	45-54	55-64
	£	£	£	£	£	£
1. Barrister	5,800	-	-	-	-	-
2. Consultant	5,010	2,590	3,460	4,500	5,350	5,880
3. Solicitor	4,340	2,400	3,040	3,600	5,060	5,560
4. Dentist	3,960	3,870	4,430	4,410	4,380	3,050
5. Accountant	3,436	1,710	2,350	2,860	4,840	3,840
6. G.P.	3,190	2,620	2,990	3,180	3,440	3,240

The moral

The financial moral, I suppose, is that if you are going to be really successful in your career, go to the Bar; but if in the severe competition of that profession you are going to be Mr. Median, or less, you will do better—much better—as a solicitor. Of all professions, the Bar has the greatest range of earnings; it offers both more and less than any other. Some emphasis to this is given by considering the percentages of each profession who achieve high earnings. The figures are as follows:

PERCENTAGE EARNING HIGH INCOMES

	At least £6,000	At least £10,000
	%	%
1. Barristers	7.3	1.4
2. Consultants	3.8	0.4
3. Solicitors	3.5	0.5
4. Accountants	2.5	0.4
5. Dentists	1.3	0.1
6. G.P.s	0.1	Nil

Hours of earning

There are two side-issues that I should mention. First, it has been said of barristers' earnings that "the lengthy law vacations mean that fees have to be earned in a little more than half the year."⁶ With respect, this is right neither in fact nor in substance. Subtract the "lengthy law vacations," and there remain nearly nine months of the year. During those vacations the superior civil courts do not sit, save for urgent business; but the county courts and criminal courts are in session for an appreciable part of the vacations. Further, any idea that because the High Court is not sitting barristers are not working is far removed from fact. The long vacation (*i.e.*, the months of August and September) is traditionally the time when the more junior members of the Bar remain in chambers in the hope of getting work which cannot await the return of more senior members who are on holiday. For all busy members of the Bar, the vacations represent a reservoir of time when, freed from appearance in the superior courts, they can catch up with some of their arrears of writing opinions, drafting pleadings and other paper work.

In truth, a picture of counsel earning their fees in a little more than half a year, and presumably reclining at ease for the rest of the year, bears no relation to the facts. A more realistic picture is of the Bar earning its fees during ten and a half or eleven months of the year, and during that time working not only during "ordinary office hours" but also for long hours in the

⁶ R. M. Jackson, *The Machinery of Justice in England*, 3rd ed. 1960, p. 274.

evenings and at week-ends. The Bar is no place for the idle or the frail.

Let me hasten to add that much the same is true of solicitors. Both the press of office work, and crises during the hearing of a case, often mean that solicitors go home with loaded brief-cases or stay late in their offices. The Bar certainly holds no monopoly of hard work among lawyers. It is one of the unwritten rules of the law that social and family commitments repeatedly have to bow to the claims of office and chambers; a new development or an unexpected argument in a case may imperiously brush aside theatres, dinner parties and sometimes even bed. What I say will be no news to lawyers' wives; but fiancées beware, for if your espoused succeeds in the law as you hope, you will find yourself no more than a residuary legatee of what is left after the law has taken what it demands.

Proposed restrictions on fees

Secondly, in a symposium by some two dozen contributors published in 1951 under the title *The Reform of the Law*, it was said⁷ that "the fees payable to barristers and solicitors for their services require strict regulation. Certain limits should be set. . . . The limits should be reasonably elastic, and variation within those limits should depend on the complexity of the case, the sum involved and the wealth of the client. As an instance for a brief fee in a defended civil case in the High Court, we would suggest lower and upper limits of ten guineas and thirty guineas."

⁷ At p. 31.

A brief fee covers all work done by counsel in preparing the case, together with the first five hours of the actual hearing. Probably the contributors would agree that a case for a millionaire or for some wealthy company, involving, say, half a million pounds and taking three weeks to prepare, should command the maximum permitted brief fee. Counsel often spends more time in getting up a case than he takes in arguing it, especially where the facts are complicated or the law difficult, or both. A man at the top of his profession could thus expect payment at the rate of less than ten guineas a week, out of which, of course, he must pay rent and other expenses. These would certainly exceed this sum, and so he would be out of pocket. Even if the "thirty" is altered to "fifty," just for luck and because this is 1962 and not 1951, it can be seen what remarkable ideas can achieve print under the title "Reform." Let such a proposal be put into operation, and within a decade the practising Bar would virtually cease to exist.

COMPLEXITY

High Court and county court

I turn now to the complexity of legal proceedings. This subject, of course, is itself complex. The cost of the actual hearing of an action is something which the client can well understand; but what happens before the case comes into court is another matter. The main criticisms centre round the interlocutory proceedings, that is, the various proceedings which are incidental or ancillary to the actual hearing. Thus the litigants in a High Court action will sometimes wonder what is the

real value of the summons for directions, a summons for summary judgment, applications for particulars, and discovery of documents. For these, as well as for the statement of claim, defence and other written pleadings, the litigants must pay.

The litigants will probably wonder still more if they compare a High Court action with a county court action. In the county court there will be the Particulars of Claim and (often but not necessarily) a Defence, and these will help to define what is in issue. Usually nothing further happens until the trial takes place. If the county court can work efficiently without a cluster of interlocutory proceedings, why cannot the High Court? Is there not a case for simplifying High Court procedure?

There is indeed some justification for this view, though probably not as much as might at first be thought. The Evershed Committee,⁸ which included distinguished laymen as well as distinguished lawyers, spent six years in making a searching examination of procedure in the High Court and Court of Appeal, with the object of "reducing the cost of litigation and securing greater efficiency and expedition in the dispatch of business."⁹ Many of the Committee's recommendations have been put into force, and more reforms are on their way^{9a}; undoubtedly there has been an appreciable improvement. Yet a substantial contrast between High Court and county court remains.

Delay

The point is emphasised by the time that will elapse

⁸ See *ante*, p. 175.

⁹ Cmd. 8878 (1953), p. 4.

^{9a} See R.S.C. (Revision), 1962 (S.I. 1962, No. 2145).

between the commencement of proceedings and the hearing of the action. Ask a solicitor "How long will it be before the case is heard?" and his answer will vary greatly with the court. If the case is in the county court, he will look at the summons, and find there the date fixed for hearing. That date will usually be six weeks or two months ahead. He will warn you that there may be an adjournment, or that the hearing of the case may not be completed on the day named because other cases will be ahead of it in the list. But subject to this he will tell you that you can expect a decision within two months or so.

If the case is in the High Court, the answer will be very different. In witness actions, a date for the trial will usually be fixed, though this will be done not initially but only when the interlocutory proceedings are at an end. Other proceedings will usually have no fixed date for hearing. Naturally the time it takes for an action to come on for trial depends on many variables, not least on the number of other cases waiting to be heard. But a solicitor will often have to advise his client that there is little prospect of the case being heard within six months of the commencement of proceedings, that he should be grateful if it is heard within nine months, and not surprised if it takes twelve months or more to come on.¹⁰ Quite apart from shortages of judges and delays by hard-pressed solicitors and counsel, the greater richness of interlocutory life in the

¹⁰ There are, of course, exceptions: see, e.g., *British Imex Industries, Ltd. v. Midland Bank, Ltd.* [1958] 1 Q.B. 542 (writ issued December 11, 1957; case argued December 19, 1957; judgment given December 20, 1957); and see *Harper v. Home Secretary* [1955] Ch. 238.

High Court is plainly responsible for much of this difference.

I am not for one moment suggesting the abolition of interlocutory proceedings. For example, discovery of documents is sometimes essential for justice. Many a man writes letters without keeping copies. An order for discovery of documents means that each litigant will be compelled to reveal to the other all the relevant documents under his control, so that there will be little opportunity for documentary surprises at the trial. Once the adversary's documents have been inspected, it can sometimes be seen that the cause is better—or worse—than had been supposed. Sometimes in the county court discovery is sought and ordered. Nevertheless, the general picture is that discovery is the rule in the High Court and the exception in the county court.

Procedural risks

In short, procedural risks are taken in the county court that are regarded as rash in the High Court. The whole atmosphere is different. If at the hearing in the county court the risks that have been taken seem likely to cause real difficulty to one side or the other, the cure is simple; the case is adjourned to enable matters to be put right. This occurs only infrequently; there is no temptation for advocates to magnify difficulties when to do so will involve the inconvenience of an adjournment, and so only if there is true and serious difficulty is an adjournment likely. By comparison, the hearing of a High Court action is a juggernaut, proceeding relentlessly from beginning to end, on the assumption that all will have been done impeccably before the case comes

into court to make such a progress possible; the county court assumes a flexibility which allows for imperfections of procedure and human weaknesses.

For the great, important and difficult cases in the High Court, such a contrast may well be fully justified. The rub comes with the lesser cases. The county court has jurisdiction in most claims of up to £400, and in certain specified spheres (especially in some landlord and tenant cases) its jurisdiction is much wider than that. But suppose a case which is a little outside the county court jurisdiction, as where the claim is for £500. Usually the parties can, if they wish, agree to give the county court jurisdiction. But litigants, and sometimes their lawyers, tend to be contra-suggestible as regards proposals made by their adversaries, so that jurisdiction by consent does not in practice often seem to be given to county courts, even though it would save both time and money. Sometimes, too, one or both of the litigants want their case to be heard by a High Court judge. Yet the action for £500 will be conducted according to the same procedure as if the claim had been for £500,000.

Of course, sometimes the most difficult and important questions of law arise in cases where the amount at stake is small. In 1878, a railway company sued a passenger in the county court for twopence, but obtained judgment for only one penny. The company appealed to a Queen's Bench Divisional Court in respect of that penny, and after reserving judgment for over a month, the court dismissed the appeal. The company appealed again, and once more judgment was reserved for over a

month; and again the appeal was dismissed.¹¹ Despite the importance of the point of law involved, the company, alas, forbore to carry its penny appeal from the Court of Appeal to the House of Lords. But as a general rule, large sums usually go with complicated facts or difficult law, and also with litigants who will brook no stone being left unturned.

Differentiation

The High Court thus caters for a very wide range of cases; yet there is little to distinguish the procedure in a relatively small and simple case from that in one that is large and complex. The procedure is tailored to the ultimate. It has been said to be the Rolls-Royce of procedures: perfect, but damned expensive. Are there not grounds for at least considering whether every case in the High Court should not be conducted substantially according to county court procedure unless there is good cause for giving it the full treatment of the present High Court process? Are there not enough cases in the High Court in which the saving of time and money of such a procedure would justify taking the risks involved? Obviously there are many difficulties, not least that of classifying the cases. It would be important to make the simplified procedure apply automatically to all cases except those which, for good cause, are taken out of it: there must be contracting out rather than contracting in if the proposal is to work at all well. Ultimately, the question is one of weighing the risks

¹¹ *London and Brighton Ry. v. Watson* (1878) 3 C.P.D. 429; (1879) 4 C.P.D. 118.

involved against the time and money that would be saved. This must be largely a matter of impression; but at least a case for the proposal could be made out.

Fusion

One other aspect of complexity lies in the division of the profession into solicitors and barristers. This, it is said, substantially increases the expense of litigation; the client must pay for two lawyers to do what could perfectly well be done by one. Subject to some qualifications, I do not think that this is right. If less than £400 is involved, the county court usually has jurisdiction, and solicitors have audience in that court. Every year the county courts decide thousands of cases which have been argued by solicitors and not counsel. Yet counsel are often briefed in county courts; the solicitor prefers to entrust the case to an expert in the particular branch of the law involved, or simply to one who is an expert in advocacy. The solicitor is then freed of the burden of preparing the arguments and authorities, and of arguing the case in person. Often he will not attend the hearing himself, but can do other work while one of his staff sits in court behind counsel.¹²

Advocacy by solicitors

On the subject of solicitors arguing cases themselves, it has been said that "a solicitor with a case at his fingertips is adequately prepared if he has the original papers and perhaps a few manuscript notes."¹³ The

¹² *Pace* R. M. Jackson, *The Machinery of Justice in England*, 3rd ed. 1960, p. 229.

¹³ *Loc. cit.*

Bar, I think, conscious of its own practice, will admire not only the nonchalance of the "perhaps," but also the restraint of the "few." However, the real difficulty in this view is that it appears to envisage a hearing in which the solicitor has merely the original papers and no copies. When he cross-examines a witness about a letter, the sole copy of the letter will have to be handed round the court, from him to the witness, thence to the judge, then to his adversary and finally back to him. Few hearings can be expeditious and effective if conducted on the principle of the three Graiae, who between them had but one eye and one tooth.

For myself I would have doubted whether many solicitors would attempt to conduct such a case without the customary bundles of copies of the correspondence and copies of other material documents. If the documents are few, the burden of copying them is small; if they are many, copies are almost essential: and if copies are to be made in any event, the additional cost of an extra carbon copy so that counsel may be briefed is small.

In the end, much of the cost of briefing counsel is likely to be offset by corresponding reductions in the solicitor's fees. In the county court, the client has free choice between one lawyer and two: and when he has discovered the relative modesty of the additional cost of having two, he often chooses to do so. I do not think that is just for the pleasure of seeing counsel's wig. As Dr. R. M. Jackson has said, "If the Bar and the solicitors were amalgamated, it is probable that there would be a slight reduction in cost. I doubt if the saving would be as drastic as some people think.

Specialisation would still be needed.”¹⁴ Let the two branches of the profession be fused, and there would still be the expense of employing two lawyers in every case which called for the services of one of the trial lawyers in the firm.

Solicitors' audience in the High Court

In the High Court and above, solicitors in general have no right of audience, and so the litigant has no option: counsel must be briefed. The litigant who does not want two lawyers has to be told that he must have them. In most cases the amount at stake fully justifies the employment of counsel; but it is sometimes said that routine work such as undefended divorces could perfectly well be done by solicitors, and that confining the right of audience to the Bar compels litigants to spend more than they need.

There is, of course, force in this. Some solicitors are as skilled in divorce work and practice as members of the Divorce Bar. Yet it is at this point that difficulties break in. Give the right of audience to all solicitors, and many who are unfamiliar with divorce practice will exercise their right of audience because their clients require it; confine the right of audience to solicitors experienced in divorce work, and at once a species of sub-Bar is created. Again, although the great majority of undefended divorce cases present no difficulties, there is always the occasional problem case. At present, in most cases of difficulty the Bench is able to rely on a small Bar with specialised knowledge. Yet again, it is

¹⁴ *The Machinery of Justice in England*, 3rd ed. 1960, p. 229.

said that the public interest requires that divorce work should be conducted with the full solemnities of the law.

Arguments such as these have their force, though they may not convince you. It may well be that some small saving might be made in some classes of case by extending the right of audience of solicitors. But surely the real question is whether the saving would, in the public interest, be worth it. If the result of the change would be that the economical client tended to press his solicitor to appear for him even though the solicitor lacked experience of that type of work, the solicitor and the court might well be placed in a difficult situation. At present, all solicitors are under an equal disability as regards appearing in the High Court; they cannot appear, and counsel must be briefed. Remove that disability, either in whole or in part, and at a blow much of the advantage which flows from a divided profession disappears.

In any case, in recent years proposals of this nature have been investigated and rejected by committees of high standing. In 1947 the Committee on Procedure in Matrimonial Causes specifically rejected the proposal to give audience to solicitors in undefended divorce cases,¹⁵ and in 1956 the Royal Commission on Marriage and Divorce, although divided on many other issues, unanimously rejected proposals to confer divorce jurisdiction on county courts, magistrates' courts or "Family

¹⁵ Final Report, Cmd. 7024 (1947: the "Denning Committee"), p. 26. There is a reservation for towns where divorce work is done if barristers are not available in sufficient numbers on reasonable terms.

Courts" set up for the purpose.¹⁶ The views of committees, however distinguished, are not, of course, conclusive; but they are strongly persuasive.

THE ENGLISH SYSTEM OF COSTS

Let me turn to the second main complaint, that the English system of costs works unfairly. The broad principle is that a successful litigant is entitled to recover his "taxed costs" from the other side. The process of taxing costs means that a Taxing Master, who is an officer of the Supreme Court, has examined the costs incurred by the winner (including the court fees, fees paid to counsel, and fees charged by the solicitor for his work), and has "taxed" them by deleting unnecessary items and reducing excessive sums. The general basis is one of allowing only those sums which a prudent and careful solicitor would have paid, and of disallowing items which represent excessive caution.

Complaints

The sort of complaints that are made are these. A successful plaintiff will say: "I sued the defendant for £550 and won my case. My solicitor's bill came to £220, but £60 was taxed off, so the plaintiff had to pay me only £710 in all. Now I find that I have to pay my own solicitor the amount taxed off, so that instead of putting into my pocket the £550 which all the time was rightfully due to me, I get only £490 *and* I have wasted a great deal of time. Is that English justice?" The

¹⁶ Report, Cmd, 9678 (1956: the "Morton Committee"), pp. 197-199.

defendant, on the other hand, may well say: "As the judge pointed out, the case was not at all clear. My liability to pay anything at all depended on some evidence that was not available to me, and on an unsettled point of law: I only just lost. Now I must pay not only the £550 claimed by the plaintiff, but also £160 toward his costs, and £210 for my own solicitor's costs—£920 in all in a case where only £550 was claimed and my lawyers advised me that I was probably not liable at all. Is *that* English justice?"

To sympathise with each is not enough: where does the truth lie? Certainly I think most English practitioners would prefer the English system to the system which prevails in the United States, where the costs awarded to the winner include little besides the court fees. To burden the winner with, say, £200 in costs if he seeks to recover £550 seems to be something considerably less than justice.

Differentiation

Yet is there not something in the complaints of each of my imaginary litigants? Is there not a case for differentiation? Sometimes it will become clear that the winner has been obviously right from the start, and that there has been no real justification for the loser's opposition. In such cases, why should not the costs awarded afford the winner a true and complete indemnity, including both items which proved unnecessary and sums which were excessive? No doubt deliberate or wanton excesses should still be taxed off; but the burden could be made to rest on the loser to demonstrate that this was the case. The difficulty is so often that with

the hindsight of the concluded proceedings an item may appear unnecessary or an amount excessive in quantum when at the time, with all the uncertainties of a future trial ahead, they seemed prudent or reasonable. "Don't spoil the ship for a ha'porth of tar" is an adage which many a litigant has acted upon and afterwards rued.

On the other hand, there are many cases in which liability may remain in doubt until a late stage. Winner and loser have each acted perfectly reasonably in litigating the case. Here the solution is more difficult. The case for disturbing the present system is weak. The remission of the court fees would not come amiss, but otherwise the present system seems the best that is possible, short of the taxpayer assuming the burden. A decision that settled an unsettled point of law, and by making the law more certain brought benefit to the community, might also qualify for an award towards the costs out of surplus court fees. In all these cases it would, of course, be for the judge to certify into which category the case should fall.

CHAPTER 6

ENVOI

I HAVE reached the end of my survey. I readily accept that it has been imperfect and incomplete; and I have taken much for granted. Virtually nothing, for example, has been said about the great system of legal aid. Access to the courts has been opened to those with slender means without any loss of independence by the legal profession and without opening the floodgates of unmeritorious litigation: is that not a great achievement? Again, occasionally a solicitor misappropriates some of the large sums of money which his clients have entrusted to him; but if he cannot repay, a fund controlled by The Law Society and fed by the whole solicitors' profession will see that the clients suffer no loss. Have lawyers the world over matched English solicitors in such mutual assurance of their clients? Each of these fruits of the last quarter century¹ deserves far more than the bare mention that I can give it here; and there is much else besides that I could (and perhaps should) have included if time would but stand still.

Yet have I not said enough to play my part in satisfying the intent of the founder of these lectures, Miss Emma Warburton Hamlyn? The lectures are for the furtherance of certain forms of knowledge "to the intent

¹ Legal Aid and Advice Act, 1949; Solicitors Act, 1941, s. 2.

that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them." Neither the English system itself nor every member of the legal profession is in every particular beyond criticism. I do not doubt that most practitioners will be able to recollect single instances which, taken alone, falsify much of what I have said. Neither admission as a solicitor nor call to the Bar, nor even elevation to the Bench, transforms a man and divests him of every human frailty. Solicitors have been known to be negligent or dishonest; barristers have been found to be inefficient or unworthy; and appellate courts have held judges not merely to be wrong in law but unfair. No system can be better than the men who work under it.

As for the system itself, I hope that I have put before you most of its more noteworthy imperfections. One at least I have not discussed, namely, the need to make it easier than it is for a barrister to become a solicitor and *vice versa*. It is good for nobody that a lawyer should be unnecessarily discouraged from changing to that branch of the profession which experience has shown will suit him best. At the root of this lies the need for examinations which so far as possible are either common to each branch of the profession or at least confer reciprocal exemptions. Given this, common education, which has its problems as well as its advantages, is not essential. No doubt there is much to make it desirable

that Bar students and articled clerks should each undergo the same tuition for the same subjects; but practical difficulties in achieving this need not stand in the way of progress. In any case, many law students today hold university law degrees which confer exemption from substantial parts of the examination for each branch of the profession, so that by a side-wind something has already been accomplished. But much more remains to be done, and progress seems slow.

There are other omissions, too. There is the circuit system, under which no barrister may belong to more than one of the seven circuits, and extra fees must be paid to any barrister who "goes special," *i.e.*, appears in a case at assizes or (usually) quarter sessions outside his own circuit. There are the rules which require that a silk shall not appear in court without a junior, and that the junior's brief fee shall be not less than three-fifths or two-thirds of the silk's, up to 150 guineas for the silk and 100 guineas for the junior. These rules are confined to courts and do not apply to other bodies such as tribunals, inspectors or arbitrators. Both the circuit system and the two-thirds rule are highly controversial. In some ways there is much to commend them, and in others there is much to condemn them. But I forbear from any discussion of them, for these are lectures and not a filibuster, and there must be some limit to your patience.

Admit all the shortcomings of my exposition, and there still remains the question of what the broad picture is. "To generalise is to omit"²; and so, leaving out the

² *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267 at 273 (1908), *per* Holmes J.

exceptional, the minor and the unimportant, is not the picture one of great achievement? Does the world hold a system which, not merely in theory but in actual daily operation, does more for the public?

It is so easy to be complacent, to stand contentedly in the ancient ways and to elevate the known against the unknown; and one must never forget that the price that has to be paid is that of eternal vigilance. On the other hand, lawyers are neither uncritical nor impercipient; indeed, their whole training and experience teaches them to accept nothing blindly but to question all things. Some of the criticisms I have tried to set before you; others I have not. No doubt for some of the omissions I am culpable. Some criticisms were just, but not worth their place, and yet others—many others—are deliberately omitted as being misconceived. It is easy enough to criticise what one does not fully understand; and many critics have not fully understood. If I have helped laymen, and lawyers abroad (not least in the U.S.A.), towards a just appreciation of the English legal profession at work, I have not wholly failed Miss Hamlyn. At the end of the day, when all doubts and reservations have been weighed, I for one would say that England has just cause for being very proud of its judges, its barristers, its solicitors, and its legal system. And, in saying this, I would humbly echo that great Master of the Rolls, Sir George Jessel, and add: "I may be wrong but I have no doubts."

